CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 771

THE UNITED STATES OF AMERICA, APPELLANT

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

Filed March 23, 1939

No. 826

HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, APPELLANT

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

Filed March 30, 1939

No. 827

DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC., APPELLANT

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

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METROPOLITAN COOPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC., APPELLANT

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from D. C. U. S., Northern District of New York	1	1
Complaint in the action entitled *United States of America*, Plaintiff, v. *Rock Royal Co-Operative, Inc., et al.*, Defendants	1	1
Exhibit A—Copy of Federal Register of Aug. 9, 1938, containing order No. 27	16	11
Exhibit B—Official order No. 126—Department of Agriculture and markets	34	27
Complaint in the action entitled *United States of America*, Plaintiff, v. *Jetter Dairy Company, Inc.*, Defendant	51	40
Motion of Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, to intervene in the case of *United States of America*, Plaintiff, v. *Rock Royal Co-Operative, Inc., et al.*, Defendants	62	47
Complaint of the intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, in the case of *United States of America*, Plaintiff, v. *Rock Royal Co-Operative, Inc., et al.*, Defendants	63	48
Complaint of *Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York* v. *Jetter Dairy Company, Inc.*	73	55
Order consolidating the cases of *United States of America* v. *Rock Royal Co-Operative, Inc., et al.* and *United States of America* v. *Jetter Dairy Company, Inc.*	83	61
Order permitting Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, to intervene	84	61
Answer of the defendant Rock Royal Co-Operative, Inc	87	63
Answer of the defendant Schuyler Junction New York Milk Shed Co-Operative Association, Inc	97	70
Answer of the defendant Central New York Co-Operative Association, Inc	107	76
Motion to strike portions of the answers of the defendants Jetter Dairy Company, Inc., Rock Royal Co-Operative, Inc., and Schuyler Junction New York Milk Shed Co-Operative Association, Inc	117	83
Amended answer of defendant Jetter Dairy Company, Inc	120	85
Plaintiff's motion to strike portions of the amended answer of the defendant Jetter Dairy Company, Inc	143	103
Order of the court denying plaintiff's motions to strike	145	104
Opinion of the Court, Cooper, J., denying plaintiff's motions to strike	146	105
Amendments to the amended answer of the defendant Jetter Dairy Company, Inc	158	112
Amended complaint of the Dairymen's League Co-Operative Association, Inc	160	113
Complaint of Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc	172	120
Findings of Fact and conclusions of law, and order directing judgment	184	127
Plaintiff's proposed findings of fact	238	167
Record references to plaintiff's proposed findings of fact	270	188
Plaintiff's proposed conclusions of law	274	190

	Original	Print
Record from D. C. U. S., Northern District of New York—Contd.		
Proposed findings of fact and conclusions of law submitted by the defendants Jetter Dairy Company, Inc., Rock Royal Co-Operative, Inc., and Schuyler Junction New York Milk Shed Co-Operative, Inc	278	192
Plaintiff's objections to the proposed findings of fact and conclusions of law submitted by the defendants Jetter Dairy Company, Inc., Rock Royal Co-Operative, Inc., and Schuyler Junction New York Milk Shed Co-Operative Association, Inc.	323	233
Record references to proposed findings of fact and conclusions of law submitted by the defendants Jetter Dairy Company, Inc., Rock Royal Co-Operative, Inc., and Schuyler Junction New York Milk Shed Co-Operative Association, Inc	346	245
Narrative statement of evidence introduced at the trial	350	249
Caption	350	249
Stipulation of facts and evidence	350	250
Defendants' motion for non-suit	382	270
Defendants' offers in evidence	385	271
Testimony of—		
Alex Eisenberg	390	274
George Wilson	404	283
Howard B. Richmond	407	286
Leonard Faulkner	410	287
Stipulation re Floyd Washbon	412	288
Testimony of—		
Max Bronfeld	412	288
Rose Paley	415	290
Herman Lavender	419	293
Israel Hoch	422	295
Raymond J. Barber	424	295
Israel Hoch (recalled)	430	299
Earl R. Mills	434	301
Nelson All	439	305
Samuel Miller	449	310
Erskine M. Harmon	473	326
Walter Kohn	485	333
Aaron H. Rubenfeld	497	340
Erskine M. Harmon (recalled)	525	359
Laurence L. Clough	530	362
James A. Conboy	530	362
Glen Bullock	532	363
Jay C. Treat	534	364
Edward M. Gaynor	538	367
Nils B. Swenson	545	371
Jay C. Treat (recalled)	548	373
Richard Stacey	551	376
Percy W. Dake	555	378
Samuel Rootstein	571	388
Robert C. Dumont	585	396
Excerpts from deposition of George R. Fitts	588	398
Affidavit of Arthur Jetter	591	400
Stipulation as to certain facts	592	401
Original transcript of oral testimony [omitted in printing]	593	

EXHIBITS

Record from D. C. U. S., Northern District of New York—Contd.	Original	Print
Exhibits to stipulation:		
No. 2. Copy of Official Order No. 126	3326	402
No. 4. List of briefs filed with Secretary of Agriculture pursuant to notice of opportunity to file written arguments	3344	416
No. 5. Tentatively approved marketing agreement dated August 5, 1938	3346	417
No. 6. Marketing Agreement dated August 29, 1938	3353	421
No. 8. Pamphlet entitled "Questions and Answers on the Federal-State Milk Program for New York"	3366	431
No. 9. Pamphlet entitled "New York Milk, Explanation of the Federal-State Marketing Plan contained in Order No. 27"	3370	436
No. 10. Letter to Dairymen in the milkshed from M. C. Bond, Extension Economist, enclosing copy of Order and other papers	3385	446
No. 12. Order directing that a referendum be conducted	3386	447
No. 13. Amendment to order directing that a referendum be conducted	3390	449
No. 14. Letter from E. W. Gaumnitz and Kenneth F. Fee dated July 8, 1938	3393	450
No. 15. List of associations qualified to vote in behalf of producers in referendum on Order No. 27	3397	453
No. 16. Cooperative ballot	3404	457
No. 17. List of cooperatives qualified to vote for members on Official Order No. 126	3405	457
No. 21. Notice of hearing on proposed marketing agreement and order	3407	459
No. 22. Booklet entitled "Mr. Dairyman Save This Booklet"	3422	476
No. 23AA. Letter from C. H. Baldwin to producers dated August 29, 1938	3448	500
No. 23BB. Letter from C. H. Baldwin to producers dated September 15, 1938	3451	502
No. 23CC. Letter from C. H. Baldwin to producers dated September 16, 1938	3452	502
No. 23DD. Letter from C. H. Baldwin to producers dated September 21, 1938	3453	503
No. 23EE. Letter from C. H. Baldwin to producers dated October 18, 1938	3454	504
No. 23FF. Letter from C. H. Baldwin to producers dated November 17, 1938	3455	505
No. 23GG. Letter from C. H. Baldwin to producers dated October 29, 1938	3456	506
No. 23HH. Letter from C. H. Baldwin to producers dated November 10, 1938	3457	508
No. 23II. Letter from Edmund F. Cooke to producers dated September 17, 1938	3458	508
No. 23. Vol. 2, No. 3. Milk Producers Market News	3461	511

Record from D. C. U. S., Northern District of New York—Contd.

	Original	Print
Exhibits to stipulation—Continued.		
No. 23A. Vol. 1, No. 12. Milk Producers Market News	3477	514
No. 23B. Vol. 1, No. 9. Milk Producers Market News	3485	516
No. 23C. Vol. 1, No. 10. Milk Producers Market News	3497	520
No. 23D. Vol. 1, No. 11. Milk Producers Market News	3513	528
No. 23E. Vol. 1, No. 13. Milk Producers Market News	3529	533
No. 23F. Vol. 1, No. 14. Milk Producers Market News	3541	541
No. 23G. Vol. 2, No. 1. Milk Producers Market News	3553	546
No. 23H. Vol. 2, No. 2. Milk Producers Market News	3569	549
No. 24. Dairymen's League News dated March 8, 1938	3581	555
No. 24A. Dairymen's League News dated May 17, 1938	3597	557
No. 24B. Dairymen's League News dated May 24, 1938	3613	558
No. 24C. Dairymen's League News dated May 31, 1938	3637	568
No. 24D. Dairymen's League News dated June 21, 1938	3653	572
No. 24E. Dairymen's League News dated August 16, 1938	3677	574
No. 24F. Dairymen's League News dated September 20, 1938	3693	589
No. 24G. Dairymen's League News dated September 27, 1938	3709	593
No. 24H. Dairymen's League News dated November 15, 1938	3725	594
No. 24I. Dairymen's League News dated October 25, 1938	3741	594
No. 24J. Dairymen's League News dated December 20, 1938	3757	595
No. 25A. The Sheffield Producer dated November 1938	3773	596
No. 25. The Sheffield Producer dated October 1938	3774	599
No. 26. Department of Agriculture release dated September 20, 1938	3775	601
No. 26A. Department of Agriculture release dated July 22, 1938	3780	605
No. 26B. Introductory statement by Holton V. Noyes at hearing on proposed orders	3784	607
No. 26C. Remarks of Holton V. Noyes at Northeastern Dairy Conference January 25, 1938	3786	609
No. 26D. Statement by Holton V. Noyes outlining his position regarding the proposed Federal-State order	3789	611

	Original	Print
Record from D. C. U. S., Northern District of New York—Contd		
Exhibits to stipulation—Continued.		
No. 26E. Remarks by Holton V. Noyes on the WGY forum July 9, 1938	3793	613
No. 26F. Press release from Department of Agriculture and Markets dated July —	3798	617
No. 26G. Press release from Department of Agriculture and Markets dated July 22	3800	619
No. 26H. Press release from Department of Agriculture and Markets dated August 8, 1938	3801	620
No. 26I. Press release from Department of Agriculture and Markets dated August 10, 1938	3804	622
No. 26J. Press release from Department of Agriculture and Markets dated August 16, 1938	3805	623
No. 26K. Release of referendum Agent dated August 16, 1938	3810	627
No. 27L. Release of referendum Agent dated August 17, 1938	3812	628
No. 26M. Release of referendum Agent dated August —	3813	628
No. 26N. Release of referendum Agent dated August 18	3814	629
No. 26O. Release of Department of Agriculture and Markets dated August 18	3815	630
No. 26P. Release of Department of Agriculture and Markets dated September 12, 1938	3818	632
No. 26Q. Release of Department of Agriculture and Markets dated September —	3820	633
No. 26R. Release of Department of Agriculture and Markets dated October 25, 1938	3822	633
No. 26S. Release of referendum Agent undated	3825	635
No. 28. Pamphlet entitled "Federal Marketing Order"	3827	637
Pamphlet entitled "The Federal Marketing Order"	3831	640
No. 41. Contract between Central New York Cooperative Association, Inc., and its members	3835	644
No. 43. Affidavit of Paul Grossman	3837	645
Plaintiff's exhibits:		
Exhibit B. Affidavit of Aaron H. Rubenfeld	3839	647
Exhibit C. Letter from Kenneth F. Fee to N. P. Powell, dated June 28, 1938	3843	650
Exhibit D. Letter from J. A. Conboy to Chateaugay Co-Operative Marketing Association, Inc., dated July 14, 1938	3844	650
Exhibit G. List of business lost by Tri-Boro Milk and Cream Company	3845	651
Defendants' exhibits:		
No. 5. Letter from H. B. Richmond to Jetter Dairy Co. dated August 4, 1938	3847	653
No. 6. Receipt from Sheffield Farms Co. Inc., dated December 5, 1938	3848	654

Record from D. C. U. S., Northern District of New York—Contd.
Defendants' exhibits—Continued. Original Print

No. 11. Statement of Dairymen's League to producers for August and September 1938 3849 654
No. 12. Statement of Dairymen's League to producers for October 1938 3850 655
No. 13. Statement of classification of milk reported as received from producers by Dairymen's League 3851 655
No. 15. Statement of Dellwood Dairy, Inc., to producers dated Sept. 15, 1938 3852 656
No. 16. Statement of Dellwood Dairy, Inc., to producers dated Oct. 24, 1938 3853 656
No. 17. Statement of Dellwood Dairy, Inc., to producers dated Nov. 25, 1938 3854 657
No. 18. Statement of Dellwood Dairy, Inc., to producers dated Dec. 23, 1938 3855 657
No. 22. Summary report of Slate Hill Milk & Cream Co. for September 1938 3856 658
No. 22A. Report of Slate Hill Milk & Cream Co., Inc., for September 1938 covering its Slate Hill plant 3857 658
No. 27A. Report of Middletown Milk & Cream Co., Inc., for November 1938 covering its Slate Hill plant 3861 661
No. 31. Statement of Slate Hill Milk & Cream Co., Inc., to producers dated October 24, 1938 3865 665
No. 32. Statement of Slate Hill Milk & Cream Co., Inc., to producers dated November 25, 1938 3866 665
No. 33. Statement of Slate Hill Milk & Cream Co., Inc., to producers dated December 2 , 1938 3867 665
No. 34. Statement of Middletown Milk & Cream Co., Inc., to producers dated Oct. 24, 1938 3867-A 666
No. 35. Statement of Middletown Milk & Cream Co., Inc., to producers dated Nov. 25, 1938 3867-B 666
No. 36. Statement of Middletown Milk & Cream Co., Inc., to producers dated Dec. 23, 1938 3868 666
No. 37. Computation of the uniform price for November 1938 3869 667
No. 38. Analysis of milk utilization for September and October 1938 3870 668
No. 39. Announcement of uniform price for September 3871 669
No. 40. Announcement of uniform price for October 3872 670
No. 41. Announcement of uniform price for November 3874 672
No. 42. Classification of milk reported as received from producers by Sussex Milk & Cream Company, Inc 3875 673
No. 43. Classification of milk reported as received from producers by Sheffield Farms Company, Inc. 3876 673
No. 44. Total milk reported as sold in all classes by Breakstone Bros., Inc. and Muller Dairies, Inc. 3877 673

Record from D. C. U. S., Northern District of New York—Contd.
Defendants' exhibits—Continued. Original Print

No. 45. Classification of milk reported as received from producers by Borden Co., Inc. 3878 674
No. 46. Statement of payments to Dairymen's League under Article VII, Sections 5 and 6 for September, October, and November 1938. 3879 674
No. 47. Statement of approximate disposition of Unpriced Class I and Class II-A milk reported as received from Producers by Keystone Dairy. 3880 675
No. 48. Statement of approximate disposition of Unpriced Class I and Class II-A milk reported as received from producers by Sussex Milk and Cream Co. 3881 675
No. 49. Statement of approximate disposition of unpriced Class I and Class II-A milk reported as received from producers by Dairymen's League Coop. Assn. 3882 675
No. 50. Statement of approximate disposition of unpriced Class I and Class II-A milk reported as received from producers by Dellwood Dairy. 3883 675
No. 51. Statement of approximate disposition of unpriced Class I and Class II-A milk reported as received from producers by Sheffield Farms Co., Inc. 3884 676
No. 52. Statement of approximate disposition of unpriced Class I and Class II-A milk reported as received from producers by Borden Co. Mf'g. Products Division. 3885 676
No. 53. Country Milk plants reported by Health Authorities in the New York Metropolitan Milk Marketing Area as having been excluded from approved lists since Sept. 1, 1938. 3886 676
No. 54. Pool return and classification for November 1938, Dairymen's League Cooperative Association, Inc. 3887 677
No. 58. Leaflet mailed with report of Second Annual Meeting Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc. 3888 678
No. 59. President's Address and report of Second Annual Meeting Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. 3889 679
No. 60. Minutes of Meetings of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. 3911 697
No. 61. Minutes of Organization meeting Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. 3922 707
No. 66. News release of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., dated August 10, 1938. 3931 712
No. 67. News release of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., dated February 7, 1938. 3938 720

	Original	Print
Record from D. C. U. S., Northern District of New York—Contd.		
Defendants' exhibits—Continued.		
No. 67A. News release of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., dated April 5, 1938	3940	722
No. 67B. News release of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., dated April 7, 1938	3942	723
No. 67C. News release of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., dated March 28, 1938, with list of newspapers attached	3943	723
No. 67E. News release of Metropolitan Milk Producers Bargaining Agency, Inc. for publication in issue of Dairymen's League News of July 20, 1938	3946	725
No. 68. Pamphlet of Sheffield Producers Cooperative Association, prepared for and filed in record of hearing before the Secretary of Agriculture	3950	728
No. 69. Copy of Market Service claim to Market Administrator for September 1938 made by Queensboro Farm Products, Inc	3960	735
No. 72. Letter of Clinton County Dairymen's Coop. Association, Inc. to E. M. Harmon, Market Administrator	3961	738
No. 73. Letter of E. M. Harmon, Market Administrator, to Elmer Stafford, President, Clinton County Dairymen's Association, Inc	3962	739
No. 77. Statement of Market Service Payments made to Borden Co., Sheffield Farms Company, Inc., Dairymen's League Cooperative Association, Sheffield Condensed Milk Co., Inc., and Cooperative pa ments to Sheffield Producers Cooperative Association	3963	740
No. 78. Stipulation with respect to transportation of milk	3968	741
No. 79. Table of Milk Tank Car rates by ten-milk zones from New York City	3969	742
No. 81. Table of Total volume of milk sold by League in fluid form (Class I) in the New Jersey Market in September, October, November	3970	742
No. 82. Computation of the actual base cash return to producers at Sollsville, New York	3971	742
Original exhibits [omitted in printing—a descriptive list of these exhibits is appended to the stipulation reprinting record]	3972	742
Final decree	10333	743
Opinion of the Court, Cooper, J	10334	743
Petition for appeal	10376	776
Order allowing appeal	10377	776
Plaintiff's assignment of errors	10457	777
Petition for appeal of the intervening plaintiff, Holton V. Noyes	10466	781
Order permitting appeal of the intervening plaintiff, Holton V. Noyes	10467	781

	Original	Print
Record from D. C. U. S., Northern District of New York—Contd.		
Petition for appeal of the intervening plaintiffs, Dairymen's League	10468	782
Petition for appeal of the intervening plaintiff, the Bargaining Agency	10469	782
Order allowing appeal of the intervening plaintiff, Dairymen's League	10470	783
Order allowing appeal of the intervening plaintiff, the Bargaining Agency	10471	783
Waiver of bond on appeals of intervening plaintiffs	10473	784
Assignments of error of intervening plaintiff, Holton V. Noyes	10474	784
Assignments of error of intervening plaintiff, the Bargaining Agency	10480	788
Assignments of error of intervening plaintiff, the Dairymen's League	10487	792
Stipulation and order authorizing the transmitting of certain exhibits to the Clerk of the Supreme Court in original form	10496	796
Stipulation as to contents of transcript of record	10503	802
Clerk's certificate [omitted in printing]	10508	805
Statement of points to be relied upon and designation as to printing record, Case No. 771	10509	805
Stipulation re printing record	10510	805
Schedule of exhibits which are not to be printed	10513	807
Statement of points to be relied upon and designation as to record, Cases No. 826, 827, 828	10521	810

1 IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. —

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROCK ROYAL CO-OPERATIVE, INC., CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC., SCHUYLER JUNCTION NEW YORK MILKSHED CO-OPERATIVE, INC., DEFENDANTS

Complaint

Filed Oct. 27, 1938

Plaintiff, by Ralph L. Emmons, United States Attorney in and for the Northern District of New York, instituting these proceedings under the direction of the Attorney General, upon request of the Secretary of Agriculture of the United States, respectfully shows to the Court and alleges:

I

The defendant Rock Royal Co-operative, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Rock Royal, in the County of Delaware, State of New York.

II

The defendant Central New York Co-operative Association, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office and place of business in the City of Cortland, County of Cortland, State of New York.

III

The defendant Schuyler Junction New York Milkshed Co-operative, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York and having its
2 principal office and place of business at Schuyler Junction, County of Herkimer, State of New York.

IV

This proceeding is brought under Section 8a (6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a (6), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the said Act of May 12, 1933, as reenacted and

amended being hereinafter referred to as the "act"), investing the several district courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the Secretary pursuant to the provisions of Title I of said Act.

V

This proceeding is brought to enforce Order No. 27 issued by the Secretary of Agriculture regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and to prevent and restrain the defendants from handling milk in violation of the provisions of said Order No. 27; to secure a declaratory judgment, pursuant to the Federal Declaratory Judgment Act of 1934 (28 U. S. C. A., Sec. 400), that the operations of those defendants who handle milk which does not cross State lines on its way to the marketing area for sale burden, obstruct, or affect interstate commerce, that such defendants are subject to the provisions of Order No. 27 or, if the court shall find that such defendants are not subject to the provisions of Order No. 27, that such defendants are subject to the provisions of Official Order No. 126 issued by the Commissioner of Agriculture and Markets of the State of New York; and, if the Court finds that such defendants are subject to the provisions of Official Order No. 126, to prevent and restrain them from violating such order.

VI

Pursuant to the provisions of Sections 8b and 8c of the Act, the Secretary on April 29, 1938, gave notice of public hearings on
3 a proposed marketing agreement and a proposed order regulating the handling of milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York, the said area being hereinafter referred to as the "Marketing Area." On April 29, 1938, the Commissioner of Agriculture and Markets of the State of New York gave notice of public hearings to be held at the same times and places on an order substantially identical with the aforesaid order.

VII

In accordance with the terms of the said notices, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, pursuant to Section 10 (i) of the Act, joint public hearings were conducted by Glenn J. Gifford, an employee of the Department of Agriculture, who was designated by the Secretary to conduct such hearings, and also designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on behalf of the State. In accordance with the terms of said notice, joint public hearings were conducted at Albany, New York, on May 16, 1938; at Malone, New York, on May 17, 1938; at

Syracuse, New York, on May 18, 1938; at Elmira, New York, on May 19, 1938, and at New York, New York, on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, New York, on May 24, 25, and 26, 1938, and at Albany, New York, on June 3, 4, 5, and 7, 1938. At the times and places aforesaid all interested parties were afforded as opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed Federal and State orders. The said hearings were attended by representatives of producers, handlers and consumers of milk sold in the marketing area.

VIII

On the 5th day of August 1938, the Secretary, pursuant to the provisions of Section 8e of the Act, found and proclaimed that, as to milk produced for sale in the marketing area, the purchasing power of such milk during the base period, August 1909 to July 1914, could not be satisfactorily determined from available statistics of the Department of Agriculture, but that the purchasing power of such milk could be satisfactorily determined from available statistics of the Department of Agriculture for that portion of the post-war period between August 1921 and July 1929, inclusive.

IX

Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them of a proposed order, the Secretary, on August 5, 1938, issued Order No. 27 regulating the handling of milk in the marketing area in the manner provided in the Act, said order containing the terms and conditions authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner as, and made applicable only to persons in the respective classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as aforesaid. Said order provides that "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 percent of the milk sold in the marketing area, or, his determination approved by the President that the failure or refusal of handlers to sign tends to prevent the effectuation of the declared policy of the act and that the issuance of the order is the

only practical means of advancing the interests of producers pursuant to such declared policy of the act." A copy of the Federal Register of August 9, 1938, containing a true, correct and complete copy of said order is hereto attached as "Exhibit A." On August 5, 1938, the Commissioner of Agriculture and Markets, after giving opportunity to interested parties to file written arguments, issued proposed Official Order No. 126, which order is substantially identical with Order No. 27. A true, correct and complete copy of proposed Official Order No. 126 is hereto attached as "Exhibit B."

X

On the 5th day of August 1938, the Secretary tentatively approved a marketing agreement regulating the handling of milk in the marketing area. Opportunity was given to all handlers who would be subject to the provisions of the order to execute said agreement but prior to the issuance of said order handlers of more than 50 per cent of the volume of milk covered by said order which was marketed within the marketing area failed or refused to sign said marketing agreement.

XI

Pursuant to the provisions of Section 8c (19) of the Act, the Secretary conducted a referendum of producers for the purpose of ascertaining whether the issuance of the order was approved or favored by at least two-thirds of the producers who, during the month of May 1938 (said month having, on the 25th day of July 1938, been determined by the Secretary to be a representative period), were engaged in the production of milk for sale in the marketing area.

XII

After conducting said referendum and after the refusal or failure of handlers of more than 50 per cent of the volume of milk covered by said order which was marketed within the marketing area to sign the aforesaid tentatively approved marketing agreement, the Secretary on the 24th day of August 1938, determined, which determination was approved by the President:

(A) That the refusal or failure of said handlers to sign such marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(B) That the issuance of the order is the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and

(C) That the issuance of the order was approved or favored by at least two-thirds of the producers who during the month of May 1938, were engaged in the production of milk for sale in the marketing area, and who voted in the above-mentioned referendum. Said findings and determination were published by the Secretary in the Federal Register on August 27, 1938.

XIII

On the 25th day of August 1938, the Commissioner of Agriculture and Markets of the State of New York, having conducted a poll to determine whether the issuance of Official Order No. 126 was favored by at least seventy-five percent of the producers of milk produced in the production area for the marketing area and, having made all the findings required by the Rogers-Allen Act (N. Y. Laws of 1937, Chapter 383), declared Official Order No. 126, to be effective on September 1, 1938. The two orders are administered by a market administrator who was appointed by both the Secretary and the Commissioner of Agriculture and Markets of the State of New York to administer both orders. A handler is obliged to file the same reports and make the same payments whether subject to Order No. 27 or to Official Order No. 126 and, whatever order a handler may be subject to, compliance with the terms of one order constitutes compliance with the terms of both.

XIV

On August 26, 1938, the Secretary issued an order which was published in the Federal Register on the 27th day of August 1938, said order providing that Order No. 27 should become effective on September 1, 1938.

XV

Pursuant to Article II of said Order No. 27, the Secretary, on August 27, 1938, designated E. M. Harmon as Market Administrator under said order. Pursuant to Article II of Official Order No. 126, the Commissioner of Agriculture and Markets of the State of New York, on September 2, 1938, designated E. M. Harmon as Market Administrator under said order. Pursuant to Article V, Section 3 of both orders, the Market Administrator prescribed forms to be
7 used by each handler in making final monthly reports in accordance with said article and section.

XVI

Each of the defendants engages in the handling of milk, or cream therefrom, which was received at a plant approved by some duly authorized health authority for the receiving of milk to be sold in the marketing area and such handling is in the current interstate commerce as defined in Section 10 (j) of the act, or directly burdens, obstructs, or affects interstate commerce in such milk, and each of the defendants is, therefore, a handler of milk as defined in section 8c (1) of the act and in paragraph 6 of section 1 of Article I of Order No. 27, and as such, each of the defendants is subject to the applicable provisions of the act and of the Order.

XVII

Order No. 27 is now and has, since September 1, 1938, been continuously in full force and effect. Official Order No. 126 is likewise now and has, since September 1, 1938, been continuously in full force and effect.

XVIII

The purpose of said Order No. 27 is to promote, foster and protect commerce in milk among the states and to effectuate the declared policy of the Act. The purpose of said Official Order No. 126 is to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled co-operative associations, and, in cooperation with the Federal Government, to protect the dairy industry and insure an adequate supply of milk for the inhabitants of the State of New York.

XIX

Approximately one-third of the milk produced for sale in the marketing area is produced in states other than the state of New York. Approximately one-sixth of the milk produced for sale in the marketing area is produced within the state of New York but crosses state lines on its way to be sold in the marketing area. Hence, approximately fifty percent of all milk produced for sale in the mar-
8 keting area crosses state lines in transit to the marketing area, and is, therefore, directly in the current of interstate commerce. A substantial amount of the milk produced in the State of New York for sale in the marketing area which does not cross state lines on its way to be sold in the marketing area is, prior to its ultimate disposition by handlers, physically and inextricably intermingled with milk which has crossed state lines on its way to be sold in the marketing area. When so intermingled, the milk which has not crossed state lines loses its separate identity and the regulation of milk which has crossed state lines cannot be made effective unless all such milk is subject to the same regulation. Unless all milk produced for sale in the marketing area, whether or not physically intermingled with milk which has crossed state lines on its way to the marketing area, is subject to the same regulation as such latter milk, discrimination will result against the milk which has moved in the current of interstate commerce as such milk will be unable to compete with the unregulated milk in the marketing area. It will, therefore, be diverted to other markets thereby producing such unstable and disorderly marketing conditions as seriously to impair the purchasing power of producers, the free flow of milk in interstate commerce will be disrupted, burdened, and obstructed, milk producers and handlers whose milk travels in the current of interstate commerce will be penalized, and the effectuation of the declared policy of Congress will be prevented.

XX

Section 2 of Article VI of each order requires the Market Administrator to compute from the reports submitted by handlers a so-called uniform price to producers which is based upon the utilization of milk by all handlers in the various classes specified in the order. The failure of any handler to file a correct report with the Market Administrator results in the announcement by the Market Administrator of a uniform price which is not based upon the total utilization of milk by all handlers, and if the utilization of milk by a handler not reporting is higher than the average utilization of milk of all handlers, the uniform price announced by the Market Administrator is lower than it otherwise would be and producers therefore fail to receive as high a price for milk as they would if all handlers reported. In addition, the failure of any handler to file a correct report makes it impossible for the Market Administrator to determine accurately the amount of money owned by such handler for milk received from producers.

XXI

Section 8 of Article VII of both orders requires each handler, whose net pool obligation for the preceding month (as defined in section 1 of Article VI of the orders) is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price, to pay to the Market Administrator on or before the 18th day of each month for payment to producers through the Producer Settlement Fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. The Market Administrator is required by section 9 of Article VII of both orders to pay on or before the 20th day of each month to handlers, whose net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price, the amount by which such handler's net pool obligation is less than such amount. Unless the handlers who are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund make their payments on the 18th of each month as required, the Market Administrator will be unable to make the necessary payments to handlers having a credit against the Producer Settlement Fund and such handlers in turn will be unable to pay the full uniform price to producers.

XXII

The defendant Rock Royal Co-operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Rock Royal Cooperative, Inc., is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $3,616.56. The defendant Rock Royal Co-operative, Inc., is

also indebted to the Market Administrator in the sum of $124.62 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof.

XXIII

The defendant Schuyler Junction New York Milkshed Co-operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Schuyler Junction New York Milkshed Co-operative, Inc., is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $1,603.00. The defendant Schuyler Junction New York Milkshed Co-operative, Inc., is also indebted to the Market Administrator in the sum of $55.28 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof.

XXIV

On October 14, 1938, which was four days after the report was due, the defendant Central New York Co-operative Association, Inc., filed a report with the Market Administrator, which report was incomplete and inaccurate, and was false and untrue inasmuch as it stated that all the milk handled by said defendant was received from said defendant's own farm. Said defendant neither owns nor operates any farm whatsoever. All the milk handled by it during the month of September 1938 was received from producers. If the defendant Central New York Co-operative, Inc., had filed a true and correct report such report would have shown an indebtedness to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $20,115.56, and plaintiff alleges that such sum is actually due the Market Administrator from the defendant Central New York Co-operative Association, Inc., for payment to producers through the Producer Settlement Fund. This defendant is also indebted to the Market Administrator in the sum of $712.25 as its pro rata
11 share of the expense of administration of the orders pursuant to Article VIII thereof. Each of the defendants has failed and refused to pay its indebtedness to market administrator and is threatening to fail and refuse to comply with the provisions of the orders.

XXV

Order No. 27 and Official Order No. 126 are identical in their terms and are administered by a market administrator, who was appointed to administer both orders. So far as the effective regulation of milk in the marketing area is concerned, it is immaterial whether a handler is compelled to comply with one order or with the other, in that compliance with the terms of one order constitutes compliance with the terms of both. Some of the milk which is sold in the marketing area does not cross state lines in transit to the market and is not physically

intermingled with milk which has crossed state lines. Unless subject to the same regulation as milk which moves in the current of interstate commerce, such milk disrupts, burdens, and obstructs interstate commerce. If the plaintiff is mistaken in its contention that such milk is subject to the provisions of Order No. 27, it follows that such milk is subject to the provisions of Official Order No. 126, and the enforcement of Official Order No. 126 is necessary to prevent such milk from burdening, obstructing and affecting interstate commerce and to make effective the operation of Order No. 27.

XXVI

Each of the defendants is a competitior of other handlers in the marketing area and unless each of the defendants is immediately restrained from continuing to violate the order to which it is subject, and is immediately compelled to comply with all of its provisions, other handlers will be encouraged, or compelled by economic necessity, to refuse to comply with the provisions of the orders, the prices received by producers for milk will be lowered, commerce in milk among the several states will be disrupted, burdened, and obstructed, the lawful regulation of such commerce as provided in the Act will be rendered ineffective, the declared policy of Congress will be defeated, and the plaintiff will suffer irreparable injury.

12 Wherefore, plaintiff demands:

(1) That the court adjudge and declare that the defendants are subject to the provisions of Order No. 27.

(2) That the court issue a preliminary injunction preventing and restraining the defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of Order No. 27, regulating the handling of milk in the marketing area, during the pendency of this suit.

(3) That the court issue a preliminary injunction commanding each of the defendants to pay all amounts now due and owing by them under the provisions of Order No. 27, and commanding each of the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said Order No. 27 during the pendency of this suit.

(4) That the court issue a preliminary injunction commanding the defendant Central New York Co-operative Association, Inc., to file true and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(5) That the court issue a permanent injunction preventing and restraining the defendants, their agents, officers, attorneys, employees, successors, and assigns from violating the provisions of Order No. 27 regulating the handling of milk in the marketing area.

(6) That the court issue a permanent injunction commanding the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all the provisions of said Order No. 27.

(7) That, if the court shall determine that any of the defendants are not subject to Order No. 27, the court adjudge and declare that such defendants are subject to the provisions of Official Order No. 126.

(8) That, if the court shall determine that any of the defendants are subject to Official Order No. 126, the court issue a preliminary injunction preventing and restraining such defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of Official Order No. 126 during the pendency of this suit.

(9) That, if the court shall determine that any of the defendants are subject to Official Order No. 126, the court issue a preliminary injunction commanding each of such defendants to pay all amounts now due and owing by it under the provisions of Official Order No. 126, and commanding each of such defendants, its agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said Official Order No. 126 during the pendency of this suit.

(10) That, if the court shall determine that the defendant Central New York Co-operative Association, Inc., is subject to Official Order No. 126, the court issue a preliminary injunction commanding said defendant Central New York Co-operative Association, Inc., to file true and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(11) That, if the court shall determine that any of the defendants are subject to Official Order No. 126, the court issue a permanent injunction preventing and restraining such defendants, their agents, officers, attorneys, employees, successors, and assigns from violating the provisions of Official Order No. 126.

(12) That, if the court shall determine that any of the defendants are subject to Official Order No. 126, the court issue a permanent injunction commanding such defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all the provisions of Official Order No. 126.

(13) That the plaintiff be given all such other, further, and different relief as to this court may seem just and proper, together with judgment for costs.

RALPH L. EMMONS,
United States Attorney
in and for the Northern District of New York,
United States Court House, Utica, New York.

CHARLES J. MCCARTHY,
Special Assistant to the Attorney General.

E. O. MATHER,
Senior Attorney, Department of Agriculture.

[*Duly sworn to by Edwin W. Gaumnitz; jurat omitted in printing.*]

16 *Exhibit A to complaint*

18 # RULES, REGULATIONS, ORDERS

TITLE 7—AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

[Order No. 27]

Order Regulating Such Handling of Milk in the New York Metropolitan Marketing Area as Is in Interstate Commerce, and as Directly Burdens, Obstructs or Affects Interstate Commerce

Whereas, under the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, under the terms and provisions of said act, the Secretary of Agriculture is empowered to issue orders applicable to processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of section 8c, such orders to regulate only such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the New York metropolitan marketing area, would tend to effectuate the declared policy of said act, gave, on the 29th day of April 1938, notice of public hearings [1] to be held on a proposed marketing agreement and a proposed order, said hearings being held jointly with the Commission of Agriculture and Markets of the State of New York at Albany, New York, May 16, 1938; Malone, New York, May 17, 1938; Syracuse, New York, May 18, 1938; Elmira, New York, May 19, 1938; New York City, May 20, 24, 25, and 26, 1938; and Albany, New York, June 3, 4, and 7, 1938, and at said times and places all interested parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order; and

[1] 3 F. R. 1000 DI.

Whereas, the Secretary of Agriculture has found and pro-
19 claimed [1] the period August 1921–July 1929 to be the base period to be used in connection with ascertaining the purchasing power of milk produced for sale in the New York metropolitan marketing area; and

Whereas, the Secretary of Agriculture finds that a pro rata assessment on handlers at a rate not to exceed 2 cents per hundredweight of Class I, II–A, and II–B milk handled will provide funds necessary for the proper administration of this order; and

Whereas, the Secretary of Agriculture finds, upon the evidence introduced at the said public hearings:

1. That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing area; and that all milk which is produced for sale in the marketing area is handled in the current of interstate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and its products, except as such milk is regulated by an order of the Commissioner of Agriculture and Markets of the State of New York, to which this order is complementary;

2. That the prices calculated to give milk handled in the marketing area a purchasing power equivalent to the purchasing power of such milk as determined pursuant to section 2 and section 8e of the act are not reasonable in view of the available supplies of feeds, the price of feeds, and other economic conditions which affect the supply and demand for such milk, and that the minimum prices fixed in accordance with the method set forth in this order are such prices as will reflect such factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;

3. That this order regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement upon which hearings have been held;

4. That orderly marketing conditions for milk flowing into the New York metropolitan marketing area are so disrupted as to result in impairment of the purchasing power of such milk, and that the issuance of this order and all of its terms and conditions will tend to effectuate the declared policy of the act.

Now, therefore, the Secretary of Agriculture, pursuant to the authority vested in him by said act, hereby orders that such handling of milk

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[1] See Page 1957.

produced for sale in the New York metropolitan marketing area as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof according to article X, be in conformity to and in compliance with the terms and conditions hereinafter set forth.

Article I.—Definitions

SECTION 1. Definitions.—The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which reenacts and further amends certain provisions of Public No. 10, 73rd Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "New York metropolitan milk marketing area" means the city of New York, and the counties of Nassau, Suffolk, and Westchester, all in the State of New York, and is hereinafter called the "marketing area."

4. "Person" means any individual, partnership, corporation, association, or any other business unit.

5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

6. "Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce. This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment. This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area.

7. "Market administrator" means the agency, which is described in article II, for the administration of this order.

Article II.—Market Administrator

SECTION 1. Selection, removal, and bond.—The agency for the administration of this order shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

SEC. 2. Compensation.—The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

SEC. 3. Powers.—The market administrator shall have power:

1. To administer the terms and provisions hereof;

2. To receive, investigate and report to the Secretary complaints of violations of this order.

SEC. 4. Duties.—The market administrator, in addition to the duties hereinafter described shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Secretary at any and all times;

3. Furnish such information and such verified reports as the Secretary may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

5. Publicly discloses to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 15 days after the date upon which he is required to perform such acts has not—

(a) Made reports pursuant to section 3 of article V or

(b) Made payments required by sections 1 and 8 of article VII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof;

7. Pay out of the funds received pursuant to article VIII—

(a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator,

(b) His own compensation, and

(c) All other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties;

8. Maintain a main office and such branch offices as may be necessary.

SEC. 5. Announcement of Prices.—The market administrator shall publicly announce prices as follows:

1. Not later than the 25th day of each month, the Class I and Class II-A prices to be in effect for the following month, pursuant to section 1 of article IV.

2. Not later than the 5th day of each month, the prices effective for the preceding month for Classes II-B, III-A, III-B, III-C, III-D, IV-A, and IV-B, pursuant to section 1 of article IV.

3. Not later than the 14th day of each month, the uniform price computed pursuant to section 2 of article VI.

Article III.—Classification of Milk

SECTION 1. Basis of classification.—All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or movement from, the plant where received from producers, including members of any cooperative association: Provided, That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant; and provided further that if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant classification of such milk at the first plant may be in accordance with its utilization at such second plant.

Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the market administrator to verify such statement by an audit of such person's records.

Any milk or cream which is on hand at any plant at the end of any month shall be classified in accordance with the form in which it leaves, or is utilized at, such plant not later than the 8th day of the following month.

SEC. 2. Classes of utilization.—The classes of utilization of milk shall be as follows:

1. Class I milk shall be all milk which leaves a plant as milk, chocolate milk, or any whole milk drink, and all milk the utilization of which is not established for classification in some other class named in this section, except that loss or waste of milk in the plant where received from producers, not to exceed 2 percent of the total quantity of milk received from producers, may be prorated to each class in the proportion which the milk in such class is of the total quantity of milk classified.

2. Class II–A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs 5 and 7 of this section.

3. Class II–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of plain condensed milk, except as set forth in paragraph 6 of this section, frozen desserts, or homogenized mixtures.

4. Class III–A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of evaporated milk in hermetically-sealed cans, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than American Cheddar and cream cheese.

5. Class III–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is subsequently held in a licensed cold storage warehouse for more than seven days at a temperature below zero degrees Fahrenheit.

6. Class III–C milk shall be all milk the butterfat from which leaves a plant in the form of frozen desserts or homogenized mixtures which were sold outside of New York City.

7. Class III–D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese.

8. Class IV–A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of butter.

9. Class IV–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of American Cheddar cheese.

Article IV.—Minimum Prices

SECTION 1. *Class prices.*—For milk containing 3.5 percent of butterfat received, during each month from producers or cooperative associations of producers at plants in the 201–210 mile zone, each handler shall pay per hundredweight net less than the prices set forth in this section. For milk containing more or less than 3.5 percent of butterfat or received from producers or cooperative associations of producers at plants in other zones, each handler shall pay per hundredweight not less than the prices set forth in this section plus or minus the differentials set forth in sections 2 and 3 of this article.

The minimum prices for Class I and Class II–A milk shall apply to all Class I and Class II–A milk which is sold in the marketing area or which passes through a plant in the marketing area. The minimum prices for milk in Class II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B shall apply to all milk of any handler in these classes unless such handler has milk in Class I to which the minimum price is not applicable, in which event the minimum III–A, III–B, III–C, III–D, IV–A, and IV–B prices shall not apply to the percent of his milk, if any, in each of the said classes which is equal to the percent of his total milk received from producers to which the Class I price is not applicable.

Payment of the minimum prices for milk received direct from producers shall be in accordance with article VII. Any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum prices applicable pursuant to this article.

1. For Class I milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 60 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range (cents per pound)	Class I price		Butter-price range (cents per pound)	Class I price	
	April through July	August through March		April through July	August through March
	Dollars per cwt.	*Dollars per cwt.*		*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.80	2.05	35–39.9	2.40	2.65
20–24.9	2.00	2.25	40–44.9	2.60	2.85
25–29.9	2.20	2.45	45–49.9	2.80	3.05
30–34.9	2.20	2.65	Over 49.9	3.00	3.25

2. For Class II–A milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 30 days preceding the 25th day of the preceding month, by the United States Department of Agriculture for 92-score butter at wholesale in the New York market.

Butter-price range (cents per pound)	Class II–A price			Butter-price range (cents per pound)	Class II–A price		
	March through July	August through October	November through February		March through July	August through October	November through February
	Dollars per cwt.	*Dollars per cwt.*	*Dollars per cwt.*		*Dollars per cwt.*	*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.30	1.35	1.50	35–39.9	2.00	2.05	2.20
20–24.9	1.50	1.55	1.70	40–44.9	2.15	2.20	2.35
25–29.9	1.70	1.75	1.90	45–49.9	2.30	2.35	2.50
30–34.9	1.85	1.90	2.05	Over 49.9	2.45	2.50	2.65

3. For Class II–B milk the price during each month shall be 10 cents higher than the Class III–A price.

4. For Class III–A milk the price during each month shall be 10 cents higher than the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such month to farmers by each of the evaporated milk plants which are located at places listed in this paragraph and for which prices are reported; *Provided*, That in no event shall the Class III–A price be less than a price computed by the market administrator as follows: To the average price of 92-score butter at wholesale in the Chicago market for such month, as reported
21 by the United States Department of Agriculture, add 30 percent, multiply by 3.5, and add 7 cents.

LOCATIONS OF EVAPORATED MILK PLANTS

Mt. Pleasant, Mich.	Berlin, Wis.
Sparta, Mich.	Richland Center, Wis.
Hudson, Mich.	Oconomowoc, Wis.
Wayland, Mich.	Jefferson, Wis.
Coopersville, Mich.	New Clarus, Wis.
Greenville, Wis.	Belleville, Wis.
Black Creek, Wis.	New London, Wis.
Orfordville, Wis.	Coldwater, Ohio.
Chilton, Wis.	Delta, Ohio.

5. For Class III–B milk the price during each month shall be 20 cents higher than the Class IV–A price.

6. For Class III–C milk the price during each month shall be 10 cents higher than the Class IV–A price.

7. For Class III–D milk the price during each month shall be 7½ cents higher than the Class IV–A price.

8. For Class IV–A milk the price during each month shall be a price computed by the market administrator as follows: From the average of the highest prices reported daily during such month by the United States Department of Agriculture for 92-score butter at wholesale in the New York market, deduct 4 cents, add 20 percent, and multiply by 3.5.

9. For Class IV–B milk the price during each month shall be a price computed by the market administrator as follows: Take the average of the weekly quotations, with differentials as indicated, from such of these markets as may issue quotations during such month: Single Daises at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York; deduct 3 cents, and multiply by 9.45. In the absence of any such quotation the price for the preceding month shall be effective.

SEC. 2. Butterfat differentials.—The minimum prices for Classes I, II–A, II–B, III–B, III–C, and III–D milk set forth in section 1 of this article shall be subject to payment of butterfat differentials pursuant to section 3 of article VII. The minimum prices for Classes III–A and IV–A milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the respective prices set forth in paragraphs 4 and 8 of section 1 of this article, divided by 35. The minimum prices for Class IV–B milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the price set forth in paragraph 9 of section 1 of this article divided by 9.45 and multiplied by 0.23.

SEC. 3. Transportation differentials.—The market administrator shall from time to time publicly announce for each plant operated by each handler the freight zone set forth in the schedule below in this

section according to the railway mileage distance from New York City of its nearest railway shipping point, or its highway mileage distance from New York City, if the latter is less than the former by more than 15 miles. Any such mileage distance shall be that recognized for rate-making purposes by the Interstate Commerce Commission. The minimum prices set forth in section 1 of this article shall be plus or minus the amounts as set forth in the following schedule:

A Freight (zone-miles)	B Class I	C Classes II-A, II-B, III-B, and III-C	D Class III-A	A Freight (zone-miles)	B Class I	C Classes II-A, II-B, III-B, and III-C	D Class III-A
	Cents per cwt.	*Cents per cwt.*	*Cents per cwt.*		*Cents per cwt.*	*Cents per cwt.*	*Cents per cwt.*
1-10	+15	+8	+4	251-260	−3.5	−2	−1
11-20	+14	+8	+4	261-270	−3.5	−2	−1
21-25	+13	+8	+4	271-275	−3.5	−2	−1
26-30	+13	+7	+4	276-280	−3.5	−3	−1
31-40	+13	+7	+4	281-290	−4.5	−3	−1
41-50	+10.5	+7	+4	291-300	−5.5	−3	−1
51-60	+10.5	+6	+3	301-310	−5.5	−4	−2
61-70	+9.5	+6	+3	311-320	−5.5	−4	−2
71-75	+8	+6	+3	321-325	−7	−4	−2
76-80	+8	+5	+3	326-330	−7	−5	−2
81-90	+8	+5	+3	331-340	−7	−5	−2
91-100	+7	+5	+3	341-350	−8	−5	−2
101-110	+7	+4	+2	351-360	−8	−6	−3
111-120	+6	+4	+2	361-370	−8	−6	−3
121-125	+5	+4	+2	371-375	−9	−6	−3
126-130	+5	+3	+2	376-380	−9	−7	−3
131-140	+5	+3	+2	381-390	−9	−7	−3
141-150	+3.5	+3	+2	391-400	−9	−7	−3
151-160	+2.5	+2	+1	401-410	−10.5	−8	−4
161-170	+2.5	+2	+1	411-420	−10.5	−8	−4
171-175	+1.5	+2	+1	421-425	−10.5	−8	−4
176-180	+1.5	+1	+1	426-430	−10.5	−9	−4
181-190	+1.5	+1	+1	431-440	−11.5	−9	−4
191-200	0.0	+1	+1	441-450	−11.5	−9	−4
201-210	0.0	0	0	451-460	−11.5	−10	−5
211-220	−1	0	0	461-470	−12.5	−10	−5
221-225	−1	0	0	471-475	−12.5	−10	−5
226-230	−1	−1	0	476-480	−12.5	−11	−5
231-240	−2	−1	0	481-490	−14	−11	−5
241-250	−2	−1	0	491-500	−14	−11	−5

Article V.—Reports of Handlers

SECTION 1. Preliminary monthly reports.—On or before the 23rd day of each month each handler shall, when requested by the market administrator, report to the market administrator in the manner and form prescribed by him: (a) The total quantity of milk received during the first twenty days of such month from producers, and (b) the utilization of such milk in the several classes set forth in article III.

SEC. 2. Reports of deliveries per day per producer.—Each handler shall, upon request of the market administrator given not less than two weeks in advance, report the average deliveries of milk per day per producer during a specified period of time.

SEC. 3. Final monthly reports.—On or before the 10th day of each month each handler shall report to the market administrator, in

the manner and on forms prescribed by the market administrator, with respect to milk received at each plant during the preceding month:

1. The total quantity of milk, with the average butterfat content thereof, received from producers, from other plants, from such handler's own farm, and from other handlers;

2. The total quantity of milk and of each product of milk moved out of such plant during such month or on hand at such plant at the end of such month, the butterfat content of each product; and the destination of any milk which moved out of such plant;

3. If classification of any milk is claimed by such handler on the basis of utilization at some other plant, the utilization of such milk, together with written consent for verification by audit thereof signed by the operator, if not a handler, of the other plant, and

4. The computation, pursuant to section 1 of article VI of such handler's net pool obligation.

SEC. 4. Verification of reports and payments.—The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records. Each handler shall, during the usual hours of business, make available to the market administrator or his representative such of his records and facilities as will enable the market administrator to:

1. Verify the receipts and utilization of all milk required to be reported pursuant to this article, and, in case of errors or omissions, ascertain the correct figures;

2. Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

3. Verify the payments to producers prescribed in article VII.

Article VI.—Determination of Uniform Price

SECTION 1. Net pool obligation of handlers.—The net pool obligation of any handler for milk received from producers during
22 each month shall be a sum of money computed for such month as follows:

1. Determine the total quantity of milk in each class at each plant;

2. Subtract from the quantity of milk in each class the quantity of such milk received from other plants or from other handlers;

3. Subtract pro rata out of each class the quantity of milk received from the handler's own farm;

4. Subtract from the remaining quantity of milk in each class, the quantity of each to which the prices in section 1 of article IV do not apply, which result shall be known as the "net pooled milk" in each class;

5. Multiply the total quantity of net pooled milk in each class, at all plants of the handler combined, by the respective class prices set forth in section 1 of article IV and add together the resulting sums;

6. Deduct, in the case of each plant where the average butterfat content of all milk received from producers is in excess of 3.5 percent and add in the case of each plant where the average butterfat content of all milk received from producers is less than 3.5 percent, an amount equal to the difference between the total value of the butterfat differentials on net pooled milk in Classes III–A, IV–A, and IV–B at the rates set forth in section 2 of article IV for such milk and the total value of the butterfat differentials on such milk as set forth in section 3 of article VII;

7. Deduct, in the case of each plant nearer New York City than the 201–210 mile zone, and add, in the case of each plant farther from New York City than the 201–210 mile zone, an amount equal to the difference between the sum of the respective transportation differentials, as set forth in section 3 of article IV, on all net pooled milk in Classes II–A, II–B, III–A, III–B, and III–C and the sum obtained by applying the appropriate zone differential set forth in column B of the schedule in section 3 of article IV to the total net pooled milk at each plant in Classes II–A, II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B.

8. Deduct 20 cents per hundredweight for all net pooled milk received from producers at plants in the counties or portions of counties listed below in this section. The result thus obtained shall be known as the "handler's net pool obligation."

Counties:
- New Jersey:
  - Hunterdon.
  - Somerset.
  - Essex.
  - Union.
  - Morris.
  - Warren.
  - Sussex.
  - Passaic.
- New York:
  - Columbia.
  - Dutchess.
  - Nassau.
  - Orange.
  - Putnam.
  - Suffolk.
  - Westchester.

Counties—Continued.
- Connecticut:
  - Litchfield.
- Massachusetts:
  - Berkshire.

Towns in Ulster County, New York:
- Marbletown.
- Hurley.
- Kingston.
- Ulster.
- Rosendale.
- Esopus.
- New Paltz.
- Lloyd.
- Gardiner.
- Plattekill.
- Marlborough.
- Shawangunk.

SEC. 2. Computation of the uniform price.—The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the final report submitted for the preceding month by each handler and, on the 14th day of such

month, compute from all of such corrected reports the uniform price in the following manner:

1. Combine into one total the net pool obligations of all handlers;

2. Subtract the total of payments required to be made for such month by section 5 of article VII and the total of payments claimed pursuant to section 6 of article VII;

3. Add the amount of cash in the producer settlement fund;

4. Divide the result by the total quantity of milk represented in the sum obtained pursuant to paragraph 1 of this section; and

5. Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 201–210-mile zone.

Article VII.—Payments to Producers

SECTION 1. Time of payment.—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from producers and he does not pay the uniform price for all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such producer's milk which was paid for at the uniform price and furnish a copy of such statement to the market administrator at the time payment is made.

SEC. 2. Transportation and location differentials.—The uniform price shall be plus or minus the differential shown in column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties listed in paragraph 8 of section 1 of article VI.

SEC. 3. Butterfat differential.—The uniform price shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of one percent above or below 3.5 percent of average butterfat content of milk delivered by any producer during any month.

SEC. 4. Grade A premiums.—In addition to the uniform price and all other payments required pursuant to this article, each handler shall pay for milk which is qualified under the New York City Department of Health requirements for sale as Grade A milk and which is delivered to a plant similarly qualified, an amount per hundredweight equivalent to the following differentials on that Class I milk which such handler sold in the marketing area as Grade A milk;

Butterfat content (per cent)	Bacteria colonies per c. c.			Butterfat content (percent)	Bacteria colonies per c. c.		
	10,000 or less	10,000 to 25,000	Over 25,000		10,000 or less	10,000 to 25,000	Over 25,000
	Cents per cwt.	*Cents per cwt.*	*Cents per cwt.*		*Cents per cwt.*	*Cents per cwt.*	*Cents per cwt.*
	60	42	5	[illegible]	72	54	10
	66	48	7.5	4.0 and above	78	60	12

SEC. 5. Payments to cooperative associations.—Any cooperative sociation or producers may apply to the Secretary for a determinaon of its qualifications to receive payments pursuant to this section reason of its having and exercising full authority in the sale of e milk of its members, using its best efforts to supply, in times of ort supply, Class I milk to the marketing area and to secure utilizaon of milk, in times of long supply, in a manner to assure the eatest possible returns to all producers, and having its entire acvities under the control of its members. After such determination, e cooperative association of producers shall be entitled to continue receive such payment until it has been disqualified by the Secretary, ter hearing, for failure to exercise the authority and to perform e functions upon which such determination was based.

The market administrator shall make the payments authorized by is section, or issue credit therefor, out of the producer settlement nd on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following tes:

1. One cent per hundredweight of net pooled milk at any handler's lant which was caused to be delivered from its members by such sociation and on which such handler has made the reports and ayments required by this order.

2. Except as set forth in paragraph 3 of this section, 2½ cents per ndredweight of net pooled milk at plants of other handlers which as reported and collected for by such association.

3. Five cents per hundredweight of net pooled milk at plants erated by such association and, if, in addition to the other qualificaons, such association has been determined by the Secretary to have fficient plant capacity to receive all the milk of producers who are embers and to be willing and able to receive milk from producers t members, 5 cents per hundredweight of any net pooled milk hich was caused by it to be delivered to any other handler and which reported and collected for by such association.

SEC. 6. Market service payment.—The market administrator shall y out of the producer settlement fund to any handler immediately ter audit of claim for such payment made on forms supplied by the arket administrator;

1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area, which was, during any month except November or December, moved to a plant where it was utilized in Classes II–A, II–B, III–A, III–B, III–C, III–D, or, during the month of October, IV–A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles; and plus $\frac{1}{10}$th of 1 cent per hundredweight per additional mile, of the shortest highway distance between the two plants; and

2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equipped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area.

SEC. 7. Producer settlement fund.—The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments made by handlers pursuant to sections 8 and 10 of this article and out of which he shall make all payments to handlers pursuant to sections 6, 9, and 10 of this article, and to cooperative association of producers pursuant to section 5 of this article.

SEC. 8. Payments to the producer settlement fund.—Each handler shall on or before the 18th day of each month pay to the market administrator for payment to producers through the producer settlement fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price.

SEC. 9. Payments out of producer settlement fund.—On or before the 20th day of each month the market administrator shall remit to each handler for payment to producers the amount, if any, by which such handler's net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. If at such time the balance in the producer settlement fund is insufficient to make all payments due to such handler, the market administrator shall reduce uniformly the payments made to each handler and shall complete such payments as soon as the necessary funds are available. No handler who, on the 25th day of the month, has not received the balance of such reduced payment from the market administrator shall be deemed to be in violation of section 1 of this article if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer settlement fund.

SEC. 10. Adjustments of errors in payments.—Whenever verification by the market administrator of reports or payments of any

handler discloses errors made in payments to or from the producer settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall, within five days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within five days, make such payment to such handler. Whenever verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of less than is required by this article, the handler shall make up such payment to the producer not later than the time of making payment next following such disclosure.

Article VIII.—Expense of Administration

SECTION 1. Payment by handlers.—As his pro rata share of the expense of administration hereof, each handler shall, on or before the 20th day of each month, pay to the market administrator a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handler, directly or at the instance of a cooperative association of producers, and which was utilized in Classes I, II–A, and II–B, the exact amount to be determined by the market administrator subject to review by the Secretary. This section shall not be deemed to duplicate any similar payment by any handler under any order issued by the Commissioner of Agriculture and Markets of the State of New York to which this order is complementary.

Article IX.—Suspension, Termination, and Liquidation

SECTION 1. Continuing obligation of handlers.—Unless otherwise provided by the Secretary in any notice of amendment, termination, or suspension of any or all of the provisions hereof, such amendment, termination, or suspension shall not (a) affect, waive, or terminate any right, duty, obligation, or liability which shall have arisen or may thereafter arise in connection with any provision of this order; (b) release or waive any violation of this order occurring prior to the effective date of such amendment, termination, or suspension; or (c) affect or impair any right or remedies of the Secretary or of any other person with respect to any such violations.

SEC. 2. Continuing power and duty.—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The market administrator shall (a) continue in such capacity until discharged by the Secretary; (b) from time to time account for all

receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator, to such person as the Secretary shall direct; and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator pursuant to this order.

SEC. 3. Liquidation.—Upon the termination or suspension of this order, the market administrator shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator in liquidating the business of the market administrator's office shall be distributed by the market administrator to handlers in an equitable manner.

24 ARTICLE X.—EFFECTIVE TIME

SECTION 1. Effective time.—This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 percent of the milk sold in the marketing area, or, his determination approved by the President that the failure or refusal of handlers to sign tends to prevent the effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of producers pursuant to such declared policy of the act.

In witness whereof, I, H. A. Wallace, Secretary of Agriculture of the United States, have executed in duplicate and issued this order to become effective in accordance with article X hereof, and caused the official seal of the Department of Agriculture to be affixed hereto in the city of Washington, District of Columbia, this 5th day of August 1938.

[SEAL]

H. A. WALLACE,
Secretary of Agriculture.

[F. R. Doc. 38-2280; Filed, August 5, 1938; 3:29 p.m.]

34 *Exhibit A to Complaint*

STATE OF NEW YORK, DEPARTMENT OF AGRICULTURE AND MARKETS, ALBANY, NEW YORK

Official Order No. 126

TO REGULATE THE HANDLING OF MILK TO BE SOLD IN THE NEW YORK METROPOLITAN MILK-MARKETING AREA

August 1938

36 ## Article I—Definitions

Section 1. Definitions.—The following terms shall have the following meanings:

1. "Statute" means the Agriculture and Markets Law as amended.
2. "Commissioner" means the Commissioner of Agriculture and Markets of the State of New York.
3. "New York Metropolitan Milk-Marketing Area" means the city of New York, and the counties of Nassau, Suffolk, and Westchester, all in the State of New York, and is hereinafter called the "marketing area".
4. "Person" means any individual, partnership, corporation, association, or any other business unit.
5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.
6. "Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area. This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment. This definition shall not be deemed to include any person who neither receives milk from producers nor handlers milk which is sold as milk or cream in the marketing area.
7. "Market Administrator" means the agency, which is described in article II, for the administration of this order.

Article II—Market Administrator

Section 1. Selection, removal, and bond.—The agency for the administration of this order shall be a market administrator who shall be a person selected and subject to removal by the Commissioner. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the

Commissioner a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Commissioner.

SECTION 2. Compensation.—The market administrator shall be entitled to such reasonable compensation as shall be determined by the Commissioner.

SECTION 3. POWERS.—The market administrator shall have power:

1. To administer the terms and provisions hereof;

2. To receive, investigate and report to the Commissioner complaints of violations of this order.

SECTION 4. Duties.—The market administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Commissioner at any and all times;

3. Furnish such information and such verified reports as the Commissioner may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

5. Publicly disclose to handlers and producers, unless otherwise directed by the Commissioner, the name of any person who, within 15 days after the date upon which he is required to perform such acts, has not

(a) Made reports pursuant to section 3 of article V or

(b) Made payments required by sections 1 and 8 of article VII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof;

7. Pay out of the funds received pursuant to article VIII (a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, (b) his own compensation, and (c) all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties;

8. Maintain a main office, and such branch offices as may be necessary.

SECTION 5. Announcement of prices.—The market administrator shall publicly announce prices as follows:

1. Not later than the 25th day of each month, the Class I and Class II-A prices to be in effect for the following month, pursuant to section 1 of article IV.

2. Not later than the 5th day of each month, the prices effective for the preceding month for Classes II-B, III-A, III-B, III-C, III-D, IV-A and IV-B, pursuant to section 1 of article IV.

3. Not later than the 14th day of each month, the uniform price computed pursuant to section 2 of article VI.

Article III—Classification of Milk

SECTION 1. Basis of classification.—All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or
38 movement from, the plant where received from producers, including members of any cooperative association; *Provided*, That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant; and provided further that, if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant, classification of such milk at the first plant may be in accordance with its utilization at such second plant.

Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the market administrator to verify such statement by an audit of such person's records.

Any milk or cream which is on hand at any plant at the end of any month shall be classified in accordance with the form in which it leaves, or is utilized at, such plant not later than the 8th day of the following month.

Section 2. Classes of utilization.—The classes of utilization of milk shall be as follows:

1. Class I milk shall be all milk which leaves a plant as milk, chocolate milk, or any whole milk drink, and all milk the utilization of which is not established for classification in some other class named in this section, except that loss or waste of milk in the plant where received from producers, not to exceed 2 percent of the total quantity of milk received from producers, may be prorated to each class in the proportion which the milk in such class is of the total quantity of milk classified.

2. Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs 5 and 7 of this section.

3. Class II-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of plain condensed milk, or, except as set forth in paragraph 6 of this section, frozen desserts or homogenized mixtures.

4. Class III-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of evaporated milk in hermetically-sealed cans, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than American Cheddar and cream cheese.

5. Class III-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is subse-

quently held in a licensed cold storage warehouse for more than seven days at a temperature below zero degrees Fahrenheit.

6. Class III-C milk shall be all milk the butterfat from which leaves a plant in the form of frozen desserts or homogenized mixtures which were sold outside of New York City.

39 7. Class III–D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese.

8. Class IV–A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of butter.

9. Class IV–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of American Cheddar cheese.

Article IV—Minimum Prices

SECTION 1. Class prices.—For milk containing 3.5 percent of butterfat received during each month from producers or cooperative associations of producers at plants in the 201–210 mile zone, each handler shall pay per hundredweight not less than the prices set forth in this section. For milk containing more or less than 3.5 percent of butterfat or received from producers or cooperative associations of producers at plants in other zones, each handler shall pay per hundredweight not less than the prices set forth in this section plus or minus the differentials set forth in sections 2 and 3 of this article.

The minimum prices for Class I and Class II–A milk shall apply to all Class I and Class II–A milk which is sold in the marketing area or which passes through a plant in the marketing area. The minimum prices for milk in Classes II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B shall apply to all milk of any handler in these classes unless such handler has milk in Class I to which the minimum price is not applicable, in which event the minimum III–A, III–B, III–C, III–D, IV–A, and IV–B prices shall not apply to the percent of his milk, if any, in each of the said classes which is equal to the percent of his total milk received from producers to which the Class I price is not applicable.

Payment of the minimum prices for milk received direct from producers shall be in accordance with article VII. Any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum prices applicable pursuant to this article.

1. For Class I milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range

in which falls the average, as determined by the market administrator, of the prices reported daily during the 60 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range (cents per pound)	Class I price		Butter-price range (cents per pound)	Class I price	
	April through July	August through March		April through July	August through March
	Dollars per cwt.	*Dollars per cwt.*		*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.80	2.05	35-39.9	2.40	2.65
20-24.9	2.00	2.25	40-44.9	2.60	2.85
25-29.9	2.20	2.45	45-49.9	2.80	3.05
30-34.9	2.20	2.65	Over 49.9	3.00	3.25

2. For Class II–A milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 30 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range (cents per pound)	Class II–A Price			Butter-price range (cents per pound)	Class II–A price		
	March through July	August through October	November through February		March through July	August through October	November through February
	Dollars per cwt	*Dollars per cwt.*	*Dollars per cwt.*		*Dollars per cwt.*	*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.30	1.35	1.50	35-39.9	2.00	2.05	2.20
20-24.9	1.50	1.55	1.70	40-44.9	2.15	2.20	2.35
25-29.9	1.70	1.75	1.90	45-49.9	2.30	2.35	2.50
30-34.9	1.85	1.90	2.05	Over 49.9	2.45	2.50	2.65

3. For Class II–B milk the price during each month shall be 10 cents higher than the Class III–A price.

4. Class III–A milk the price during each month shall be 10 cents higher than the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such month to farmers by each of the evaporated milk plants which are located at places listed in this paragraph and for which prices are reported: *Provided*, That in no event shall the Class III–A price be less than a price computed by the market administrator as follows: To the average price of 92-score butter
41 at wholesale in the Chicago market for such month, as reported, by the United States Department of Agriculture, add 30 percent, multiply by 3.5, and add 7 cents.

Locations of Evaporated Milk Plants

Mt. Pleasant, Mich.	Black Creek, Wis.
Sparta, Mich.	Orfordville, Wis.
Hudson, Mich.	Chilton, Wis.
Wayland, Mich.	Berlin, Wis.
Coopersville, Mich.	Richland Center, Wis.
Greenville, Wis.	Oconomowoc, Wis.
Jefferson, Wis.	New London, Wis.
New Glarus, Wis.	Coldwater, Ohio.
Belleville, Wis.	Delta, Ohio.

5. For Class III–B milk the price during each month shall be 2 cents higher than the Class IV–A price.

6. For Class III–C milk the price during each month shall be 1 cents higher than the Class IV–A price.

7. For Class III–D milk the price during each month shall be 7½ cents higher than the Class IV–A price.

8. For Class IV–A milk the price during each month shall be price computed by the market administrator as follows: From th average of the highest prices reported daily during such mont by the United States Department of Agriculture for 92-score butte at wholesale in the New York market, deduct 4 cents, add 20 percen and multiply by 3.5.

9. For Class IV–B milk the price during each month shall b a price computed by the market administrator as follows: Take th average of the weekly quotations, with differentials as indicate from such of these markets as may issue quotations during suc month; Single Daisies at Wisconsin Cheese Exchange, Plymout Wisconsin, plus one cent per pound; Twins at Gouverneur Chee Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cub New York; deduct 3 cents, and multiply by 9.45. In the absence any such quotation the price for the preceding month shall b effective.'

SECTION 2. Butterfat differentials.—The minimum prices for Class I, II–A, II–B, III–B, III–C, and III–D milk set forth in section of this article shall be subject to payment of butterfat differentia pursuant to section 3 of article VII. The minimum prices for Class III–A and IV–A milk containing more or less than 3.5 percent bu terfat shall be plus or minus, for each one-tenth of one perce butterfat, an amount equal to the respective prices set forth in par graphs 4 and 8 of section 1 of this article, divided by 35. The min mum price for Class IV–B milk containing more or less than 3 percent butterfat shall be plus or minus, for each one-tenth of o percent butterfat, an amount equal to the price set forth in paragra 9 of section 1 of this article divided by 9.45 and multipli by 0.23.

42 SECTION 3. Transportation differentials.—The market admi istrator shall from time to time publicly announce for ea

plant operated by each handler the freight zone set forth in the schedule below in this section according to the railway mileage distance from New York City of its nearest railway shipping point, or its highway mileage distance from New York City, if the latter is less than the former by more than 15 miles. Any such mileage distance shall be that recognized for rate-making purposes by the Interstate Commerce Commission. The minimum prices set forth in section 1 of this article shall be plus or minus the amounts as set forth in the following schedule.

A	B	C	D	A	B	C	D
Freight zone miles	Class I	Classes II-A, II-B, III-B and III-C	Class III-A	Freight zone miles	Class I	Classes II-A, II-B, III-B and III-C	Class III-A
	Cents per cwt.	*Cents per cwt.*	*Cents per cwt.*		*Cents per cwt.*	*Cents per cwt.*	*Cents per cwt.*
1- 10	+15	+ 8	+4	251-260	− 3.5	− 2	−1
11- 20	+14	+ 8	+4	261-270	− 3.5	− 2	−1
21- 25	+13	+ 8	+4	271-275	− 3.5	− 2	−1
26- 30	+13	+ 7	+4	276-280	− 3.5	− 3	−1
31- 40	+13	+ 7	+4	281-290	− 4.5	− 3	−1
41- 50	+10.5	+ 7	+4	291-300	− 5.5	− 3	−1
51- 60	+10.5	+ 6	+3	301-310	− 5.5	− 4	−2
61- 70	+ 9.5	+ 6	+3	311-320	− 5.5	− 4	−2
71- 75	+ 8	+ 6	+3	321-325	− 7	− 4	−2
76- 80	+ 8	+ 5	+3	326-330	− 7	− 5	−2
81- 90	+ 8	+ 5	+3	331-340	− 7	− 5	−2
91-100	+ 7	+ 5	+3	341-350	− 8	− 5	−2
101-110	+ 7	+ 4	+2	351-360	− 8	− 6	−3
111-120	+ 6	+ 4	+2	361-370	− 8	− 6	−3
121-125	+ 5	+ 4	+2	371-375	− 9	− 6	−3
126-130	+ 5	+ 3	+2	376-380	− 9	− 7	−3
131-140	+ 5	+ 3	+2	381-390	− 9	− 7	−3
141-150	+ 3.5	+ 3	+2	391-400	− 9	− 7	−3
151-160	+ 2.5	+ 2	+1	401-410	−10.5	− 8	−4
161-170	+ 2.5	+ 2	+1	411-420	−10.5	− 8	−4
171-175	+ 1.5	+ 2	+1	421-425	−10.5	− 8	−4
176-180	+ 1.5	+ 1	+1	426-430	−10.5	− 9	−4
181-190	+ 1.5	+ 1	+1	431-440	−11.5	− 9	−4
191-200	0.0	+ 1	+1	441-450	−11.5	− 9	−4
201-210	0.0	0	0	451-460	−11.5	−10	−5
211-220	− 1	0	0	461-470	−12.5	−10	−5
221-225	− 1	0	0	471-475	−12.5	−10	−5
226-230	− 1	− 1	0	476-480	−12.5	−11	−5
231-240	− 2	− 1	0	481-490	−14	−11	−5
241-250	− 2	− 1	0	491-500	−14	−11	−5

44 Article V—Reports of Handlers

SECTION 1. Preliminary monthly reports.—On or before the 23rd day of each month each handler shall, when requested by the market administrator, report to the market administrator in the manner and form prescribed by him (a) the total quantity of milk received during the first twenty days of such month from producers, and (b) the utilization of such milk in the several classes set forth in article III.

SECTION 2. Reports of deliveries per day per producer.—Each handler shall, upon request of the market administrator given not less than two weeks in advance, report the average deliveries of milk per day per producer during a specified period of time.

SECTION 3. Final monthly reports.—On or before the 10th day of each month each handler shall report to the market administrator,

in the manner and on forms prescribed by the market administrato with respect to milk received at each plant during the precedi month:

1. The total quantity of milk, with the average butterfat conte thereof, received from producers, from other plants, from su handler's own farm, and from other handlers;

2. The total quantity of milk and of each product of milk mov out of such plant during such month or on hand at such plant the end of such month, the butterfat content of each product; a the destination of any milk which moved out of such plant;

3. If classification of any milk is claimed by such handler on t basis of utilization at some other plant, the utilization of such mil together with written consent for verification by audit thereof sign by the operator, if not a handler, of the other plant, and

4. The computation, pursuant to section 1 of article VI of su handler's net pool obligation.

SECTION 4. Verification of reports and payments.—The market a ministrator shall promptly verify all reports and payments of ea handler by audit of such handler's records. Each handler shall, du ing the usual hours of business, make available to the market admini trator or his representative such of his records and facilities as w enable the market administrator to:

1. Verify the receipts and utilization of all milk required to reported, pursuant to this article, and, in case of errors or omissio ascertain the correct figures;

2. Weigh, sample, and test for butterfat content the milk receiv from producers and any product of milk upon which classificati depends; and

3. Verify the payments to producers prescribed in article VII.

45 Article VI—Determination of Uniform Price

SECTION 1. Net pool obligation of handlers.—The net pool ob gation of any handler for milk received from producers during ea month shall be a sum of money computed for such month as follow

1. Determine the total quantity of milk in each class at each plan

2. Subtract from the quantity of milk in each class the quanti of such milk received from other plants, or from other handlers;

3. Subtract pro rata out of each class the quantity of milk receiv from the handler's own farm;

4. Subtract from the remaining quantity of milk in each cla the quantity of each to which the prices in section 1 of article I do not apply, which result shall be known as the "net pooled mil in each class;

5. Multiply the total quantity of net pooled milk in each cla at all plants of the handler combined, by the respective class pric set forth in section 1 of article IV, and add together the resulti sums;

6. Deduct, in the case of each plant where the average butte fat content of all milk received from producers is in excess of

rcent and add in the case of each plant where the average butterfat ntent of all milk received from producers is less than 3.5 percent, amount equal to the difference between the total value of the tterfat differentials on net pooled milk in Classes III-A, IV-A, and -B at the rates set forth in section 2 of article IV for such milk and e total value of the butterfat differentials on such milk as set forth section 3 of article VII;

7. Deduct, in the case of each plant nearer New York City than e 201-210 mile zone and add in the case of each plant farther from w York City than the 201-210 mile zone, an amount equal to the ference between the sum of the respective transportation differen-ls, as set forth in seciion 3 of article IV, on all net pooled milk Classes II-A, II-B, III-A, III-B, and III-C, and the sum obtained applying the appropriate zone differential set forth in column B the schedule in section 3 of article IV, to the total net pooled milk each plant in Classes II-A, II-B, III-A, III-B, III-C, III-D, -A, and IV-B.

8. Deduct 20 cents per hundredweight for all net pooled milk eived from producers at plants in the counties or portions of nties listed below in this section. The result thus obtained shall known as the "handler's net pool obligation."

Counties		Towns in Ulster County New York	
New Jersey	New York		
nterdon	Columbia	Marbletown	New Paltz
merset	Dutchess	Hurley	Lloyd
sex	Nassau	Kingston	Gardiner
ion	Orange	Ulster	Plattekill
rris	Putnam	Rosendale	Marlborough
rren	Suffolk	Esopus	Shawangunk
ssex	Westchester		
ssaic			
Connecticut	Massachusetts		
chfield	Berkshire		

SECTION 2. Computation of the uniform price.—The market administrator shall, on or before the 14th day of each month, audit for thematical correctness and obvious errors the final report subted for the preceding month by each handler and, on the 14th of such month, compute from all of such corrected reports the form price in the following manner:

. Combine into one total the net pool obligations of all handlers.

. Subtract the total of payments required to be made for such nth by section 5 of article VII and the total of payments claimed suant to section 6 of article VII;

. Add the amount of cash in the producer settlement fund;

. Divide the result by the total quantity of milk represented in sum obtained pursuant to paragraph 1 of this section; and

. Subtract not less than 4 cents nor more than 5 cents to pro-e against the contingency of errors in reports and payments or

of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 201-210 mile zone.

Article VII—Payments to Producers

SECTION 1. Time of payment.—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from producers and he does not pay the uniform price for all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such pro-
47 ducer's milk which was paid for at the uniform price and furnish a copy of such statement to the market administrator at the time payment is made.

SECTION 2. Transportation and location differentials.—The uniform price shall be plus or minus the differentials shown in Column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties and towns in New York State listed in paragraph 8 of section 1 of article VI.

SECTION 3. Butterfat differential.—The uniform price shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of one percent above or below 3.5 percent of average butterfat content of milk delivered by any producer during any month.

SECTION 4. Grade A premiums.—In addition to the uniform price and all other payments required pursuant to this article, each handler shall pay for milk which is qualified under the New York City Department of Health requirements for sale as Grade A milk and which is delivered to a plant similarly qualified, an amount per hundredweight equivalent to the following differentials on that Class I milk which such handler sold in the marketing area as Grade A milk:

Butterfat content (percent)	Bacteria colonies per c. c.		
	10,000 or less	10,000 to 25,000	Over 25,000
	Cents per cwt.	*Cents per cwt.*	*Cents per cwt.*
3.7	60	42	5
3.8	66	48	7 5
3.9	72	54	10
4.0 and above	78	60	12

SECTION 5. Payments to cooperative associations.—Any cooperative association of producers may apply to the Commissioner for a determination of its qualifications to receive payments pursuant in this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply in times of short supply Class I milk to the marketing area, and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members. After such determination the cooperative association of producers shall be entitled to continue to receive such payment until it has been disqualified
48 by the Commissioner, after hearing for failure to exercise the authority and to perform the functions upon which such determination was based.

The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members by such association and on which such handler has made the reports and payments required by this order.

2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Commissioner to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association.

SECTION 6. Market Service Payment.—The market administrator shall pay out of the producer settlement fund to any handler immediately after audit of claim for such payment made on forms supplied by the market administrator:

1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area, which was during any month except November or December, moved to a plant where it was utilized in Classes II–A, II–B, III–A, III–B, III–C, III–D, or, during the month of October, IV–A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles, and plus $\frac{1}{10}$ of 1 cent per hundred-

weight per additional mile, of the shortest highway distance between the two plants; and

2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equipped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area.

SECTION 7. Producer settlement fund.—The market administrator shall establish and maintain a separate fund known as "the
49 producer settlement fund" into which he shall deposit all payments made by handlers pursuant to sections 8 and 10 of this article and out of which he shall make all payments to handlers pursuant to sections 6, 9 and 10, of this article, and to cooperative associations of producers, pursuant to section 5 of this article.

SECTION 8. Payments to the producer settlement fund.—Each handler shall, on or before the 18th day of each month, pay to the market administrator for payment to producers through the producer settlement fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price.

SECTION 9. Payments out of producer settlement fund.—On or before the 20th day of each month the market administrator shall remit to each handler for payment to producers the amount, if any, by which such handler's net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. If at such time the balance in the producer settlement fund is insufficient to make all payments due to such handler, the market administrator shall reduce uniformly the payments made to each handler and shall complete such payments as soon as the necessary funds are available. No handler who on the 25th day of the month has not received the balance of such reduced payment from the market administrator shall be deemed to be in violation of section 1 of this article if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer settlement fund.

SECTION 10. Adjustments of errors in payments.—Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall, within five days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within five days, make such payment to such handler. Whenever verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of less than is required by this article, the handler shall

make up such payment to the producer not later than the time of making payment next following such disclosure.

Article VIII—Expense of Administration

SECTION 1. Payment by handlers.—As his pro rata share of the expense of administration hereof, each handler shall, on or before the 20th day of each month, pay to the market administrator a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handler, directly or at the instance of a cooperative association of producers, and which was utilized in Classes I, II–A, and II–B, the exact amount to be determined by the market administrator subject to review by the Commissioner.

Article IX—Suspension, Termination and Liquidation

SECTION 1. Continuing obligation of handlers.—Unless otherwise provided by the Commissioner in any notice of amendment, termination or suspension of any or all of the provisions hereof, such amendment, termination or suspension shall not (a) affect, waive, or terminate any right, duty, obligation, or liability which shall have arisen or may thereafter arise in connection with any provision of this order; (b) release or waive any violation of this order occurring prior to the effective date of such amendment, termination or suspension; or (c) affect or impair any rights or remedies of the Commissioner or of any other person with respect to any such violations.

SECTION 2. Continuing power and duty.—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The market administrator shall (a) continue in such capacity until discharged by the Commissioner; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator, to such person as the Commissioner shall direct; and (c) if so directed by the Commissioner, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property and claims vested in the market administrator pursuant to this order.

SECTION 3. Liquidation.—Upon the termination or suspension of this order, the market administrator shall, if so directed by the Commissioner, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator in liquidating the business of the market administrator's office shall be distributed by the market administrator to handlers in an equitable manner.

51 In United States District Court for the Northern District of New York

Civil Action No. —

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JETTER DAIRY COMPANY, INC., DEFENDANT

Complaint

Filed Nov. 26, 1938

Plaintiff, by Ralph L. Emmons, United States Attorney in and for the Northern District of New York, instituting these proceedings under the direction of the Attorney General, upon request of the Secretary of Agriculture of the United States, respectfully shows to the Court and alleges:

I

The defendant Jetter Dairy Company, Inc., is a corporation organized and existing under the laws of the State of New York and having its principal office and place of business at Oriskany Falls, Oenida County, State of New York.

II

This proceeding is brought under Section 8a (6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a (6)), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the said Act of May 12, 1933, as reenacted and amended being hereinafter referred to as the "Act"), vesting
52 the several district courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the Secretary pursuant to the provisions of Title I of said Act.

III

This proceeding is brought to enforce Order No. 27 issued by the Secretary of Agriculture regulating the handling of milk in the New

York Metropolitan Milk Marketing Area, and to prevent and restrain the defendant from handling milk in the current of interstate commerce, or so as directly to burden, obstruct, or affect such commerce in milk, in violation of the provisions of said Order No. 27.

IV

Pursuant to the provisions of Sections 8b and 8c of the Act, The Secretary, on April 29, 1938, gave notice of public hearings on a proposed marketing agreement and a proposed order regulating the handling of milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York, the said area being hereinafter referred to as the "Marketing Area." On April 29, 1938, the Commissioner of Agriculture and Markets of the State of New York gave notice of public hearings to be held at the same times and places on an order substantially identical with the aforesaid order.

V

In accordance with the terms of the said notice, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, pursuant to section 10 (i) of the Act, joint public hearings were conducted by Glenn J. Gifford, an employee of the Department of Agriculture, who was designated by the Secretary to conduct such hearings, and also designated by the Commissioner of Agriculture and Markets of the State of New York, to conduct such hearings on behalf of the State. In accordance with the terms
53 of said notice, the aforesaid public hearing were conducted at Albany, New York, on May 16, 1938; at Malone, New York, on May 17, 1938; at Syracuse, New York, on May 18, 1938; at Elmira, New York, on May 19, 1938; and at New York, New York, on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, New York, on May 24, 25, and 26, 1938, and at Albany, New York, on June 3, 4, 5, and 7, 1938. At the times and places aforesaid all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed order. The said hearing was attended by representatives of producers, handlers and consumers of milk sold in the marketing area.

VI

On the 5th day of August 1938, the Secretary, pursuant to the provisions of Section 8c of the Act, found and proclaimed, that, as to milk produced for sale in the marketing area, the purchasing power of such milk during the base period, August 1909 to July 1914, could not be satisfactorily determined from available statistics of the De-

partment of Agriculture, but that the purchasing power of such milk could be satisfactorily determined from available statistics of the Department of Agriculture for that portion of the post-war period between August 1921 and July 1929, inclusive.

VII

Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of a proposed Order, the Secretary, on August 5, 1938, issued Order No. 27 regulating the handling of milk in the Marketing Area in the manner provided in the Act, said Order containing terms and conditions authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner as, and made applicable only to persons in the respective classes of industrial or commercial activity specified in, the marketing agreement upon which hearings were held as aforesaid. Said Order provides that "This Order shall become effective after the issuance
54 by the Commissioner of Agriculture and Markets of the State of New York, of an order containing provisions similar to the provisions of this order and to which this order shall be complementary and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 percent of the milk sold in the marketing area, or. his determination approved by the President that the failure or refusal of handlers to sign tends to prevent the effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of producers pursuant to such declared policy of the Act." A copy of the Federal Register of August 9, 1938, containing a true, correct, and complete copy of said Order No. 27 is hereto attached as "Exhibit A."

VIII

On the 5th day of August 1938, the Secretary tentatively approved a Marketing Agreement regulating the handling of milk in the Marketing Area. Opportunity was given to all handlers who would be subject to the provisions of the Order to execute said agreement, but prior to the issuance of said order, handlers of more than 50 percent of the volume of milk covered by said order which was marketed Register of August 9, 1938, containing a true, correct, and complete agreement.

IX

Pursuant to the provisions of Section 8c (19) of the Act, the Secretary conducted a referendum of producers for the purpose of ascer-

taining whether the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938 (said month having, on the 25th day of July 1938, been determined by the Secretary to be a representative period), were engaged in the production of milk for sale in the Marketing area.

X

After conducting said referendum and after the refusal or failure of handlers of more than 50 percent of the volume of milk covered by said Order which was marketed within the Marketing Area to sign the tentatively approved Marketing Agreement relating to milk, the Secretary on the 24th day of August 1938, determined, which determination was approved by the President:

(A) That the refusal or failure of said handlers to sign such Marketing Agreement tends to prevent the effectuation of the declared policy of the Act;

(B) That the issuance of the Order is the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and

(C) That the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938, were engaged in the production of milk for sale in the Marketing Area, and who voted in the above-mentioned referendum. Said findings and determination were published by the Secretary in the Federal Register on August 27, 1938.

XI

On August 26, 1938, the Secretary issued an order which was published in the Federal Register on the 27th day of August 1938, said order providing that Order No. 27 should become effective on September 1, 1938. Prior to this date, the Commissioner of Agriculture and Markets of the State of New York had issued Official Order No. 126 containing provisions similar to the provisions of said Order No. 27, and to which said order is complementary. Said Official Order No. 126 likewise became effective on September 1, 1938.

XII

Pursuant to Article II of said Order, the Secretary on August 27, 1938, designated E. M. Harmon as Market Administrator under said Order. Pursuant to Article V, Section 3, The Market Administrator prescribed forms to be used by each handler in making final monthly reports in accordance with said Article and Section.

XIII

The defendant engages in the handling of milk, or cream therefrom, which was received at a plant approved by a duly authorized

authority for the receiving of milk to be sold in the marketing area, and such handling is in the current of interstate commerce as defined in section 10 (j) of the Act or directly burdens, obstructs, or affects interstate commerce in such milk, and the defendant is, therefore, a handler of milk as defined in Section 8c (1) of the Act and in paragraph 6 of Section 1 of Article I of the Order, and as such is subject to the applicable provisions of the Act and of the Order.

XIV

Order No. 27 is now and has, since September 1, 1938, been continuously in full force and effect.

XV

The purpose of said Order No. 27 is to promote, foster and protect commerce in milk among the States and to effectuate the declared policy of the Act.

XVI

Approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York. Approximately one-sixth of the milk produced for sale in the marketing area is produced within the State of New York but crosses State lines on its way to be sold in the marketing area. Hence, approximately fifty percent of all milk produced for sale in the marketing area crosses State lines in transit to the marketing area, and is, therefore, directly in the current of interstate commerce. A substantial amount of the milk produced in the State of New York for sale in the marketing area which does not cross State lines on its way to be sold in the marketing area is, prior to its
57 ultimate disposition by handlers, physically and inextricably intermingled with milk which has crossed State lines on its way to be sold in the marketing area. When so intermingled the milk which has not crossed State lines loses its separate identity and the regulation of milk which has crossed State lines cannot be made effective unless all of such milk is subject to the same regulation. Unless all milk produced for sale in the marketing area, whether or not physically intermingled with milk which has crossed State lines on its way to the marketing area, is subject to the same regulation as such latter milk, discrimination will result against the milk which has moved in the current of interstate commerce, as such milk will be unable to compete with the unregulated milk in the marketing area. It will, therefore, be diverted to other markets, thereby producing such unstable and disorderly marketing conditions as seriously to impair the purchasing power of producers, the free flow of

milk in interstate commerce will be disrupted, burdened, and obstructed, milk producers and handlers whose milk travels in the current of interstate commerce will be penalized, and the effectuation of the declared policy of Congress will be prevented.

XVII

Section 2 of Article VI of the Order requires the Market Administrator to compute from the reports submitted by handlers a so-called uniform price to producers which is based upon the utilization of milk by all handlers in the various classes specified in the Order. The failure of any handler to report to the Market Administrator results in the announcement by the Market Administrator of a uniform price which is not based upon the total utilization of milk by all handlers, and, if the utilization of milk by a handler not reporting is higher than the average utilization of milk of all handlers, the uniform price announced by the Market Administrator is lower than it otherwise would be and producers therefore fail to receive as high a price for the milk as they would if all handlers reported. In addition, the failure of any handler to file a report makes it
58 impossible for the Market Administrator to determine the amount of money owed by such handler for milk received from producers.

XVIII

Section 8 of Article VII of Order No. 27 requires each handler, whose net pool obligation for the preceding month (as defined in section 1 of Article VI of the Order) is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price, to pay to the Market Administrator on or before the 18th day of each month for payment to producers through the Producer Settlement Fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. The Market Administrator is required by Section 9 of Article VII of Order No. 27 to pay on or before the 20th day of each month to handlers, whose net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price, the amount of which such handler's net pool obligation is less than such amount. Unless the handlers who are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund make their payments on the 18th day of each month as required, the Market Administrator will be unable to make the necessary payments to handlers having a credit against the Producer Settlement Fund, and such handlers in turn will be unable to pay the full uniform price to producers.

XIX

The defendant has filed a report with the Market Administrator for the month of October. On the basis of such report the defendant is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $14,616.05. The defendant is also indebted to the Market Administrator in the sum of $535.37 as its pro rata share of the expense of administration of Order No. 27, pursuant to Article VIII thereof. The defendant has failed and refused to pay its indebtedness to
59 the Market Administrator and is threatening to refuse to comply with the other provisions of the order.

XX

The defendant is a competitor of other handlers in the marketing area and unless the defendant is immediately restrained from continuing to violate the order, and is immediately compelled to comply with all of its provisions, other handlers will be encouraged, or compelled by economic necessity, to refuse to comply with the provisions of the order, the prices received by producers of milk will be lowered, commerce in milk among the several States will be disrupted, burdened, and obstructed, the lawful regulation of such commerce as provided in the Act will be rendered ineffective, the declared policy of Congress will be defeated, and the plaintiff will suffer irreparable injury.

Wherefore, Plaintiff demands:

(1) That the Court order the defendant to show cause why a preliminary injunction should not issue, preventing and restraining the defendant, its agents, officers, attorneys, employees, successors and assigns, from violating any of the provisions of Order No. 27, regulating the handling of milk in the marketing area during the pendency of this suit.

(2) That the Court order the defendant to show cause why a preliminary injunction should not issue, commanding the defendant to pay all amounts now due and owing by it under the provisions of Order No. 27, and commanding the defendant, its agents, officers, attorneys, employees, successors and assigns, to comply with all of the provisions of said Order No. 27 during the pendency of this suit.

(3) That the Court issue a permanent injunction preventing and restraining the defendant, its agents, officers, attorneys, employees, successors and assigns, from violating the provisions of Order No. 27, regulating the handling of milk in the marketing area.

(4) That the Court issue a permanent injunction commanding the defendant, its agents, officers, attorneys, employees, successors and assigns, to comply with all the provisions of said Order No. 27.

60 (5) That plaintiff be given all such other further and dif-

ferent relief as to this Court may seem just and proper, together with judgment for costs.

RALPH L. EMMONS,
United States Attorney,
in and for the Northern District of New York,
United States Court House, Utica, New York.

JOHN S. L. YOST,
CHARLES J. MCCARTHY,
Special Assistants to the Attorney General.
E. O. MATHER,
Senior Attorney, Department of Agriculture.

61 [*Duly sworn to by Edwin W. Gaumitz; jurat omitted in printing.*]

[Exhibits to complaint omitted.]

62 In United States District Court for the Northern District of New York

Civil Action No. —

UNITED STATES OF AMERICA, PLAINTIFF, HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, APPLICANT FOR INTERVENTION

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL., DEFENDANTS

Motion of Holton v. Noyes as Commissioner of Agriculture and Markets of the State of New York for Leave to Intervene

Filed Nov. 19, 1938

Holten V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, moves the court for leave to intervene as a party plaintiff in this action in order to assert his claim against the defendants as set forth in his proposed complaint, of which a copy is hereto attached, on the ground that official order No. 126 of the Department of Agriculture and Markets, adopted, promulgated, and made effective by him, is similar and complementary to order No. 27, which was made effective by the Secretary of Agriculture of the United States, that if the defendants are not subject to the provisions of order No. 27 they are subject to the provisions of official order No. 126; that the same facts which would constitute a violation by the defendants of order No. 27 constitute a violation of official order No. 126, if the defendants are subject to said official order No. 126; and that the claim of the applicant and the main action herein therefore have questions of law and fact in common. The question of whether the defendant is subject to either or both orders is a single contro-

versy, in that the defendants have violated both order No. 27 and order No. 126 in the same manner, by failing to pay to the Market Administrator various sums of money for payment to producers through the Producer Settlement Fund, and, further, by the failure of the defendants to pay their pro rata share of the expenses of administration, as more fully set forth in the proposed complaint hereto attached.

MILO R. KNIFFEN,
Attorney for Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Applicant for Intervention, State Office Building, Albany, N. Y.

LOUIS S. WALLACH,
Associate Attorney, Department of Agriculture & Markets, State of New York,
Of Counsel.

63 In United States District Court for the Northern District of New York

Civil Action No. —

UNITED STATES OF AMERICA, PLAINTIFF, HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, APPLICANT FOR INTERVENTION

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL., DEFENDANTS

Complaint of intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York

Filed Nov. 19, 1938

Intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, by Milo R. Kniffen, his attorney, for his complaint alleges:

1. The United States of America has heretofore commenced an action against the defendants above named under Sec. 8a (6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a (6), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the said Act of May 12, 1933, as reenacted and amended, being hereinafter referred to as the "Act"), investing the several district courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the Secretary pursuant to the provisions of Title I of said Act.

2. The claim of the intervening plaintiff arises out of the same controversy as that of the original plaintiff, in so far as the defendants above named are concerned, and the intervening complaint herein is ancillary to the original complaint of the plaintiff herein.

3. The defendant Rock Royal Co-operative, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Rock Royal, in the County of Delaware, State of New York.

4. The defendant Central New York Co-operative Association, Inc., is a cooperative corporation organized and existing under and
64 by virtue of the laws of the State of New York, and having its principal office and place of business in the City of Cortland, County of Cortland, State of New York.

5. The defendant Schuyler Junction New York Milkshed Co-operative, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Schuyler Junction, County of Herkimer, State of New York.

6. This proceeding is brought to enforce official order No. 126, issued by the intervening plaintiff herein, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and to prevent and restrain the defendants from handling milk in violation of the provisions of said official order No. 126; or, if the court shall find, however, that those defendants who handle milk which does not cross state lines on its way to the marketing area for sale burden, obstruct, or affect interstate commerce, to hold such defendants subject to the provisions of order No. 27, issued by the Secretary of Agriculture of the United States, and, if the court finds that such defendants are subject to the provisions of order No. 27, to prevent and restrain them from violating such order.

7. Pursuant to the provisions of Section 258–m of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), the Commissioner on April 29, 1938, gave notice of public hearings on a proposed order regulating the handling of milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York, the said area being hereinafter referred to as the "marketing area". On April 29, 1938, the Secretary of Agriculture of the United States gave notice of public hearings to be held at the same times and places on a Marketing Agreement and an order substantially identical with the aforesaid order.

8. In accordance with the terms of the said notices, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, the intervening plaintiff herein, pursuant to Section 10-i of the Act, and Section 258–n of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), joint public hearings were conducted by Glenn J. Gifford, an employee of the Department of Agriculture of the United States, who
65 was designated by the Secretary to conduct such hearings, and also designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on

behalf of the State. In accordance with the terms of said notice, joint public hearings were conducted at Albany, New York, on May 16, 1938; at Malone, New York, on May 17, 1938; at Syracuse, New York, on May 18, 1938; at Elmira, New York, on May 19, 1938, and at New York, New York, on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, New York, on May 24, 25, and 26, 1938, and at Albany, New York, on June 3, 4, 5, and 7, 1938. At the times and places aforesaid, all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed federal and state orders. The said hearings were attended by representatives of producers, handlers, and consumers of milk sold in the marketing area.

9. Upon the evidence introduced at the said hearings, and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of a proposed order, the Secretary, on August 5, 1938, issued order No. 27 regulating the handling of milk in the marketing area in the manner provided in the Act, said order containing the terms and conditions authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner as, and made applicable only to, persons in the respective classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as aforesaid. Said order provides that "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary, and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 per cent of the milk sold in the marketing area, or his determination approved by the President that the failure or refusal to sign tends to prevent the effectuation of the declared policy of the act, and that the issuance of the order is the only practical means of advancing the interests of producers pursuant to such declared policy of the act." On August 26, 1938, the Secretary
66 having made all necessary findings, issued an order providing that order No. 27 should become effective on September 1 1938.

On August 5, 1938, the Commissioner of Agriculture and Markets after giving opportunity to interested parties to file written arguments, issued proposed official order No. 126, which order was substantially identical with order No. 27. On August 25, 1938, the Commissioner having duly conducted a poll to determine (Sec. 258-m of the Agriculture and Markets Law of the State of New York, Chapter 383 of the Laws of 1937) whether the issuance of official order No

126 was favored by at least seventy-five per cent of the producers of milk produced in the production area for the marketing area, and, having made all the findings required by the said section 258-m of the Agriculture and Markets Law of the State of New York, declared official order No. 126 to be effective Sept. 1, 1938.

10. Order No. 27 and official order No. 126 are administered by a market administrator who was appointed by both the Secretary and the Commissioner to administer both orders. A handler is obliged to file the same reports and make the same reports whether subject to official order No. 126 or whatever order the handler may be subject to. Compliance with one order constitutes compliance with the terms of both.

11. Pursuant to Article II of said order No. 27, the Secretary, on August 27, 1938, designated E. M. Harmon as Market Administrator under said order. Pursuant to Article II of Official Order No. 126, the Commissioner of Agriculture and Markets of the State of New York, on September 2, 1938, designated E. M. Harmon as Market Administrator under said order. Pursuant to Article V, Section 3 of both orders, the Market Administrator prescribed forms to be used by each handler in making final monthly reports in accordance with said article and section.

12. Order No. 27 is now and has, since September 1, 1938, been continuously in full force and effect. Official order No. 126 is likewise now and has, since September 1, 1938, been continuously in full force and effect.

13. The purpose of said order No. 27 is to promote, foster, and protect commerce in milk among the states, and to effectuate the declared policy of the Act. The purpose of said official order No. 126
67 is to promote, foster, and encourage the intelligent and orderly marketing of milk through producer-owned and controlled co-operative associations, and, in cooperation with the Federal Government, to protect the dairy industry, and insure an adequate supply of milk for the inhabitants of the State of New York.

14. Section 2 of Article VI of each order requires the Market Administrator to compute from the reports submitted by handlers a so-called uniform price to producers which is based upon the utilization of milk by all handlers in the various classes specified in the order. The failure of any handler to file a correct report with the Market Administrator results in the announcement by the Market Administrator of a uniform price which is not based upon the total utilization of milk by all handlers, and, if the utilization of milk by a handler not reporting is higher than the average utilization of milk of all handlers, the uniform price announced by the Market Administrator is lower than it otherwise would be, and producers therefore fail to receive as high a price for milk as they would if all handlers reported. In addition, the failure of any handler to file a correct report makes it impossible for the Market Administrator to determine accurately the amount of money owed by such handler for milk received from producers.

15. Section 8 of Article VII of both orders requires each handler whose net pool obligation for the preceding month (as defined in section 1 of Article VI of the orders) is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price to pay to the Market Administrator on or before the 18th day of each month for payment to producers through the Producer Settlement Fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. The Market Administrator is required by section 9 of Article VII of both orders to pay on or before the 20th day of each month to handlers whose net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price, the amount by which such handler's net pool obligation is less than such amount. Unless the handlers who are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund make their payments on the 18th of each month as required, the Market Administrator will be unable to make the necessary payments to handlers having a
68 credit against the Producer Settlement Fund, and such handlers in turn will be unable to pay the full uniform price to producers.

16. The defendant Rock Royal Co-operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Rock Royal Co-operative, Inc., is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $3,616.56. The defendant Rock Royal Co-operative, Inc., is also indebted to the Market Administrator in the sum of $124.62 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof.

17. The defendant Schuyler Junction New York Milkshed Co-operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Schuyler Junction New York Milkshed Co-operative, Inc., is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $1,603.00. The defendant Schuyler Junction New York Milkshed Co-operative, Inc., is also indebted to the Market Administrator in the sum of $55.28 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof.

18. On October 14, 1938, which was four days after the report was due, the defendant Central New York Co-operative Association, Inc., filed a report with the Market Administrator, which report was incomplete and inaccurate, and was false and untrue inasmuch as it stated that all the milk handled by said defendant was received from said defendant's own farm. Such defendant neither owns nor operates any farm whatsoever. All the milk handled by it during the

month of September 1938, was received from producers. If the defendant Central New York Co-operative, Inc., had filed a true and correct report, such report would have shown an indebtedness to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $20,115.56, and plaintiff alleges that such sum is actually due the Market Administrator from the defendant Central New York Co-operative Association, Inc., for payment to producers through the Producer Settlement Fund. This defendant is also indebted to the Market Administrator in the sum of $712.25 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof. Each of the defendants has failed and refused to pay its indebtedness to the Market Administrator, and is threatening to fail and refuse to comply with the provisions of the orders.

39 19. Order No. 27 and official order No. 126 are identical in their terms and are administered by a market administrator, who was appointed to administer both orders. So far as the effective regulation of milk in the marketing area is concerned, it is immaterial whether a handler is compelled to comply with one order or with the other, in that compliance with the terms of one order constitutes compliance with the terms of both. Unless the milk which moves in the current of interstate commerce, or which burdens and obstructs and affects interstate commerce and is therefore beyond the power of the state to regulate, is subject to the same regulation as the milk which is purely intrastate in character, regulation by the State of the latter milk will be ineffective. If the defendants are not subject to official order No. 126, it follows that they are subject to the provisions of order No. 27, and the enforcement of order No. 27 is necessary to insure the effective control of the purely intrastate milk subject to official order No. 126.

20. Each of the defendants is a competitor of other handlers in the marketing area, and, unless each of the defendants is immediately restrained from continuing to violate the order to which it is subject, and is immediately compelled to comply with all of its provisions, other handlers will be encouraged, or compelled by economic necessity, to refuse to comply with the provisions of order No. 27 and official order No. 126, the prices received by producers for milk will be lowered, and the intervening plaintiff will suffer irreparable injury.

Wherefore, the intervening plaintiff demands:

(1). That the court adjudge and declare that the defendants are subject to provisions of official order No. 126.

(2) That the court issue a preliminary injunction preventing and restraining the defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of official order No. 126, regulating the handling of milk in the marketing area, during the pendency of this suit.

(3) That the court issue a preliminary injunction commanding each of the defendants to pay all amounts now due and owing by them under the provisions of official order No. 126, and commanding
70 each of the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said official order No. 126 during the pendency of this suit.

(4) That the court issue a preliminary injunction commanding the defendant Central New York Co-operative Association, Inc., to file true and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(5) That the court issue a permanent injunction preventing and restraining the defendants, their agents, officers, attorneys, employees, successors, and assigns from violating the provisions of official order No. 126 regulating the handling of milk in the marketing area.

(6) That the court issue a permanent injunction commanding the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all the provisions of said official order No. 126.

(7) That, if the court shall determine that any of the defendants are not subject to official order No. 126, the court adjudge and declare that such defendants are subject to the provisions of order No. 27.

(8) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a preliminary injunction preventing and restraining such defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of order No. 27, during the pendency of this suit.

(9) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a preliminary injunction commanding each of such defendants to pay all amounts now due and owing by it under the provisions of order No. 27, and commanding each of such defendants, its agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said order No. 27 during the pendency of this suit.

(10) That, if the court shall determine that the defendant Central New York Co-operative Association, Inc., is subject to order No. 27, the court issue a preliminary injunction commanding said defendant Central New York Co-operative Association, Inc., to file true
71 and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(11) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a permanent injunction preventing and restraining such defendants, their agents, officers, attorneys, employees, successors, and assigns from violating the provisions of order No. 27.

(12) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a permanent injunction commanding such defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all the provisions of order No. 27.

(13) That the intervening plaintiff be given all such other, further, and different relief as to this court may seem just and proper, together with judgment for costs.

MILO R. KNIFFEN,
Attorney for Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Applicant for Intervention, State Office Building, Albany, N. Y.

LOUIS S. WALLACH,
Associate Attorney, Department of Agriculture & Markets, State of New York,
Of Counsel.

72 [*Duly sworn to by Holton V. Noyes; jurat omitted in printing.*]

73 In United States District Court

Civil Action No. 32 Consolidated Cause

[Title omitted.]

Complaint of intervening plaintiff

Filed Dec. 15, 1938

Intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, by Milo R. Kniffen, his attorney, for his complaint against Jetter Dairy Company Inc. alleges:

1. The United States of America has heretofore commenced an action against the defendants above named under Sec. 8a (6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a (6) as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the said Act of May 12, 1933, as reenacted and amended being hereinafter referred to as the "Act"), vesting the several district courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the Secretary pursuant to the provision of Title I of said Act.

2. The claim of the intervening plaintiff arises out of the same controversy as that of the original plaintiff, insofar as the defendant is concerned, and the intervening complaint herein is ancillary to the original complaint of the plaintiff herein.

74 3. Upon information and belief defendant is a corporation organized and existing under the laws of the State of New York and having its principal office and place of business at Oriskany Falls, Oneida County, State of New York.

4. This proceeding is brought to enforce Official Order No. 126, issued by the intervening plaintiff herein, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and

to prevent and restrain the defendant from handling milk in violation of the provisions of said Official Order No. 126, or, if the Court shall find, however, that the defendant is handling milk which does not cross state lines on its way to the marketing area for sale, burdens, obstructs, or affects interstate commerce, to hold that such defendant is subject to the provisions of Order No. 27, issued by the Secretary of Agriculture of the United States, and, if the Court finds that the defendant is subject to the provisions of Order No. 27, to prevent and restrain it from violating such order.

5. Pursuant to the provisions of Section 258m of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), the Commissioner on April 29, 1938, gave notice of public hearings on a proposed order regulating the handling of milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York, the said area being hereinafter referred to as the "Marketing Area." On April 29, 1938, the Secretary of Agriculture of the United States gave notice of public hearings to be held at the same time and places on a Marketing Agreement and an order substantially identical with the aforesaid order.

75 6. In accordance with the terms of the said notices, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, the intervening plaintiff herein, pursuant to Section 10 i of the Act and Section 258-n of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), joint public hearings were conducted by Glenn J. Gifford, an employee of the Department of Agriculture of the United States, who was designated by the Secretary to conduct such hearings, and also designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on behalf of the State. In accordance with the terms of said notice, joint public hearings were conducted at Albany, New York, on May 16, 1938; at Malone, New York, on May 17, 1938; at Syracuse, New York, on May 18, 1938; at Elmira, New York, on May 19, 1938; and at New York, on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, New York, on May 24, 25, and 26, 1938, and at Albany, New York, on June 3, 4, 5, and 7, 1938. At the time and places aforesaid all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed federal and state orders. The said hearings were attended by representatives of producers, handlers, and consumers of milk sold in the marketing area.

7. Upon the evidence introduced at the said hearings, and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of a proposed order, the Secretary, on August 5, 1938, issued order No. 27, regulating the handling of milk in the marketing area

n the manner provided in the Act, said order containing the terms nd conditions authorized by the applicable provisions of the Act, nd no others, and regulating the handling of milk in the same manner, as and made applicable only to, persons in the respec- 6 tive classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as afore- aid. Said order provides that "This order shall become effective fter the issuance by the Commissioner of Agriculture and Markets f the State of New York of an order containing provisions similar o the provisions of this order and to which this order shall be com- lementary, and on the first day of the month following, by more han three days, publication in the Federal Register by the Secretary f (a) his finding that the order is approved by more than two-thirds f the producers voting in a referendum, (b) a marketing agreement ontaining provisions similar to this order approved by him and gned by handlers of more than 50 per cent of the milk sold in the arketing area, or, his determination approved by the President that he failure or refusal to sign tends to prevent the effectuation of the eclared policy of the act, and that the issuance of the order is the nly practical means of advancing the interest of producers pursuant o such declared policy of the act. On August 26, 1938, the Secre- ary, having made all necessary findings, issued an order providing hat order No. 27 should become effective on September 1, 1938.

On August 5, 1938, the Commissioner of Agriculture and Markets, fter giving opportunity to interested parties to file written argu- ents, issued proposed official order No. 126, which order was sub- antially identical with order No. 27. On August 25, 1938, the Com- issioner having duly conducted a poll to determine (Sec. 258-m of he Agriculture and Markets Law of the State of New York, Chapter 3 of the Laws of 1937) whether the issuance of official order No. 126 as favored by at least seventy-five per cent of the producers of ilk produced in the production area for the marketing area, and, aving made all the findings required by the said section 258-m of he Agriculture and Markets Law of the State of New York, de- clared official order No. 126 to be effective Sept. 1, 1938.

8. Order No. 27 and official order No. 126 are administered by a market administrator who was appointed by both the ecretary and the Commissioner to administer both orders. A han- ler is obliged to file the same reports and make the same reports hether subject to official order No. 126 or whatever order the handler ay be subject to. Compliance with one order constitutes compliance ith the terms of both.

9. Pursuant to Article II of said No. 27, the Secretary, on ugust 27, 1938, designated E. M. Harmon as Market Administrator nder said order. Pursuant to Article II of Official Order No. 126, he Commissioner of Agriculture and Markets of the State of New ork, on September 2, 1938, designated E. M. Harmon as Market dministrator under said order. Pursuant to Article V, Section 3 f both orders, the Market Administrator prescribed forms to be used

by each handler in making final monthly reports in accordance with said article and section.

10. Order No. 27 is now and has, since September 1, 1938, been continuously in full force and effect. Official Order No. 126 is likewise now and has, since September 1, 1938, been continuously in full force and effect.

11. The purpose of said order No. 27, is to promote, foster, and protect commerce in milk among the states, and to effectuate the declared policy of the Act. The purpose of said official order No. 126 is to promote, foster, and encourage the intelligent and orderly marketing of milk through producer-owned and—controlled cooperative associations, and, in cooperation with the Federal Government, to protect the dairy industry, and insure an adequate supply of milk for the inhabitants of the State of New York.

12. Section 2 of Article VI of each order requires the Market Administrator to compute from the reports submitted by handlers a so-called uniform price to producers which is based upon the utilization of milk by all handlers in the various classes specified in
78 the orders. The failure of any handler to file a correct report with the Market Administrator results in the announcement by the Market Administrator of a uniform price which is not based upon the total utilization of milk by all handlers, and, if the utilization of milk by a handler not reporting is higher than the average utilization of milk of all handlers, the uniform price announced by the Market Administrator is lower than it otherwise would be, and producers therefore fail to receive as high a price for milk as they would if all handlers reported. In addition, the failure of any handler to file a correct report makes it impossible for the Market Administrator to determine accurately the amount of money owed by such handler for milk received from producers.

13. Section 8 of Article VII of both orders requires each handler whose net pool obligation for the preceding month (as defined in section I of Article VI of the orders) is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price to pay to the Market Administrator on or before the 18th day of each month for payment to producers through the Producer Settlement Fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. The Market Administrator is required by section 9 of Article VII of both orders to pay on or before the 20th day of each month to handlers whose net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price the amount by which such handler's net pool obligation is less than such amount. Unless the handlers who are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund make their payments on the 18th of each month as required, the Market Administrator will be unable to make

the necessary payments to handlers having a credit against the Producer Settlement Fund.

79 14. The defendant has filed a report with the Market Administrator for the month of October. On the basis of such report the defendant is indebted to the Market Administrator in the sum of $14,216.05. The defendant is also indebted to the Market Administrator in the sum of $535.37, as its pro rata share of the expenses of administration of the orders pursuant to Article VIII thereof. The defendant has failed and refused to pay its indebtedness to the Market Administrator and is threatening to refuse to comply with the other provisions of the order.

15. Order No. 27 and Official Order No. 126 are identical in their terms and are administered by a market administrator, who was appointed to administer both orders. So far as the effective regulation of milk in the marketing area is concerned, it is immaterial whether a handler is compelled to comply with one order or with the other, in that compliance with the terms of one order constitutes compliance with the terms of both. Unless the milk which moves in the current of interstate commerce, or which burdens and obstructs and affects interstate commerce and is therefore beyond the power of the state to regulate, is subject to the same regulation as the milk which is purely intrastate in character, regulation by the State of the latter milk will be ineffective. If the defendant is not subject to official order No. 126, it follows that it is subject to the provisions of order No. 27, and the enforcement of Order No. 27 is necessary to insure the effective control of the purely intrastate milk subject to official order No. 126.

16. The defendant is a competitor of other handlers in the marketing area, and, unless the defendant is immediately restrained from continuing to violate the order to which it is subject, and is immediately compelled to comply with all of its provisions, other handlers will be encouraged, or compelled by economic necessity, to refuse to comply with the provisions of order No. 27 and Official Order No. 126, the prices received by producers for milk will be lowered, and the intervening plaintiff will suffer irreparable injury.

80 Wherefore, the intervening plaintiff demands:

(1) That the court adjudge and declare that the defendant is subject to provisions of official order No. 126.

(2) That the court issue a preliminary injunction preventing and restraining the defendant, its agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of official order No. 126, regulating the handling of milk in the marketing area, during the pendency of this suit.

(3) That the court issue a preliminary injunction commanding the defendant to pay all amounts now due and owing by it under the provisions of official order No. 126, and commanding the defendant, its agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said official order No. 126 during the pendency of this suit.

(4) That the court issue a preliminary injunction commanding the defendant to pay all amounts now due and owing by it under the provisions of official order No. 126, and commanding the defendant, its agents, officers, attorneys, employees, successors and assigns, to comply with all of the provisions of said official order No. 126, during the pendency of this suit.

(5) That the court issue a permanent injunction preventing and restraining the defendant, its agents, officers, attorneys, successors and assigns, from violating the provisions of official order No. 126, regulating the handling of milk in the Marketing Area.

(6) That, if the court shall determine that the defendant is not subject to official order No. 126, the court adjudge and declare that the defendant is subject to the provisions of order No. 27.

81 (7) That, if the court shall determine that the defendant is subject to order No. 27, the court issue a preliminary injunction preventing and restraining such defendant, its agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of order No. 27, during the pendency of this suit.

(8) That, if the court shall determine that the defendant is subject to order No. 27, the court issue a preliminary injunction commanding such defendant to pay all amounts now due and owing by it under the provisions of Order No. 27, and commanding such defendant, its agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said order No. 27 during the pendency of this suit.

(9) That, if the court shall determine that the defendant is subject to order No. 27, the court issue a permanent injunction preventing and restraining such defendant, its agents, officers, attorneys, employees, successors, and assigns from violating the provisions of order No. 27.

(10) That, if the court shall determine that the defendant is subject to order No. 27, the court issue a permanent injunction commanding such defendant, its agents, officers, attorneys, employees, successors, and assigns to comply with all the provisions of order No. 27.

(11) That the intervening plaintiff be given all such other, further, and different relief as to this court may seem just and proper, together with judgment for costs.

MILO R. KNIFFEN,
Attorney for Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Intervening Plaintiff, State Office Building, Albany, New York.

LOUIS S. WALLACH,
Associate Attorney, Department of Agriculture and Markets, State of New York,
Of Counsel.

82 [*Duly sworn to by Holton V. Noyes; jurat omitted in printing.*]

83. In United States District Court for the Northern District of New York

Civil Action No. 32

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL., DEFENDANTS

Civil Action No. 49

UNITED STATES OF AMERICA, PLAINTIFF

v.

JETTER DAIRY COMPANY, INC., DEFENDANT

Order consolidating cases

Filed Dec. 2, 1938

Upon motion of the United States of America, the plaintiff in the above-entitled causes, and it appearing to the Court that the above-entitled causes involve common questions of law and fact, and that the convenience of the Court and of the parties will be served by the consolidation of the above-entitled causes, and counsel for all parties having consented thereto, in open court,

It is ordered, adjudged, and decreed that the above-entitled causes be and hereby are consolidated into one action in this Court and that the orders and proceedings heretofore had in said causes, respectively, are hereby made orders and proceedings in this cause, and that the consolidated cause proceed under the title of United States of America v. Rock Royal Co-Operative, Inc., et al., Civil Action No. 32, Consolidated Cause.

Dated at Albany, New York, this 1st day of Dec. 1938.

(s) FRANK COOPER,
United States District Judge.

Dup.

84 In United States District Court

Civil Action No. 32. Consolidated Cause
[Title omitted.]

Order permitting intervention of Holton V. Noyes

Filed Dec. 15, 1938

A motion to intervene under Rule 24–b of the Rules of Federal Procedure by Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, as a party plaintiff in the action

entitled "United States of America, Plaintiff, v. Rock Royal operative, Inc., Central New York Co-operative Association, Schuyler Junction New York Milkshed Co-operative, Inc., defants, Civil Action No. 32, "having been presented to the court gether with the proposed verified complaint of the applicant, having duly come on for hearing on the 26th day of November and

A motion to intervene as plaintiff under Rule 24-b of the Rule Federal Procedure by Holton V. Noyes as Commissioner of Agriture and Markets of the State of New York in an action enti "United States of America, plaintiff, v. Jetter Dairy Company, fendant, Civil Action No. —," having duly come on to be hear open court on the 26th day of November, 1938, and

It appearing to the court that the claim of applicant for inter tion and the claim of the original plaintiff in each of the afore causes have common questions of law and fact, and that the ques of whether the defendants are subject to the Federal order or State order presents a single controversy, and the presence of applicant for intervention is necessary to enable the court to e a judgment which will settle finally the claims of all the par and that the claim of the applicant for intervention is ancillar the claim set forth in the original complaints, and counsels for al the parties having consented in open court to the granting of motions of the applicant herein to intervene, and

85 The Court having heretofore ordered that the two aforen tioned causes be consolidated and that the consolidated c proceed under the title of United States of America vs. Rock R Co-operative Inc., et al. Civil Action No. 32, Consolidated Cause

It is ordered, adjudged, and decreed that Holton V. Noyes as C missioner of Agriculture and Markets is hereby permitted to in vene as a party plaintiff in the Action of United States of Amer Plaintiff vs. Rock Royal Co-operative, Inc., et al., Civil Action 32, Consolidated Cause, and that the defendants Rock Royal operative, Inc., Central New York Co-operative Association, and Schuyler Junction New York Milkshed Co-operative Inc. required to plead, demur, or answer the proposed verified compl attached to the motion here, as and within the time that they wi required to plead, demur, or answer to an original bill in said C as of this date, upon condition, however, that the answer of defe ants to the complaint of the original plaintiff be deemed t answers to the complaint of the intervening plaintiff and with right of the defendants to interpose a separate answer or to am the existing answer, and that said intervening plaintiff shall be re for and shall go to trial at the time already fixed for such trial, o such other time as shall be fixed by the original plaintiff and defendants.

It is further ordered, adjudged, and decreed that the said in vening plaintiff serve a complaint in the Action of United State America, plaintiff, v. Jetter Dairy Company, Inc., defendant, u

Willard A. Pratt, the attorney for the defendant Jetter Dairy Company, Inc., and that the said defendant be required to plead, demur, or answer to the said complaint of the intervening plaintiff under the rules of this court, and except as herein otherwise provided, and without change of time fixed for trial.

86 It is further ordered, adjudged, and decreed that the consolidated cause proceed under the title of United States of America, Plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Intervening Plaintiff, vs. Rock Royal Co-operative Inc., et al., Defendants, Civil Action No. 32, Consolidated Cause.

Dated at Albany, N. Y., this 6th day of December, 1938.

(s) FRANK COOPER,
United States District Judge.

87 In United States District Court

Civil Action No. 32

[Title omitted.]

Answer

Filed Dec. 5, 1938

Defendant, Rock Royal Co-Operative, Inc., for an answer to the complaint, alleges:

First. Admits on information and belief, the allegations stated in Paragraphs marked "I, II, III, IV, V"; so much of Paragraph marked "IX" as alleges that the Secretary, on August 5, 1938, issued Order No. 27, and that on or about August 5, 1938, the Commissioner of Agriculture, issued proposed Official Order No. 126. Admits that said "proposed Official Order No. 126 is substantially identical with Order No. 27."

Second. Admits on information and belief, so much of Paragraph marked "X" as alleges that handlers of more than 50% of the volume of milk covered by said Orders, failed to sign a Marketing Agreement.

Third. Admits on information and belief, that the Secretary conducted a purported referendum of producers for the purported purpose of ascertaining whether Order No. 27 was favored by at least two-thirds of the producers, mentioned in Paragraph marked "XI."

Fourth. Admits on information and belief, that on or about August 24, 1938, the Secretary made a purported determination, which 88 was subsequently approved by the President, and which contained the statements set forth under Paragraphs A, B, and C of said "XII" allegation, and that said Findings were published in the Federal Register on August 27, 1938.

Fifth. Admits on information and belief, that the Commissioner of Agriculture of the State of New York, conducted a purported poll of producers, and thereafter, did on August 25, 1938, make certain

purported Findings, pursuant to the provisions of Chapter 383 o the Laws of 1937 of the State of New York, and declared Offici Order No. 126 to be effective on September 1st, 1938. Admits thi the Market Administrator was appointed by the Secretary and Com missioner of Agriculture to administer said purported Orders. Ad mits that the provisions of Order No. 27 and Official Order No. 12 are as stated in copies thereof, annexed to the complaint.

Sixth. Admits on information and belief, the allegations containe in Paragraphs marked "XIV and XV" of the complaint. Admits s much of Paragraph marked "XVI" of the complaint, as alleges tha this defendant operates a duly approved milk receiving plant for re ceiving milk to be sold in the portion of the marketing area include in the City of New York.

Seventh. Admits so much of Paragraph XXII, as alleges that thi defendant filed a report with the Market Administrator for th month of September. Denies that it has any knowledge or informa tion sufficient to form a belief, as to so much of said Paragraph, a alleges that "on the basis of such report the defendant Rock Roya Cooperative, Inc. is indebted to the Market Administrator * * in the sum of $3,616.56," and therefore denies the same.

Eighth. Denies that it has any knowledge or information suf cient to form a belief, as to the allegations contained in Para
89 graphs marked "VI, VII, VIII, IX, XIX, XX, XXI, XXI XXIII, XXIV, and XXV" except to the portions thereo heretofore admitted, and therefore denies the same.

Ninth. Said defendant further answering the complaint, on info mation and belief, denies the same and each and every allegatio therein contained, not hereinbefore specifically admitted or denie

Tenth. Defendant, for a first, separate, distinct answer and affirma tive defense, alleges on information and belief, that said Order N 27 and Official Order No. 126 are illegal and void on the ground tha in issuing said Order No. 27, the Secretary exceeded his administr tive authority and power for the reason that the number of pr ducers represented in such purported referendum, was 65,255, which number only 33,663 or 51.6% voted "yes" in favor of sai Order. The provisions of Title 7, Section 608c, Subdivision 19, U. Code, are as follows:

"(19) Producer referendum.—For the purpose of ascertainin whether the issuance of an order is approved or favored by producer as required under the applicable provisions of this title, the Secreta may conduct a referendum among producers. The requirements approval or favor under any such provisions shall be held to be com plied with if of the total number of producers or the total volume production, as the case may be, represented in such referendum, th percentage approving or favoring is equal to or in excess of th percentage required under such provision. Nothing in this subsecti shall be construed as limiting representation by cooperative associ tions as provided in subsection (12)." (As added June 3, 1937, c. 29 Sec. 2 (f), 50 Stat. 247.)

Eleventh. On information and belief, the findings of the Secretary of Agriculture to the effect that the provisions of said statute were complied with, is unsupported by said referendum or by any probative evidence on which to base such finding.

Twelfth. On information and belief, the Commissioner of
90 Agriculture of the State of New York, in issuing said Official Order No. 126, exceeded his administrative authority and power, and said Order was and is void, for the reason that the number of producers represented in said purported poll, was upwards of more than 44,000, of which number, only 25,935, or 59% voted "yes" in favor of said Order. The provisions of Section 258m of the Agriculture and Markets Law of the State of New York, being part of Chapter 383 of the Laws of 1937, provide:

"If after such hearing the commission shall find, either upon the testimony given at the hearing or upon information concerning conditions existing in the milk industry in such marketing area, which the commissioner has otherwise obtained, that conditions exist so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective and that it is favored by at least seventy-five per centum of the producers of milk produced in the production area for said marketing area, he may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers.

* * * * * * *

"4. In determining the approval or request for an order as herein provided or the termination thereof on the part of producers the commissioner shall consider the approval, request, or favor in respect thereto by any bona fide cooperative association of producers engaged in marketing milk within such marketing area as the approval, request, or favor either of making an order or of termination thereof of the producers who are under contract with such cooperative association of producers."

The Finding by the Commissioner of Agriculture of the State of New York that at least 75% of the producers within the production area, approved or favored the proposed Order, was unsupported by said poll or by any probative evidence on which to base such finding.

On information and belief, in determining the purported approval of the producers of milk in said area, certain cooperative association, which were not "bona fide cooperative associations of producers engaged in marketing milk" were permitted to cast votes of all of their members of persons represented as being their members, and such votes were or may have been improperly considered in violation of said statute.

Thirteenth. Defendant for a second affirmative defense
91 alleges on information and belief, the provisions of said Order No. 27 were violative of the provisions of Title 7, Section 608c, Subdivision 5, which requires that Orders "in the case of milk and milk products" shall fix prices which "shall be uniform as to all

handlers." On information and belief, Orders No. 27 and Official Order No. 126, are violative of said statute, in that the prices therein provided to be paid to producers are not uniform as to all handlers, but on the contrary, handlers of upwards of 50% of all milk in said marketing area are exempted from the provisions thereof.

Said Orders, by identical provisions, provide as follows:

"Article VII.—Payments to Producers

"SECTION 1. Time of payment.—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article."

On information and belief, said Orders contain no similar provision applicable to cooperative associations which are engaged in the competitive sale of milk with other handlers of the same class.

By reason thereof, said Orders are violative of the Fourteenth Amendment to the Constitution.

Fourteenth. Defendant, for a third affirmative defense, alleges on information and belief, that the said Order No. 27 and Official Order No. 126 are violative of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that:

"a. The said Orders deny to this defendant, the right to purchase milk upon the same terms and conditions, no more and no less, as those imposed upon other handlers of the same class.

"b. They attempt to deprive this defendant of large sums of money, to be paid to other handlers, without due process of law, and in violation of the liberty guaranteed to it by the Fifth Amendment.

"c. They attempt to deprive this defendant of its property rights, including subsisting contract rights, without due process of law.

92 "d. They attempt to take money, which is the private property of this defendant, without due process, in violation of the Fifth Amendment to the Constitution.

"e. They are wholly arbitrary, capricious and unequal."

Fourteenth. Defendant for a Fourth affirmative defense, alleges on information and belief, that said Order No. 27 and Official Order No. 126, are illegal and void and violative of Title 15 U. S. Code relating to monopolies and combinations and illegal restraint of trade, in that the same permit certain handlers who are exempted from the provisions of said Orders, and certain other handlers who have a competitive advantage thereunder, to engage in unfair trade practices, and without loss to themselves, sell milk as distributors, at prices lower than the cost thereof to other handlers who are also distributors and who are subject to the provisions of said Orders, thereby said handlers may be excluded from engaging in a lawful business, to wit: The purchase and sale of milk, in violation of Title 8, Section 41 of the U. S. Code; of the provisions of Title 15 U. S. Code, and

f such handlers' rights, in violation of the Fifth and Fourteenth
mendments to the Constitution.

The said statutes, to wit: Title 7, Section 608c of the U. S. Code,
nd the provisions of Chapter 383 of the Laws of 1937 of the State
f New York, known as Sections 258m and 258n, are void for the
eason that they are violative of the said Fifth and Fourteenth
mendments to the Constitution.

Fifteenth. Defendant for a Fifth Affirmative defense, alleges on
nformation and belief, that the provisions of said Order No. 27 and
fficial Order No. 126 are of such a technical and complicated nature,
hat the producers entitled to vote in the referendum and poll con-
ucted by the Secretary and Commissioner, on which issuance of said
rders were predicated, were obliged to reply upon explanations of
he meaning of said Orders by persons and agencies which claimed
o understand them.

On information and belief, the Metropolitan Cooperative
3 Milk Producers Bargaining Agency, hereinafter referred to
as Bargaining Agency," a New York membership corporation,
hose membership was limited to cooperative corporations, and whose
embers were exempt from paying producers the uniform price as
ated in said Orders, and so many of whose members as were engaged
n the sale of milk as distributors, were exempted from paying a uni-
rm price for their milk, caused to be circulated by pamphlets, news-
apers, public statements and radio addresses, an explanation which
sserted that said Orders guaranteed "an equal purchase price to be
aid by all handlers for milk for the same use" and that each producer
ould be paid at a uniform rate. The Department of Agriculture of
he United States issued a pamphlet consisting of 13 pages, making
he same assertions.

The Dairymen's League Cooperative Association, member of the
argaining Agency, also issued and uttered public statements to the
me effect.

Said statements were intended to, and did induce wide-spread
elief among producers to the effect that the said Orders "required
ll handlers to pay the uniform price to all producers" and that all
andlers were charged "the same cost for milk." Said statements
ere untrue and, on information and belief, were made by the Bar-
aining Agency, Dairymen's League and others in furtherance of a
nspiracy to convert the provisions of Title 7, Section 608c U. S.
ode, and of Sections 258m and 258n of the Agriculture and Markets
aw of the State of New York, to their personal ends as instruments
o create an illegal monopoly in the purchase and sale of fluid milk,
nd in restraint of trade, with intent to inflict damage upon this
efendant and others in a like situation.

Said wide-spread and public misrepresentations, constituted a
raud upon the milk producers in the marketing area who were
ntitled to vote in said referendum and poll, and upon the Secretary
f Agriculture of the United States and the Commissioner of Agri-
lture of the State of New York, and rendered said referendum and

poll void and of no effect and rendered Order 27 and Official Order No. 126, null and invalid.

94 Sixteenth. Defendant for a Sixth affirmative defense, alleges that it is not engaged in business as a distributor of milk, but acts only, as a non profit cooperative corporation in selling the milk of its producer members and others, if any, who deliver milk to its plant, to distributors for re-sale in the marketing area, described in said Orders.

The dealer to whom defendant sells its milk, is one of those to whom the discriminatory provisions of the said Orders apply, and thereby said Order No. 27 and Official Order No. 126, by their terms, and by the operation thereof, tend to discriminate against the customer purchasing milk of the defendant and to exclude it from the milk business, and by such operation exclude this defendant and its members from the sale of its milk and that of its members, and further tends to create a monopoly in the purchase and sale of milk, in handlers who are given a competitive advantage by the provisions of said Orders, to the exclusion of this defendant and others similarly situated.

Seventeenth. Defendant for a seventh affirmative defense alleges that said Orders are discriminatory in that the prices fixed therein for milk other than fluid milk and cream are less than the fair market value thereof, and in that large dairy companies control the principal markets for surplus or manufactured milk, and it is impossible for this defendant to successfully engage therein without possession of large capital, which it and others in a like situation have not, in order that they may conduct nation-wide advertising campaigns and otherwise compete with such large companies.

Such unfair and discriminatory manipulation of the price of milk in the lower brackets, tends to create an illegal monopoly in the purchase and sale of milk in said large dairy companies, to the ultimate exclusion of this defendant and its principal customer.

95 Eighteenth. Defendant for an Eighth affirmative defense alleges that the provisions of Title 7, Section 608c, of the U. S. Code, and of Chapter 383 of the Laws of 1937 of the State of New York, are illegal and void on the ground that they attempt to delegate to cooperatives who are also dealers or distributors of milk the right to dictate the terms and conditions on which distributors, other than cooperatives, may purchase milk, and at the same time to exempt themselves from compliance therewith, and also delegates to certain large cooperatives, which are in fact dealers or distributors, the power to deny their producer members the right to express their favor or disfavor for or against Order No. 27, Official Order No. 126, and/or any other Orders issued under said statutes, contrary to the expressed intent of said statutes and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Nineteenth. Defendant for a Ninth affirmative defense alleges that Erskine M. Harmon, Market Administrator of Order No. 27 and Offi-

cial Order No. 126, at the time of making demand upon this defendant for payment of moneys into the Producer Settlement Fund, failed to furnish to this defendant any accounting or statement as to the basis for such demand, and on information and belief said Administrator has refused to furnish such information to the public and to companies in a like situation with this defendant.

Since the demand of said Administrator in effect required payment by this defendant of moneys collected for milk of defendant's producer members to be contributed to other producers, defendant asserts that it is entitled to know the basis upon which such demand is made, and is entitled to a statement of the account thereof, and the said Administrator exceeded his administrative authority, if any, in keeping his calculations and accounts secret from this defendant and others in a like situation. By such course said Administrator
96 has appropriated to himself the powers and rights of dictatorship and of imposing upon this defendant and others payments of large sums of money without any accounting and in violation of the purpose and reasonable intent of the statutes and Orders, and of the Fifth Amendment to the Constitution. Assuming the validity of the said Orders and statutes under which the same issued (which, however, defendant denies), such arbitrary assessment is unwarranted, and this action is prematurely brought.

This suit on the equity side of the Court seeks an injunctive enforcement of the arbitrary decrees and demands of said Administrator, whose denial of reasonable access to his accounts and the basis of his demands is repugnant to the principles of equity. Said action is an unconscionable attempt to use a Court of Equity to enforce arbitrary powers in said Administrator, which defendant asserts do not exist.

Wherefore defendant Rock Royal Cooperative, Inc., demands judgment:

1. Dismissing the complaint.

2. An affirmative adjudication that Order No. 27 and Official Order No. 126 be declared to be invalid, illegal, null, and void on the grounds stated in the separate defenses above set forth.

3. Affirmatively adjudging that the provisions of Title 7, 608c, U. S. Code, and the provisions of Chapter 383 of the Laws of 1937 of the State of New York, are unconstitutional and void as being violative of the Fifth and Fourteenth Amendments to the Constitution of the United States, on the grounds separately stated in the affirmative defenses above set forth.

4. That the defendant, Rock Royal Cooperative, Inc., have such further judgment, order, and relief as to the Court may seem just.

(Signed) CHARLES W. JENKINS,
Charles W. Jenkins,
Attorney for defendant, Rock Royal Cooperative, Inc.,
Office & P. O. Address, Bank Building, Deposit, New York.

96-A *Duly sworn to by Sidney Simmons; jurat omitted in printing.*

97 In United States District Court

Civil Action No. 32

[Title omitted.]

Answer

Filed Nov. 25, 1938

Defendant, Schuyler Junction New York Milk Shed Co-Operative, Inc., for an answer to the complaint, alleges:

First. Admits on information and belief, the allegations stated in Paragraphs marked "I, II, III, IV, V"; so much of Paragraph marked "IX" as alleges that the Secretary, on August 5, 1938, issued Order No. 27, and that on or about August 5, 1938, the Commissioner of Agriculture, issued proposed Official Order No. 126. Admits that said "proposed Official Order No. 126 is substantially identical with Order No. 27."

Second. Admits on information and belief, so much of Paragraph marked "X" as alleges that handlers of more than 50% of the volume of milk covered by said Orders, failed to sign a Marketing Agreement.

Third. Admits on information and belief, that the Secretary conducted a purported referendum of producers for the purported purpose of ascertaining whether Order No. 27 was favored by at least two-thirds of the producers, mentioned in Paragraph marked "XI."

Fourth. Admits on information and belief, that on or about August 24, 1938, the Secretary made a purported determination, which was subsequently approved by the President, and which contained the statements set forth under Paragraphs A, B, and C of said XII allegation, and that said Findings were published in the Federal Register on August 27, 1938.

98

Fifth. Admits on information and belief, that the Commissioner of Agriculture of the State of New York, conducting a purported poll of producers, and thereafter, did on August 25, 1938, make certain purported Findings, pursuant to the provisions of Chapter 383 of the Laws of 1937 of the State of New York, and declared Official Order No. 126 to be effective on September 1st, 1938. Admits that the Market Administrator was appointed by the Secretary and Commissioner of Agriculture to administer said purported Orders. Admits that the provisions of Order No. 27 and Official Order No. 126 are as stated in copies thereof, annexed to the complaint.

Sixth. Admits on information and belief, the allegations contained in Paragraphs marked "XIV and XV" of the complaint. Admits so much of Paragraph marked "XVI" of the complaint, as alleges that this defendant operates a duly approved milk receiving plant for receiving milk to be sold in the portion of the marketing area included in the City of New York.

Seventh. Admits so much of Paragraph "XXIII," as alleges that this defendant filed a report with the Market Administrator for the

month of September. Denies that it has any knowledge or information sufficient to form a belief, as to so much of said Paragraph, as alleges that "on the basis of such report the defendant Schuyler Junction New York Milk Shed Co-Operative, Inc., is indebted to the Market Administrator * * * in the sum of $1603.00, and therefore denies the same.

Eighth. Denies that it has any knowledge or information sufficient to form a belief, as to the allegations contained in Paragraphs marked "VI, VII, VIII, IX, XIX, XX, XXI, XXIII, XXIV, and XXV," except to the portions thereof heretofore admitted, and therefore denies the same.

Ninth. Said defendant further answering the complaint, on information and belief, denies the same and each and every allegation therein contained, not hereinbefore specifically admitted or denied.

Tenth. Defendant, for a first, separate, distinct answer and affirmative defense, alleges on information and belief, that said Order No. 27 and Official Order No. 126 are illegal and void on the ground that in issuing said Order No. 27, the Secretary exceeded his administrative authority and power for the reason that the number of producers represented in such purported referendum, was 65,255, of which number only 33,663, or 51.6%, voted "yes" in favor of said Order. The provisions of Title 7, Section 608c, Subdivision 19, U. S. Code, are as follows:

"(19) Producer referendum.—For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12)." (As added June 3, 1937, c. 296, Sec. 2 (f), 50 Stat. 247.)

Eleventh. On information and belief, the findings of the Secretary of Agriculture to the effect that the provisions of said statute were complied with, is unsupported by said referendum or by any probative evidence on which to base such finding.

Twelfth. On information and belief, the Commissioner of Agriculture of the State of New York, in issuing said Official Order No. 126, exceeded his administrative authority and power, and said Order was and is void, for the reason that the number of producers represented in said purported poll, was upwards of more than 44,000, of which number only 25,935, or 59%, voted "yes" in favor of said Order. The provisions of Section 258m of the Agriculture and Markets Law of the State of New York, being part of Chapter 383 of the Laws of 1937, provide:

"If after such hearing the commissioner shall find, either upon the testimony given at the hearing or upon information concerning conditions existing in the milk industry in such marketing area, which the commissioner has otherwise obtained, that conditions exist so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective and that it is favored by at least seventy-five per centum of the producers of milk produced in the production area for said marketing area, he may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers.

* * * * * * *

"4. In determining the approval or request for an order as herein provided or the termination thereof on the part of producers the commissioner shall consider the approval, request or favor in respect thereto by any bona fide cooperative association of producers engaged in marketing milk within such marketing area as the approval, request, or favor either of making an order or of termination thereof of the producers who are under contract with such cooperative association of producers."

The Finding by the Commissioner of Agriculture of the State of New York that at least 75% of the producers within the production area approved or favored the proposed Order, was unsupported by said poll or by any probative evidence on which to base such Finding.

On information and belief, in determining the purported approval of the producers of milk in said area, certain cooperative associations, which were not "bona fide cooperative associations of producers engaged in marketing milk" were permitted to cast votes of all of their members or persons represented as being their members, and such votes were or may have been improperly considered in violation of said statute.

Thirteenth. Defendant for a second affirmative defense al-
101 leges on information and belief, the provisions of said Order No. 27 were violative of the provisions of Title 7, Section 608c, Subdivision 5, which requires that Orders "in the case of milk and milk products" shall fix prices which "shall be uniform as to all handlers." On information and belief, Orders No. 27 and Official Order No. 126, are violative of said statute, in that the prices therein provided to be paid to producers, are not uniform as to all handlers, but on the contrary, handlers of upwards of 50% of all milk in said marketing area are exempted from the provisions thereof.

Said Orders, by identical provisions, provide as follows:

"Article VII—Payments to Producers

"Section 1. Time of payment.—On or before the 25th day of each month, each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than

the uniform price, subject to differentials set forth in sections 2 and 3 of this article."

On information and belief, said Orders contain no similar provision applicable to cooperative associations which are engaged in the competitive sale of milk with other handlers of the same class.

By reason thereof, said Orders are violative of the Fourteenth Amendment to the Constitution.

Fourteenth. Defendant, for a third affirmative defense, alleges on information and belief, that the said Order No. 27 and Official Order No. 126 are violative of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that:

a. The said Orders deny to this defendant, the right to purchase milk upon the same terms and conditions, no more and no less, as those imposed upon other handlers of the same class.

b. They attempt to deprive this defendant of large sums of money, to be paid to other handlers, without due process of law, and in violation of the liberty guaranteed to it by the fifth Amendment.

c. They attempt to deprive this defendant of its property rights, including subsisting contract rights, without due process of law.

102 d. They attempt to take money, which is the private property of this defendant, without due process, in violation of the Fifth Amendment to the Constitution.

e. They are wholly arbitrary, capricious, and unequal.

Fourteenth. Defendant for a Fourth affirmative defense, alleges on information and belief, that said Order No. 27 and Official Order No. 126, are illegal and void and violative of Title 15 U. S. Code relating to monopolies and combinations and illegal restraint of trade, in that the same permit certain handlers who are exempted from the provisions of said Orders, and certain other handlers who have a competitive advantage thereunder, to engage in unfair trade practices, and without loss to themselves, sell milk as distributors, at prices lower than the cost thereof to other handlers who are also distributors and who are subject to the provisions of said Orders, thereby said handlers may be excluded from engaging in a lawful business, to wit: the purchase and sale of milk, in violation of Title 8, Section 41 of the U. S. Code; and the provisions of Title 15 U. S. Code, and of such handlers' rights, in violation of the Fifth and Fourteenth Amendments to the Constitution.

The said statutes, to wit: Title 7, Section 608c of the U. S. Code, and the provisions of Chapter 383 of the Laws of 1937 of the State of New York, known as Sections 258m and 258n, are void for the reason that they are violative of the said Fifth and Fourteenth Amendments to the Constitution.

Fifteenth. Defendant for a Fifth Affirmative defense, alleges on information and belief, that the provisions of said Order No. 27 and Official Order No. 126 are of such a technical and complicated nature, that the producers entitled to vote in the referendum and poll conducted by the Secretary and Commissioner, on which issuance of said Orders were predicated, were obliged to rely upon explanations of

the meaning of said Orders by persons and agencies which claimed to understand them.

On information and belief, the Metropolitan Cooperative Milk Producers Bargaining Agency, hereinafter referred to as
103 "Bargaining Agency," a New York membership corporation, whose membership was limited to cooperative corporations, and whose members were exempt from paying producers the uniform price as stated in said Orders, and so many of whose members as were engaged in the sale of milk as distributors, were exempted from paying a uniform price for their milk, caused to be circulated by pamphlets, newspapers, public statements, and radio addresses, an explanation which asserted that said Orders guaranteed "an equal purchase price to be paid by all handlers for milk for the same use" and that each producer would be paid at a uniform rate. The Department of Agriculture of the United States issued a pamphlet consisting of 12 pages, making the same assertions.

The Dairymen's League Cooperative Association, member of the Bargaining Agency, also issued and uttered public statements to the same effect.

Said statements were intended to, and did induce wide-spread belief among producers to the effect that the said Orders "required all handlers to pay the uniform price to all producers" and that all handlers were charged "the same cost for milk." Said statements were untrue and, on information and belief, were made by the Bargaining Agency, Dairymen's League and others in furtherance of a conspiracy to convert the provisions of Title 7, Section 608c U. S. Code, and of Sections 258m and 258n of the Agriculture and Markets Law of the State of New York, to their personal ends as instruments to create an illegal monopoly in the purchase and sale of fluid milk, and in restraint of trade, with intent to inflict damage upon this defendant and others in a like situation.

Said wide-spread and public misrepresentations constituted a fraud upon the milk producers in the marketing area who were entitled to vote in said referendum and poll, and upon the Secretary of Agriculture of the United States and the Commissioner of Agriculture of the State of New York, and rendered said referendum and poll, void and of no effect, and rendered Order No. 27 and Official Order No. 126, null and invalid.

104 Sixteenth. Defendant for a Sixth affirmative defense alleges that it is not engaged in business as a distributor of milk, but acts only as a non-profit cooperative corporation in selling the milk of its producer members and others, if any, who deliver milk to its plant, to distributors for re-sale in the marketing area, described in said Orders.

The dealer to whom defendant sells its milk is one of those to whom the discriminatory provisions of the said Orders apply, and thereby said Order No. 27 and Official Order No. 126, by their terms, and by the operation thereof, tend to discriminate against the customer purchasing milk of the defendant and to exclude it from the milk

business, and by such operation, exclude this defendant and its members from the sale of its milk and that of its members, and further tends to create a monopoly in the purchase and sale of milk, in handlers who are given a competitive advantage by the provisions of said Orders, to the exclusion of this defendant and others similarly situated.

Seventeenth. Defendant for a seventh affirmative defense alleges that said Orders are discriminatory in that the prices fixed therein for milk other than fluid milk and cream, are less than the fair market value thereof, and in that large dairy companies control the principal markets for surplus or manufactured milk, and it is impossible for this defendant to successfully engage therein without possession of large capital, which it and others in a like situation, have not, in order that they may conduct nation-wide advertisin, campaigns and otherwise compete with such large companies.

Such unfair and discriminatory manipulation of the price of milk in the lower brackets tends to create an illegal monopoly in the purchase and sale of milk in said large dairy companies, to the ultimate exclusion of this defendant and its principal customer.

105 Eighteenth. Defendant for an Eighth affirmative defense, alleges that the provisions of Title 7, Section 608c of the U. S. Code, and of Chapter 383 of the Laws of 1937 of the State of New York, are illegal and void on the ground that they attempt to delegate to cooperatives who are also dealers or distributors of milk, the right to dictate the terms and conditions on which distributors, other than cooperatives, may purchase milk, and at the same time, to exempt themselves from compliance therewith, and also delegates to certain large cooperatives, which are in fact dealers or distributors, the power to deny their producer members, the right to express their favor or disfavor for or against Order No. 27, Official Order No. 126 and/or any other Orders issued under said statutes, contrary to the expressed intent of said statutes and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Nineteenth. Defendant for a Ninth affirmative defense, alleges that Erskine M. Harmon, Market Administrator of Order No. 27 and Official Order No. 126, at the time of making demand upon this defendant for payment of moneys into the Producer Settlement Fund, failed to furnish to this defendant, any accounting or statement as to the basis for such demand, and on information and belief, said Administrator has refused to furnish such information to the public and to companies in a like situation with this defendant.

Since the demand of said Administrator, in effect, required payment by this defendant of moneys collected for milk of defendant's producer members, to be contributed to other producers, defendant asserts that it is entitled to know the basis upon which such demand is made, and is entitled to a statement of the account thereof, and the said Administrator exceeded his administrative authority, if any, in keeping his calculations and accounts secret from this defendant

and others in a like situation. By such course, said Administrator has appropriated to himself the powers and rights of
106 dictatorship and of imposing upon this defendant and others, payments of large sums of money without any accounting; and in violation of the purpose and reasonable intent of the statutes and Orders, and of the Fifth Amendment to the Constitution. Assuming the validity of the said Orders and statutes under which the same issued (which, however, defendant denies), such arbitrary assessment is unwarranted, and this action is prematurely brought.

This suit on the equity side of the Court seeks an injunctive enforcement of the arbitrary decrees and demands of said Administrator, whose denial of reasonable access to his accounts and the basis of his demands, is repugnant to the principles of equity. Said action is an unconscionable attempt to use a Court of Equity to enforce arbitrary powers in said Administrator, which defendant asserts, do not exist.

Wherefore, defendant Schuyler Junction New York Milk Shed Cooperative, Inc., demands judgment:

1. Dismissing the complaint.

2. An affirmative adjudication that Order No. 27 and Official Order No. 126 be declared to be invalid, illegal, null, and void on the grounds stated in the separate defenses above set forth.

3. Affirmatively adjudging that the provisions of Title 7, 608c U. S. Code, and the provisions of Chapter 383 of the Laws of 1937 of the State of New York, are unconstitutional and void as being violative of the Fifth and Fourteenth Amendments to the Constitution of the United States, on the grounds separately stated in the affirmative defenses above set forth.

4. That the defendant, Schuyler Junction New York Milk Shed Cooperative, Inc., have such further judgment, order and relief as to the Court may seem just.

WILLARD R. PRATT,
Willard R. Pratt,
Attorney for Defendant, Schuyler Junction New York Milk Shed Cooperative, Inc., Office & P. O. Address: 201-2 U. G. & E. Bldg., Utica, New York.

107 In United District Court

Civil Action No. 32

[Title omitted.]

Answer

Filed Nov. 22, 1938

Defendant, Central New York Co-Operative Association, Inc., for its answer on behalf of itself and its members, alleges by its attorneys. Haskell & Foley:

1. Denies any knowledge or information sufficient to form a belief with respect to the allegations of paragraphs I, III, VI, VII, VIII. X, XII, XXII, and XXIII.

2. With respect to the allegations of paragraph V, denies so much thereof as alleges that this defendant handles milk in violation of Order No. 27, or official Order No. 126 and denies any knowledge or information sufficient to form a belief as to whether the other defendants handle milk in violation of said orders.

3. With respect to the allegations of paragraph IX, denies any knowledge or information sufficient to form a belief as to whether Order No. 27 was issued upon the evidence introduced at the hearings referred to in said paragraph and after giving opportunity to interested persons to file written arguments in support of or in opposition to the findings and provisions or any of them of a proposed order, and denies any knowledge or information sufficient to form a belief as to whether official Order No. 126 was issued after the Commissioner of Agriculture and Markets had given opportunity to interested
108 parties to file written arguments and denies that order No. 27 contains only terms and conditions authorized by the Act.

4. With respect to the allegations of paragraph XIII denies any knowledge or information sufficient to form a belief as to whether the poll therein referred to was conducted.

5. With respect to the allegations of paragraph XVI admits that this defendant engages in the handling of milk or cream therefrom received at plants approved by some duly authorized health authority for the receiving of milk to be sold in the marketing area and denies each and every other allegation of said paragraph insofar as the same relates to this defendant and denies any knowledge or information sufficient to form a belief with respect to the allegations of said paragraph insofar as the same refers to the other defendants.

6. With respect to the allegations of paragraph XVII admits that the Secretary of Agriculture and the Commissioner of Agriculture and Markets declared the orders referred to in said paragraph effective as of September 1, 1938, and denies each and every other allegation of said paragraph.

7. Denies each and every allegation of paragraph XVIII.

8. With respect to the allegations of paragraph XIX, admits approximately one-third of the milk produced for sale in the marketing area is produced in states other than New York and denies any knowledge or information sufficient to form a belief with respect to each and every other allegation of said paragraph.

9. With respect to paragraph XX, admits that the orders therein referred to require the Market Administrator to compute a uniform price to producers from the reports of handlers, which price is based upon the utilization of milk by all handlers in the various classes specified in said orders. So far as said paragraph relates to this defendant, denies that a failure by it to report to the Market Administrator results in the announcement by the Market Administrator of a uniform price which is not based upon the total utilization of milk by all handlers or in a uniform price lower than it would other-
109 wise be if the utilization of milk handled by this defendant is higher than the average utilization of milk by all handlers or

that the producers therefore fail to receive as high a price for milk as they would if all handlers reported and deny any knowledge or information sufficient to form a belief with respect to each and every other allegation of said paragraph.

10. With respect to the allegations of paragraph XXI, admits that Section 8 of Article VII of both orders and Section 9 of Article VII of both orders contain the requirements alleged in said paragraph and denies any knowledge or information sufficient to form a belief with respect to each and every other allegation of said paragraph.

11. With respect to the allegations of paragraph XXIV admits this defendant owns and operates no farms, denies any knowledge or information sufficient to form a belief with respect to the allegations of said paragraph which refer to the other defendants, and denies each and every other allegation of said paragraph.

12. With respect to the allegations of paragraph XXV, admits the orders referred to therein are identical in terms and are administered by a Market Administrator appointed to administer both orders and that compliance with the terms of one order is compliance with the terms of both and that some milk sold in the marketing area does not cross state lines in transit to the market and is not physically intermingled with milk which has crossed state lines and denies any knowledge or information sufficient to form a belief with respect to each and every other allegation of said paragraph.

13. With respect to the allegations of paragraph XXVI, admits this defendant competes with handlers in the marketing area, denies any knowledge or information with respect to the allegations of said paragraph insofar as they refer to the other defendants and denies each and every other allegation of said paragraph.

For a First, Separate and Affirmative Defense

14. This defendant was organized on or about June 12, 1934, pursuant to the Co-Operative Corporations Law of the State of New York.

110 15. The members of this defendant at all times have been dairy farmers producing milk upon their own farms.

16. The principal activity of this defendant at all times has been and is the distribution of milk produced by its members on behalf of its members and at all times since its formation this defendant has acted for and on behalf of its members in the distribution of the milk produced by them on their farms and at all times since its formation this defendant and its members have conducted and do conduct the business of distributing the milk produced on its members farms as a joint enterprise in which this defendant and its members have been and are jointly engaged.

17. At all times since on or about June 12, 1934, this defendant and its members as part of the said joint enterprise have distributed and sold milk produced on its members farms and milk received from

others than its members in New York City and all milk distributed by this defendant and its members as part of the said joint enterprise has been and is milk received from its own members farms or received from handlers of milk.

18. The milk produced by defendant's members and received by defendant from handlers of milk is sold in New York City to retail establishments and to ultimate consumers by defendant and its members in the course of the said joint enterprise carried on by defendant and its members and the proceeds received from the sale of such milk less the expenses of distributing the same are remitted to the members of this defendant and there is no sale of the said milk produced by this defendant's members until the same is sold in New York City to retail stores and ultimate consumers in the course of the said joint enterprise.

19. By reason of the foregoing, none of the milk handled by this defendant is subject to the provisions of Article VI, Article VII, Section 8, or Article VIII of Order No. 27 or Order No. 126.

For a Second Separate and Affirmative Defense

20. The Act referred to in the complaint under which Order No. 27 was issued empowers the Secretary of Agriculture to issue orders regulating the marketing of milk sold in the marketing area
111 which milk was received in the marketing area by way of interstate commerce and which orders shall complement orders issued by the State authorities and regulate only such milk as is not regulated by the State authorities.

21. Order No. 27 is not complementary to Order No. 126, the order of the New York State authorities regulating the marketing of milk in the marketing area. The said Order No. 27 purports to regulate all milk sold in the marketing area and said Order No. 27 regulates the same milk as is regulated by the order of the State authorities and said Order No. 27 is in duplication of and not complementary to said Order No. 126 of the State authorities.

22. That by reason of the foregoing, the said Order No. 27 was beyond the power of the Secretary of Agriculture to issue and is illegal, null, void and of no effect.

For a Third Separate and Affirmative Defense

23. The said Order No. 27 purports to regulate interstate commerce in milk by setting forth a comprehensive scheme of prices to be paid to producers of milk in respect of all milk sold in the marketing area, irrespective of where such milk is produced or of the manner in which such milk reaches the marketing area.

24. By reason thereof said Order No. 27 was beyond the power of the Secretary of Agriculture to issue and beyond the power of Congress to authorize to be issued, and said order in invalid, null, and void.

For a Fourth Separate and Affirmative Defense

25. All the milk handled by this defendant and its members which is produced by its members is produced in the State of New York and all milk handled by this defendant which is received from others than its members is purchased by this defendant in the State of New York.

26. All milk handled by this defendant is sold in the State of New York and none of the milk handled by this defendant crosses state lines at any time, nor is such milk handled by this defendant mixed with milk which has crossed state lines or has been produced
112 in other states and none of the milk handled by this defendant is at any time in the current of interstate commerce nor does any of the milk handled by this defendant at any time affect, interfere with, burden, or obstruct interstate commerce.

27. By reason of the foregoing, the milk handled by this defendant is not subject to regulation by Congress and insofar as the said Order No. 27 seeks to fix the prices to be paid for such milk, the said order is beyond the power of Congress to authorize and is null and void.

For a Fifth Separate and Affirmative Defense

28. The Act referred to in the complaint pursuant to which the said Order No. 27 was issued provides that no order containing provisions such as found in said Order No. 27 should become effective until approved by producers of at least two-thirds of the milk shipped to be sold in the marketing area affected by said order.

29. Upon information and belief, said Order No. 27 was issued only after a vote of such producers shipping milk to be sold in the New York metropolitan marketing area had been taken and only after the requisite number of such producers had approved the issuance of said order.

30. The said provision requiring the consent of a portion of said producers before the said Order No. 27 could be issued is an unconstitutional and invalid attempt to delegate to private persons the legislative powers of Congress contrary to Article I, Section 1 of the Federal Constitution and violative of the Fifth Amendment to the Federal Constitution providing that no person shall be deprived of liberty or property without due process of law, by reason of which the said order is unconstitutional, invalid, null, and void.

For a Sixth Separate and Affirmative Defense

31. The statute pursuant to which official Order No. 126 was issued provides that no order containing provisions such as found in said Order No. 126 should become effective until approved by at least three-fourths of the producers affected by such order.

113 32. Upon information and belief, said Order No. 126 was issued only *only* after a vote of the producers affected by said

order had been taken and only after the requisite number of such producers had approved the issuance of said order.

33. The said provision requiring the consent of a portion of said producers before said Order No. 126 could be issued is an unconstitutional and invalid attempt to delegate to private persons, the legislative power of the New York State legislature contrary to Article III, Section 1 of the Constitution of the State of New York and contrary to Article I, Section 6 of the Constitution of the State of New York and to the Fourteenth Amendment to the Federal Constitution providing that no person shall be deprived of liberty or property without due process of law, by reason whereof the said Order No. 126 is unconstitutional, invalid, and void.

For a Seventh Separate and Affirmative Defense

34. Repeats and realleges each and every allegation set forth in paragraphs numbered 14, 15, 16, 17, and 18.

35. Order No. 27 and Order No. 126 provide for the fixation of a uniform price to be paid each month to the producers of milk, which uniform price is computed upon the basis of various minimum prices required to be paid by said orders for milk dependent upon the ultimate utilization of the milk received from producers and is based upon all milk utilized in the marketing area and subject to the said orders.

36. The said orders provide for the establishment of a producers' settlement fund into which must be paid by handlers the amount by which a figure arrived at by taking the total quantity of milk handled by them which is subject to said orders and multiplying such quantity by the applicable minimum prices therefor, exceeds a figure arrived at by multiplying said quantity by the uniform price announced by the Market Administrator. The orders provide that from such settlement pool there shall be turned over to each handler of milk whose obligation for the payment of milk to producers calculated at the minimum prices is less than their obligation calculated at the uniform price an amount equal to such difference,
114 and such handlers are required to pay over pro rata to the producers from whom they have received milk the amount so received from the producers' settlement fund.

37. The amount which the members of this defendant were entitled to receive for the milk produced on their farms and distributed by this defendant and its members during September 1938 pursuant to the said joint enterprise conducted by this defendant and its members was in excess of the amount such members would receive if said members had received for their milk an amount equal to the quantity of milk produced by said members on their farms and distributed by this defendant and its members in the course of said joint enterprise multiplied by the uniform price fixed for September 1938 pursuant to said Orders.

38. The method adopted in said Orders for the calculation of th uniform price to be paid to producers for milk received from them is such that upon information and belief such uniform price at al times will be less per unit of milk than the amount the members o this defendant will receive for their milk upon its distribution b this defendant and said members pursuant to the aforesaid join enterprise.

39. The said Orders insofar as they require payment to the sai producers' settlement fund in respect of milk produced by the mem bers of this defendant on their farms and distributed by said mem bers and this defendant as part of the joint enterprise conducted b said members and this defendant take without compensation fro the members of this defendant the difference between the amoun which the said members of this defendant are and will be in th future entitled to receive for their milk pursuant to the said join enterprise conducted by defendant and its members, and the less amount which said members would receive for their milk, if the received therefor an amount calculated upon the uniform price, an through the device of the said producers settlement fund turn ove the amount so taken to other producers of milk, and said orders thu deprive the members of this defendant whom this defendant repr sents and appears for in this suit, of their property, witho
115 due process of law, and to the extent that said orders seek t compel this defendant to make payment for the milk produce on its members farms as if said milk were purchased from said mem bers, deprive this defendant and its members of the liberty carrying on their joint enterprise, whereby they dispose of the mil produced by the said members and all milk purchased by this d fendant from handlers of milk, without due process of law, whereb said Order No. 27 and the provision of the Act authorizing sa order are contrary to the Fifth Amendment to the Federal Const tution and unconstitutional, null and void and by reason where said Order No. 126 and the provisions of the Agriculture and Ma kets Law authorizing said order are contrary to the Fourteen Amendment to the Federal Constitution and contrary to Article Section 6 of the Constitution of the State of New York.

For an Eighth Separate and Affirmative Defense

40. Order No. 126, referred to in the complaint was issued by th New York State authorities pursuant to the Agriculture and Ma kets Law of the State of New York, for the purpose of fixing pric to be paid to producers for milk by handlers in respect of milk so in the New York metropolitan marketing area.

41. Plaintiff sustains no injury or damages by reason of any vi lation of said Order No. 126, nor does plaintiff represent any perso who do suffer injury or damage by reason of any such violation.

42. By reason of the foregoing plaintiff is without power to maintain the within action insofar as it seeks to enforce the said Order No. 126.

Wherefore, defendant Central New York Co-Operative Association, Inc., prays judgment dismissing the complaint.

(Signed) ALBERT HASKELL, JR.,
HASKELL & FOLEY,
Attorneys for Defendant, Central New York Co-operative Association, Inc.,
Office & P. O. Address 69 Main Street, Cortland, New York.

116 [*Duly sworn to by Frank M. Henry; jurat omitted in printing.*]

117 In United States District Court

Civil Action No. 32. Consolidated Cause

[Title omitted.]

Motion to strike

Filed Nov. 12, 1938

The plaintiff moves the Court as follows:

I

To strike from the answer filed by the defendant, Rock Royal Co-operative, Inc., to the complaint herein the second of two consecutive paragraphs each numbered fourteenth, and paragraphs fifteenth, sixteenth, and seventeenth of said answer, because the said paragraphs of said answer, and each and every one of them,

(a) Fail to state a legal defense to plaintiff's claim, and

(b) Contain only allegations which are redundant, immaterial, and impertinent.

II

To strike from the answer filed by the defendant Schuyler Junction, New York, Milk Shed Co-operative, Inc., to the complaint herein the second of two consecutive paragraphs each numbered fourteenth, and paragraphs fifteenth, sixteenth, and seventeenth of said answer, because the said paragraphs of said answer, and each

118 and every one of them,

(a) Fail to state a legal defense to plaintiff's claim, and

(b) Contain only allegations which are redundant, immaterial, and impertinent.

III

To strike from the answer filed by the defendant Jetter Dairy Company, Inc., to the complaint herein paragraphs nineteenth,

twentieth, twenty-first, twenty-second, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth of said answer, because the said paragraphs of said answer, and each and every one of them,

(a) Fail to state a legal defense to plaintiff's claim, and

(b) Contain only allegations which are redundant, immaterial, impertinent, and scandalous.

RALPH L. EMMONS,
United States Attorney in and for the Northern District of New York, United States Court House, Binghamton, New York,
JOHN S. L. YOST,
CHARLES J. McCARTHY,
Special Assistants to the Attorney General, Department of Justice, Washington, D. C.,
E. O. MATHER,
Senior Attorney, Department of Agriculture, Washington, D. C.,
Attorneys for Plaintiff.

119 To: WILLARD R. PRATT and CHARLES W. JENKINS,
Attorneys for defendants Rock Royal Co-operative, Inc., Schuyler Junction, New York, Milk Shed Co-operative, Inc., and Jetter Dairy Company, Inc., 201-2 U. G. & E. Building, Utica, New York.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Court House, Albany, New York, on the 13th day of December 1938, at 12 o'clock, noon, of that day, or as soon thereafter as counsel can be heard.

Ralph L. Emmons
RALPH L. EMMONS,
United States Attorney in and for the Northern District of New York,
United States Court House, Binghamton, New York,
John S. L. Yost
JOHN S. L. YOST,
Charles J. McCarthy
CHARLES J. McCARTHY,
Special Assistants to the Attorney General, Department of Justice, Washington, D. C.,
E. O. Mather
E. O. MATHER,
Senior Attorney, Department of Agriculture, Washington, D. C.,
Attorneys for Plaintiff.

120 In United States District Court

Civil Action No. 32. Consolidated cause

[Title omitted.]

Amended answer

Filed Feb. 25, 1939

Defendant, Jetter Dairy Company, Inc., for an amended answer to the complaint of plaintiff United States of America, respectfully alleges:

First. Admits the allegations contained in Paragraphs marked "I, II, and III." Admits that on or about April 29, 1938, the Secretary of Agriculture and Commissioner of Agriculture of the State of New York issued purported notices of public hearings on proposed Marketing Agreements, as stated in Paragraph IV of the complaint.

Second. Admits so much of Paragraph marked "V" as alleges that joint public hearings were held by Glen J. Gifford, as designee of the Secretary, and by the Commissioner of Agriculture at the various places and at the times stated in said Paragraph. Admits on information and belief that various persons attended and were heard at said hearings.

Admits that the Secretary issued a "Finding" substantially as stated in Paragraph VI of the complaint.

Third. Admits so much of Paragraph VII of the complaint, as alleges that the Secretary, on August 5, 1938, issued Order No. 27; that the same contained the provisions which are stated therein as published in the Federal Register of August 9, 1938.

121 Fourth. Denies that it has any knowledge or information sufficient to form a belief, as to the allegations contained in Paragraph marked "VIII," and therefore denies the same.

Fifth. Admits so much of Paragraph IX, as alleges that the Secretary conducted a purported referendum of producers, but denies that the same was conducted pursuant to the provisions of 8c (10) of the Act.

Sixth. Admits on information and belief, so much of Paragraph X, as alleges that on or about August 24, 1938, the Secretary issued a "determination," which was approved by the President, as stated in subdivision A, B, and C of said Paragraph.

Seventh. Denies any knowledge or information sufficient to form a belief, as to the allegations contained in Paragraph marked "XI," and therefore denies the same, except that defendant admits on information and belief, that the Secretary of Agriculture and the Commissioner of Agriculture, publicly declared that Order No. 27 and Official Order No. 126, were effective on September 1st, 1938.

Eighth. Admits the allegations of Paragraph marked "XII" and so much of Paragraph marked "XIII" of the complaint, as alleges

that the defendant engages in the sale of milk which was received at a plant authorized to receive milk to be sold in the Marketing Area; admits that the milk of one of three such plants operated by the defendant, passes by rail from Bridgewater, N. Y., to Weehawken, N. J., and then back to New York City. Denies that it has any knowledge of information sufficient to form a belief, as to the allegations in said Paragraph contained, which alleges that said milk "is in the current of inter-state commerce * * * or directly burdens, obstructs or affects inter-state commerce."

Ninth. Denies the allegations contained in Paragraph XIV of the complaint, for reasons set forth in the affirmative defenses hereinafter stated. Admits that the purported purpose of Order No. 27,
122 is as stated in Paragraph marked "XV," but denies that the same either promotes, fosters or protects commerce in milk, so as to effectuate the declared policy of the Act.

Tenth. Admits so much of Paragraph XVI that asserts that if all milk sold in the Area is not subject to the same regulations, that discrimination will result against milk not so regulated, but alleges that the said Orders, by their terms, do not apply to all such milk, and that the same are discriminatory, and that such discriminatory provisions, have contributed to disorderly market conditions. Defendant further answering the allegations contained in said Paragraph, denies that it has any knowledge or information sufficient to form a belief, as to such other allegations, and therefore, denies the same.

Eleventh. Admits so much of Paragraph XVII, as correctly quotes the provisions of the "Order," and that computations cannot be made by the Market Administrator without information or figures to be used in such computation. Admits so much of Paragraph marked "XVIII" as correctly quotes the provisions of Order No. 27, and admits that the Market Administrator cannot make payment of sums of money which he has not received, or which he does not possess.

Twelfth. Admits so much of Paragraph XIX, as alleges that the defendant filed a report with the Market Administrator, covering purchases of milk made by defendant in the month of October. Admits that the defendant has failed and refused to pay to the said Administrator, the sum of $14,616.05, and the further sum of $535.37.

Thirteenth. Admits so much of Paragraph XX as alleges that the defendant is a competitor of other handlers in the Marketing Area, and affirmatively alleges that such competing handlers as handle upwards of more than 40% of all the milk in said marketing Area, are not subject to the provisions of said Order. Denies that the failure of this defendant to pay the sums above set forth, will either disrupt or obstruct the lawful regulation of commerce, or that plaintiff will suffer irreparable injury.

Fourteenth. Defendant further answering the complaint,
123 denies the same and each and every allegation therein contained, not hereinbefore specifically admitted or denied.

Fifteenth. Defendant Jetter Dairy Company, Inc., for an answer

plaintiff United States of America, has heretofore commenced an action against the defendants in this consolidated cause, as stated in paragraph marked "1"; admits the allegations contained in paragraphs marked "2, 3, and 4."

Admits on information and belief, the allegations contained in paragraph marked "5," and so much of paragraph marked "6" as alleges that joint public hearings were held by Glenn J. Gifford at the times and places therein stated, and that various persons present were heard concerning the proposed Marketing Order and Agreement.

Sixteenth. Admits so much of paragraph "7" as alleges that the Secretary issued Order No. 27 on August 5, 1938. As to all allegations of the amended complaint, purporting to set forth or interpret the provisions of said Order No. 27 and Official Order No. 126, this defendant makes reference to the Orders themselves as to their contents. Admits that on or about August 26, 1938, the Secretary issued an Order providing that Order No. 27 should become effective September 1, 1938; that on August 25th, the Commissioner issued Official Order No. 126 and declared the same to be effective September 1, 1938.

Seventeenth. Admits that E. M. Harmon was designated as Market Administrator of the Federal and State Orders, and on information and belief admits that the Market Administrator prepared certain forms for making monthly reports and otherwise. Admits that the purported purposes of Order No. 27 and Official Order No. 126 are as stated in paragraph marked "11," but denies that said Orders either could or did, effectuate the declared policies of the Acts under which they were promulgated.

Admits so much of Paragraph "12" as alleges that the Market Administrator cannot make computations of the uniform price and otherwise without figures from which to make calculations; and admits so much of paragraph "13" as alleges that the Market Administrator cannot make payments through the Producer Settlement Fund in the absence of moneys therein.

124

Eighteenth. Denies that it has any knowledge or information sufficient to form a belief as to allegations in paragraph "14" that, assuming the validity of the Orders, which defendant denies, the defendant would be indebteded to the Market Administrator in the sum of $14,616.05, and therefore denies the same. Defendant admits that 2¢ per cwt. on the October purchases of milk made by the defendant, amounts to upwards of $535.37. Defendant denies the allegation that it has failed to make payment of said sum, and alleges that payment thereof was made to the Market Administrator under protest. Defendant admits that it has refused to pay the sum of $14,616.05 to the Administrator.

Nineteenth. Admits so much of paragraph "16" as alleges that defendant is a competitor of other handlers in the marketing area.

Twentieth. Defendant further answering the complaint of the in-

therein contained, not hereinbefore specifically admitted or denied, or concerning which defendant has not specifically admitted or denied similar allegations in the complaint in the original action, in which the United States of America was plaintiff, and Jetter Dairy Company, Inc., was defendant.

Twenty-first. Defendant Jetter Dairy Company, Inc., in support of the several affirmative defenses to the complaints of plaintiff United States and of the intervening plaintiff, which affirmative defenses are hereinafter separately stated, alleges that the Metropolitan Marketing Area, defined by Order No. 27, includes the City of greater New York, and territory adjacent thereto, wholly within the territorial boundaries of the State of New York.

Milk dealers, licensed as such, under the provisions of Section 253 of the Agriculture and Markets Law, of the State of New York, alone, have the right to engage in the purchase and sale of milk in said Marketing Area, and the term "milk dealer" includes—

"Any person who purchases or handles or sells milk, including * * * cooperative corporations and unincorporated cooperative associations."

125 Such dealers are, by Article 1, Subdivision 6, of Order No. 27, denominated as "handlers." A handler is there defined as—

"Any person who engages in the handling of milk or cream therefrom, which was received at a plant approved by any Health authority for the receiving of milk to be sold in the Marketing Area * * * this definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association, or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association, and for which such association, collects payments."

The health authority in the "Metropolitan Milk Marketing Area," is the Department of Health of the City of New York, which inspects country receiving plants, farms, dairies, and other facilities of milk producers, as well as bottling and distributing facilities in the City of New York. The Official records of said Department of Health of the City of New York, as of August 1938, disclosed that there were 54,111 milk producers whose dairies had been inspected and approved for the production of Grade B milk for shipment to and sale in the City of New York; 6,109 milk producers whose dairies had been approved for the production of Grade A milk for shipment to, and sale in the City of New York, making in all 60,220 milk producers. Said producers were located in the States of New York, Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania, and Vermont, hereinafter referred to as the "New York Milk Shed." Included therein, are the producers delivering to this defendant's plants, whose minimum production of milk is upwards of more than 40,000 quarts of milk daily.

Upwards of 420 country receiving plants have been approved for the receiving and shipping of Grade B milk, and upwards of 86 milk

receiving plants for receiving and shipping Grade A milk, making a total of upwards of 506 milk receiving stations in all in said New York Milk Shed. Included therein, are defendant's three receiving stations.

Twenty-second. At all the times hereinafter mentioned, this defendant was a competitor of, and has sold milk in its business, in competition with dealers operating the country milk receiving stations in the New York Milk Shed above referred to, and who shipped milk received at said stations to the Metropolitan Area and sold the same in competition with milk sold by defendant.

Twenty-third. Defendant's principal competitors are as follows:

126 a. The Borden Company and various corporations subsidiary thereto, hereinafter referred to "Bordens."

b. National Dairy Products Corporation, and various subsidiaries thereof, including Sheffield Farms Company, Inc., Muller Dairies, Inc., Breakstone Brothers, Inc., and Sheffield Condensed Milk Company, hereinafter referred to as "National Dairy."

c. Dairymen's League Cooperative Association, Inc., hereinafter referred to as "Dairymen's League" and various corporations subsidiary thereto, including Hauk & Schnabt Dairy, Inc., DeLancey Milk and Cream Company, and Lincoln Farm Products Corp., and which corporations were formerly operated by Dairymen's League as separate corporations, but on information and belief, whose businesses were combined with Dairymen's League, and are now operated as branches thereof since about August 1938.

d. Other dealers, known in the industry as "independent dealers." Defendant is an "independent dealer."

This defendant and said competitors, in so far as they are engaged in the sale of milk for fluid consumption in the City of New York, are all dealers or handlers of a like class.

Defendant and its said competitors, are also known in the industry as "distributors." The Dairymen's League therefore, occupies a dual capacity as a cooperative agent of producers and as a distributor. It claims that "distributors buying from the Dairymen's League, handle 40%—approximately 50,000 forty-quart cans daily of the Metropolitan Market's supply." Dairymen's League, as a distributor, sells milk in competition with defendant and other distributors, including those purchasing their supplies from it, and is a dominating factor in the prices which defendant and other competing dealers can demand and procure for fluid milk.

Twenty-fourth. As of August 1938, the Sheffield Farms Company, Inc., and Sheffield Condensed Milk Company, operated and now operate, upwards of 99 approved milk receiving stations in said New York Milk Shed, receiving milk from upwards of 10,100 producers; the greater part of said producers deliver milk to Sheffield Farms Company, Inc., and are organized in a membership cooperative corporation, known as Sheffield Producers' Cooperative Association, Inc., hereinafter referred to as "Sheffield Cooperative."

On information and belief, said Sheffield Farms Company, Inc., and some or all National Dairy subsidiaries above referred to, also purchase supplies of milk from other cooperative associations
127 operating approved milk receiving stations in the said New York Milk Shed.

Dairymen's League was in August, 1938, operating upwards of 107 approved milk receiving plants in the New York Milk Shed, receiving milk from 11,106 producers.

As of August, 1938, Bordens operated upwards of 77 approved milk receiving stations, receiving milk from upwards of 8,610 producers, all of whom, on information and belief, were and are members of Dairymen's League; milk of said producers is delivered to Bordens and payment therefor, is made by the Bordens to said Dairymen's League, which in turn pays said producers, and also pays producers delivering milk to its own plants.

The number of approved producers included in Dairymen's League membership was in August, 1938, upwards of 19,716.

On information and belief, several subsidiaries of Bordens, purchase milk from producers at other approved milk receiving stations in the New York Milk Shed, but the exact number of said stations and producers delivering thereto, is not known to this defendant.

Twenty-fifth. On June 7th, 1938, a Certificate of Incorporation of "Metropolitan Cooperative Milk Producers Bargaining Agency, Inc," hereinafter referred to as "Bargaining Agency," was filed in the Office of the Secretary of State of the State of New York, by or on behalf of Seward A. Miller, 11 W. 42nd Street, New York City, attorney for Dairymen's League, whereby there was created a membership corporation. Said Certificate provided in part:

"10. The membership of the corporation, shall be limited to cooperative associations organized under or subject to the provisions of the Cooperative corporations Law of the New York State, or of similar laws of any other State, and organized and controlled by milk producers."

Shortly thereafter, the Dairymen's League and Sheffield Cooperative became members of said new corporation or Bargaining Agency. Other cooperatives, operating country receiving plants, were solicited to become members of the Bargaining Agency, and some did so. The officers, members, agents, and servants of the Bargaining Agency, in furtherance of the scheme hereinafter set forth, procured the formation of cooperative corporations among the milk producers delivering milk to plants owned by independent dealers, including this defendant, which said cooperatives were neither milk dealers, handlers, or bona fide cooperatives, within the meaning of Title 7, Section 608c U. S. Code, and Chapter 383 of the Laws of 1937 of the State of New York.

128 Twenty-sixth. Defendant further alleges that the Congress, by the passage of Title 7, Section 608c, U. S. Code, as amended, and the Legislature of the State of New York, by the passage of Chapter 383 of the Laws of 1937, as amended, attempted to provide an enabling

ct and a procedure whereby, through cooperation, producers could effect the pooling of their milk, and thereby to provide for an equitable distribution of the proceeds thereof, ratably among the producers.

Defendant further alleges that, contrary to the spirit and intent of said statutes, the Bargaining Agency entered upon a program or scheme to procure for several large member cooperative corporations, including the Dairymen's League, a competitive advantage over proprietary corporations and dealers, including this defendant and others similarly situated, in the purchase and sale of milk, and thereby to discriminate against defendant and said others, and to establish in said Bargaining Agency members and companies dealing with them, a monopoly in the purchase and sale of milk in the Metropolitan Area. Said scheme had as its object, the confiscation of this defendant's property rights without due process, and the denial to it of equal protection of the law, contrary to the Fifth and Fourteenth Amendments to the Constitution.

On information and belief, the Bargaining Agency was at all times, dominated and controlled by the Dairymen's League and Sheffield Cooperative.

In furtherance of the scheme above set forth, the Bargaining Agency, presented to the Secretary of Agriculture of the United States, hereinafter referred to as "Secretary," and to the Commissioner of Agriculture of the State of New York, hereinafter referred to as "Commissioner," a proposed marketing agreement and Order, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and requested that the same be promulgated under the authority conferred by Title 7, Section 608c U. S. Code, hereinafter referred to as the "Federal Act," and under the provisions of Chapter 383 of the Laws of 1937 of the State of New York, hereinafter referred to as the "State Act."

First Affirmative Defense

Twenty-seventh. Under authority of Section 8b and 8c of the "Federal Act," and the provisions of section 258m of the State Act,
129 the Secretary and Commissioner gave notice of public hearings on said proposed Marketing Agreement and Order, and after such hearings, the Secretary on August 5, 1938, issued Order No. 27 and the Commissioner made public, proposed Official Order No. 126. The Secretary elected to conduct a referendum of producers pursuant to the provisions of Title 7, Section 608c (19) of the Act for the purpose of ascertaining whether the issuance of the proposed Order was approved or favored by at least two-thirds of the producers who, during the month of May, 1938, were engaged in the production of milk for sale in the marketing area. The Commissioner elected to conduct a poll for the purpose of ascertaining whether the issuance of Official Order No. 126 was approved or favored by at least 75% of the producers residing in the State of New York, who during the month of May, 1938, were engaged in production of milk for sale

in the marketing area. After conducting said referendum and po
the Secretary and Commissioner "determined" that two-thirds of t
producers in the production area covered by Order No. 27 and 75
of the producers in the production area covered by Official Order N
126, approved or favored the issuance of said Orders. On inform
tion and belief, said Findings and determinations by the Secreta
and Commissioner, were predicted solely on the said referendum a
poll, and the votes cast therein.

Order No. 27 and Official Order No. 126 are illegal and void f
fraud connected with said referendum conducted by the Secreta
and poll conducted by the Commissioner, on which, issuance of sa
Orders were predicated.

The Bargaining Agency and Dairymen's League, in furtherance
their scheme, prior to said referendum and poll, carried on an elabor
campaign of false and misleading propaganda through the media
of newspapers, radio speeches, letters, pamphlets, and otherwise, c
culated to mislead and deceive milk producers entitled to vote there
or whose votes were entitled to be cast on their behalf by cooperativ

On April 29th, 1938, the Secretary signed a notice of hearing
the proposed Marketing Order, and published said notice to the pr
ducers in the New York Milk Shed, accompanied by a proposed Ord
stating however:

"The provisions proposed by the Metropolitan Cooperative Mi
Producers Bargaining Agency, Inc., are set forth below as possib
provisions of a marketing agreement and of an order. Th
130 publication in this form is for the convenience of interest
parties and is not to be considered as in any way signifyi
their approval by the Secretary of Agriculture."

Hearings on the proposed Federal and State Orders were he
jointly thereafter. Coincident therewith, and on or about April
1938, the Bargaining Agency issued a 24-page booklet, on the co
of which was contained the following statement: "Mr. Dairymen
Save this Booklet. The Plant It Explains May Save Your Firm
Said booklet contained statements which were grossly untrue, and
particular, stated on page 1:

"Principles Upon Which the Order Is Based

"The fundamental requirements of the industry which the Or
seeks to establish are five in number, viz:

"1. An equal purchase price to be paid by all dealers for milk for
same use.

"2. An equal share to each producer of the benefits of the fl
markets.

* * * * * * *

"Complete simplicity in the terms of the Order is impossible par
because of the complexity of the subject dealt with and partly beca
of the impossibility of giving the desired legal effect to certain p
visions without employing the language of the Courts. It is c

fidently believed that the present Order can successfully withstand any assaults upon its legality."

Coincident therewith, one Baldwin, as executive secretary of the Bargaining Agency, issued and circulated generally, an inflammatory letter, calculated to arouse hatred toward dealers, including this defendant. Referring to the "dealer," Baldwin said in part:

"He has ground you down in poverty * * * attend the meetings and hearings—listen to the radio talks. Vote for your own best interests."

Prior to the vote on said proposed Order, widespread, innumerable statements and representations were made to all producers in the area, by both the Bargaining Agency and Dairymen's League, their members, agents, servants, and affiliates, to the effect that all handlers would be required to pay the uniform price to all producers, and that no handler had a competitive advantage over the other. Specifically, as an example, the Dairymen's League News, the official newspaper of the Dairymen's League, on August 16th, 1938, contained the following statements on page 5:

131 "Uniform Pool Prices for Producers

"The order requires handlers to pay the uniform, or blended, price calculated by the market administrator, to all producers delivering milk during month unless the handler has received milk and sold it as Class I milk outside of the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable.

* * * * * * *

"Operation of the pool assures all handlers the same cost for milk sold in the marketing area and assures for that milk payments to all producers at a uniform rate, except for the transportation and other differentials provided."

Thereafter the Department of Agriculture, in August 1938, issued a printed pamphlet under the seal of the Department stating, on pages 12 and 13:

"The order requires handlers to pay the uniform pool, or blended, price, calculated by the market administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as class I milk outside of the marketing area.

* * * * * * *

"Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to all producers at a uniform rate, except for the transportation and other differentials provided."

The foregoing statements were and are untrue. Identical provisions of Article I of said Orders provide:

"5. 'Producer' means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

"6. 'Handler' means any person who engages in the handling milk, or cream therefrom, which was received at a plant approved any health authority for the receiving of milk to be sold in the ma keting area.

* * * * * * *

"This definition shall be deemed to include a cooperative associati of producers with respect to any milk received from producers any plant operated by such association or with respect to any mi which it causes to be delivered from producers to any other hand for the account of such association and for which such association c lects payment."

The only provision in said Orders directing payment to produc is as follows:

"Article VII—Payments to Producers

"Section 1. Time of Payment.—On or before the 25th day of ea month, each handler which is not a cooperative association
132 producers shall make payment to each producer for all m delivered by such producer at any plant during the preced month at not less than the uniform price, subject to differentials forth in sections 2 and 3 of this article."

There is no provision in said Orders directing payment of the u form price to producers delivering to cooperatives, including Dai men's League, which claims to receive 40% of all the milk in area.

On the contrary, the actual price paid to all such producers by Dairymen's League was less than the "uniform price" by a s stantial amount, and prices paid to producers delivering to so other cooperatives were also less than the "uniform price."

The statements above quoted to the effect that all handlers pay same cost for milk sold in the marketing area were also false untrue, since said Orders fail to impose upon Dairymen's League obligation to pay such uniform prices for the 40% of all the mil the area handled by it, and also in like manner exempt the ot cooperatives operating country receiving plants.

On information and belief, the falsity of such representation well known to the agents of the Secretary in charge of the Da Section of the Agricultural Adjustment Administration. The sou of defendant's information is an affidavit of E. W. Gaumnitz, c of the Dairy Section of the Agricultural Adjustment Adminis tion, United States Department of Agriculture, verified Decembe 1938, and which said affidavit was served on this defendant in action on a motion now pending for a preliminary injunction.

Such statements were also false for the reason that the Orders their terms obligated this defendant, and others similarly situa who paid the cost of operation of their country plants, to pay to producers for milk at its source the prices fixed by the Orders.

Orders required dealers such as Bordens, purchasing from cooperatives such as Dairymen's League, to pay for milk which had already been received, cooled, and made ready for shipment only the base price. The Orders contained no requirement that such dealers pay such cooperatives for such services, the cost of which amounts to from 10¢ per cwt. to 25¢ per cwt. in an economical operation, dependent upon volume and other elements.

Said producers who voted in the referendum and poll were
133 informed by the Official Bulletin of the Federal Government that the Orders for which they were voting contained provisions requiring equal payment to producers and equal cost to handlers when, in truth and in fact, the provisions of said Orders were to the exact contrary.

On information and belief, such false and fraudulent representations were made by Bargaining Agency and Dairymen's League, with deliberate intent to deceive such producers as were accorded the individual right to vote in the referendum and poll conducted on said orders, and tended to deceive such producers and influence them to vote "yes," or to refrain from voting "no."

Said Orders are discriminatory as between producers and as between handlers, and the false and fraudulent misrepresentations to producers, as above set forth, constituted a fraud upon those producers represented in the referendum and poll, and upon the agencies of the United States and State of New York.

By reason thereof, said referendum and poll were and are, illegal and void for fraud, and said Orders are thereby rendered null and void.

Second Affirmative Defense

Twenty-eighth. Order No. 27 and Official Order No. 126 are invalid illegal and void, for the reason that the same discriminate between this defendant as a distributor of milk in competition with cooperatives including the Dairymen's League as stated in Paragraph Twenty-seventh above, and also discriminates against this defendant and dealers engaged principally in the sale of fluid milk in favor of the Dairymen's League, National Dairy, and Bordens, which purchase milk through members of the Bargaining Agency, and other dealers engaged both in manufacture of milk, and sale of fluid milk, in that the price schedules established to be paid for milk utilized in manufactured classes, are preferential, less than the fair market value thereof; such preferential prices constitute a discount or rebate to said competitors on part of their milk, which is applied to the blended price paid for all milk, and such discount is actually intended to and does amount to a discount on the price paid by such competitors for fluid milk, and gives to them a competitive advantage over defendant and others similarly situated, thereby denying to them the right to purchase fluid milk on the same competitive terms, no more

and no less, as applied to Dairymen's League, Bordens, Sheffields and several independent competitors, which handle more than
134 70% of the milk sold in the marketing area.

Said Orders are also discriminatory against this defendant, and grant a competitive advantage to defendants' chief competitors, Bordens, National Dairy and Dairymen's League, in that by the provisions of Article 7, Section 1, said competitors are permitted to "blend" the prices paid, or purported to have been paid by said competitors for milk produced in the production area and sold in other markets, with the uniform price, thereby reducing the purchase price paid by said competitors for milk sold in the Metropolitan Area in competition with this defendant.

The construction placed upon said provisions of Order No. 27 by the Secretary, is set forth in a pamphlet issued by the United States Department of Agriculture in October 1938, on the cover of which is printed "Market Administrator, New York Metropolitan Milk Marketing Area, 95 Madison Avenue, New York, N. Y." Page 14 of said pamphlet states:

"Uniform Pool Prices for Producers

"Handlers are required to pay the uniform pool, or blended, price, calculated by the Market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class 1 milk outside of the Marketing Area. In such instance, the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. For the remainder of each producer's milk, the handler may pay such prices as he sees fit, but is required to furnish the producer with a statement of the percentage of the producer's milk paid for at the uniform price."

Under this provision, defendants' chief competitors, which have plants which are approved for both the production area under Order No. 27 and other marketing areas as well, are permitted to pay a price less than the bona fide actual value for milk sold outside of the Metropolitan Marketing Area, and by "blending" such price, actually pay much less for the milk purchased and sold in competition with defendant. Such competitive advantage tends to create a monopoly in defendants' chief competitors and the Orders thereby become instrumentalities by which defendant will, if said Orders are enforced against it, be forced out of business and excluded from carrying on its established business of buying and selling milk. Such discrimination, the purpose and effect of which is to create a monopoly in defendant's said competitors, is confiscatory and violative of the Fifth and Fourteenth Amendments to the Constitution,
135 and by reason thereof, the said Orders are unconstitutional and void.

Said Orders are also violative of the statutes under which they purport to have been issued in that the freight differentials therein stated, are unfair and discriminatory against handlers and producers in areas beyond the 200 milk zone, so-called, and in addition to such discrimination, the same grant a preference in price to producers and cooperatives in eighteen counties, all of which are less than 200 miles from New York City.

The actual wholesale delivered cost per quart of milk, under Official Order No. 27 and Order No. 126 above referred to, including operation of country receiving plants, freight, processing, bottling, delivery, taxes, license fees, and the actual overhead expenses, which are necessary to the operation of such business, was, in the month of September and October 1938 and now is upwards of 9¾¢ per quart, and on information and belief, the costs other than the price paid to producers for milk by Bordens, National Dairy, and the Dairymen's League, and other competing dealers, are approximately the same.

The Dairymen's League, in its official newspaper, the Dairymen's League News, dated November 15, 1938, makes the following statement:

"To pay established prices, pay for full butter fat content and all other charges 9¾¢ is figured as the absolute minimum at which handlers can sell milk to stores and make full payment to producers."

The market price of milk in the wholesale or dealer-to-dealer trade in New York City, in which defendant sells its milk, has been since September 1st, 1938, the effective date of said Orders, and now is, from 8¢ to 9¢ per quart, with the average being not to exceed 9¢, and defendant is obliged to sell its milk at said market price in competition with milk of the same kind and quality. Should defendant refuse to sell at such price, its customers can, and will, purchase from defendant's competitors above enumerated and other competitors, at said 8¢ to 9¢ price.

Indeed, the Dairymen's League News for November 29th, 1938 (published November 28th), states:

"In the New York City market, there is considerable unfair competition, it was stated. Most of it is in the store trade. Milk is being offered to stores at 8, 8½, and 9¢ per quart."

136 "Unfair competition", by sale of milk at less than the cost thereof to this defendant and dealers similarly situated, has been since September 1st, 1938, and now is being actively carried on by defendant's chief competitors, Dairymen's League, National Dairy, and Bordens, all of whom purchase milk through cooperatives which belong to the Bargaining Agency.

If defendant is compelled to pay the price stated in the Official Orders, under the present market re-sale price in New York City, which is dominated by the companies above referred to, and other corporations purchasing milk from producers who are affiliated di-

rectly or indirectly with the Bargaining Agency, defendant's capital will be exhausted and it will be obliged to discontinue business.

Defendant's chief competitors are making use of Order No. 27 and Official Order No. 126, normally intended to lawful price fixing Orders, as a cloak for, and as an instrumentality for an illegal monopoly and combination or conspiracy in restraint of trade, as defined by the Anti-Trust Laws. Such unlawful use of said invalid Federal and State Orders, is made possible solely by reason of the discriminatory provisions thereof, as is more fully set out in the several affirmative defenses herein.

By reason of the premises, said Orders are discriminatory as against this defendant, and are invalid and void, as being violative of the Fifth and Fourteenth Amendments to the Constitution.

Third Affirmative Defense

Twenty-ninth. Order No. 27 and Official Order No. 126, hereinafter referred to as the "Federal and State Orders," are illegal and void on the ground that in issuing the same, the Secretary of Agriculture, and the Commissioner of Agriculture of the State of New York, exceeded their administrative authority and power for the reason that the purported referendum and poll of producers, purported to have been taken by the Secretary and Commissioner, were and are void on the following grounds:

a. The purported referendum was not conducted in compliance with the provisions of Title 7, Section 608c–19, U. S. Code, in that producers and cooperative associations entitled to vote therein, were denied the right to cast their votes in favor of, or against the proposed Orders.

137 b. Less that two-thirds of the producers represented in the referendum on Order No. 27, and less than 75% of those represented in the poll on Official Order No. 126, signified themselves in favor of said Orders.

c. The Dairymen's League, Cooperative Association, Inc., which is actually a dealer, handler and distributor, selling milk in competition with this defendant, who is also a dealer, handler and distributor, was permitted, in said referendum and poll, to cast upwards of 20,000 votes therein, which votes unquestionably controlled the result thereof, and by such method, the bona fide producers delivering milk to said competing dealer, herein referred to as Dairymen's League, were denied the right to vote in favor of or against said Orders, in violation of the clear intent of the statutes under which the same purport to have issued.

d. Said Orders discriminate in favor of said Dairymen's League and against this defendant, and other handlers similarly situated, and deny to this defendant, which was allowed no vote or voice in the adoption of said purported Orders, due process and equal protection of the law, both in the manner of adoption and in the terms of said Orders, contrary to the provisions of the Fifth and Fourteenth

Amendments to the Constitution, and contrary to the express provisions of Title 7, Section 608c, U. S. Code, as amended.

The Findings by the Secretary, as stated in Subdivisions (A), (B), and (C), which were as follows:

"(A) That the refusal or failure of said handlers to sign such Marketing Agreement tends to prevent the effectuation of the declared policy of the Act;

"(B) That the issuance of the Order is the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and

"(C) That the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May, 1938, were engaged in the production of milk for sale in the Marketing Area, and who voted in the above mentioned referendum. Said Findings and determination were published by the Secretary in the Federal Register on August 27, 1938."

of Paragraph "X" of the complaint, are without any probative evidence to support the same, and amount merely to an expression of opinion of the Secretary as to the matters purported to have been "found."

Fourth Affirmative Defense

Thirtieth. Order No. 27 and Official Order No. 126. are illegal and void in that by the provisions thereof, the class prices of milk utilized in Class 3A, consisting of milk used in the manufacture of evaporated milk; condensed milk, etc., is determined by prices paid at various condenseries located in foreign states outside of the New York
138 Milk Shed, a number of which condenseries are, on information and belief, operated or controlled by affiliates or subsidiaries of the National Dairy and of Bordens, and thereby, said Orders have, by said provisions, delegated to the operators of said condenseries, the power and authority to fix the price to be paid by defendant's said competitors for milk purchased in competition with the defendant, and thereby said companies have been delegated the power to fix and control the amount of competitive advantage which they may obtain over defendant and others in a like situation. Said delegation of power was unlawful, and exceeded the administrative authority of the Secretary of Agriculture and Commissioner of Agriculture and Markets, and is illegal and void as constituting an unlawful restraint of trade and in that it tends to create a monopoly in the purchase and sale of fluid milk in defendant's chief competitors above referred to.

Thirty-first. Said Orders are further discriminatory against defendant in that the same by their provisions, direct that defendant and other handlers or milk dealers, who are not cooperative corporations, pay the prices established by said Orders, and by the Market Administrator thereunder, but exempt handlers who are cooperative corporations including the Dairymen's League and all members of the Bargaining Agency, from paying producers the so-called "uniform" price, contrary to the intent of Section 608c–5 (A) of the Agricultural Adjustment Act.

Under said Orders, for the month of September, 1938, the Dairymen's League paid to its upwards of 20,000 milk producers supplying milk to the said Dairymen's League and Borden Company, at a base rate on all milk of said producers, of upwards of 10¢ per cwt. less than the "uniform" price required to be paid by defendant to its producers. Said underpayment by Dairymen's League, applied to the portion of its milk used in fluid form, amounted to a rebate or discount of upwards of 20¢ per cwt. on such fluid milk. In addition thereto, said Dairymen's League and other cooperatives, in making settlement with the Producers' Settlement Fund, was, by the terms of said Orders, allowed an additional reduction of upwards of 5¢ per cwt. on all of its milk which, when applied to the portion thereof used in fluid form, constituted a further discount of upwards of more than 10¢ per cwt. on said fluid milk.

On information and belief, the competitive advantage to National Dairy, Bordens and Dairymen's League, in the prices charged
139 for milk in the lower brackets, when applied to the portion of milk used by them in fluid form, constituted a further rebate or competitive advantage over defendant, equal to upwards of at least 30¢ per cwt. on said milk.

Thirty-second. Defendant further alleges that said competitive advantage to defendant's competitors as above set forth, denied to this defendant, the right to purchase milk of the same kind and class, under the same terms and conditions, no more and no less, as applied to other citizens who were milk dealers and handlers of the same class and in the same business.

Such discriminatory competitive advantage to defendant's competitors, tends to create a monopoly in said competitors, over this defendant in the purchase and sale of milk, and permits some or all of said chief competitors to engage in an actual combination or conspiracy in restraint of trade against this defendant and others in a like situation, and thereby to confiscate its property and property rights without due process and to deny it equal protection of the law in violation of the Fifth and Fourteenth Amendments.

Fifth Affirmative Defense

Thirty-third. Order No. 27 and Official Order No. 126 are invalid and void as an attempted delegation to one group (cooperative handlers), of the power to regulate the business of another group of the same class and in the same business (handlers other than cooperatives). By such device, there has been delegated to cooperative corporations, which are also handlers and distributors of milk, the power to prescribe prices to be paid by this defendant and others in a like situation, and at the same time, exempt themselves from compliance with such regulation.

Said cooperatives, which control upwards of 50% of all the milk in the area, have been delegated the power to deny producers deliver-

here sought to be enforced, and thereby to discriminate against competing handlers of the same class, including this defendant, and against producers delivering to such cooperatives.

Such delegation of powers by the Congress is unconstitutional, and an abandonment of the legislative duties imposed upon the Congress by the Constitution.

140 Said Orders are invalid and void for the reason that they expropriate moneys from one group of dealers of the same class (handlers other than cooperatives), including this defendant, to be paid through the Market Administrator, to a competing group (cooperative handlers), which are not subject to the price fixing provisions thereof. Thereby such cooperative competitors of defendant, are receiving a subsidy from the capital assets of defendant, which has been and now is being used in this cunningly devised scheme, to confiscate this defendant's business, and to create a monopoly in the purchase and sale of milk in the controlling members of the Bargaining Agency. The provisions of Title 7, 608c of the U. S. Code, as amended, and of Chapter 383 of the Laws of 1937 of the State of New York, as amended, are unconstitutional and violative of the Fifth and Fourteenth Amendments to the Constitution, in that the same, and the Orders issued thereunder, confiscate the property of defendant without due process and deny it equal protection of the law.

Such unlawful expropriation of defendant's moneys, without due process, for the use of its competitors, tends to create a monopoly in the purchase and sale of milk, and an unlawful combination in restraint of trade in defendant's chief competitors as defined by the Federal Anti Trust Laws (Title 15, U. S. Code), in violation of the Fifth and Fourteenth Amendments to the Constitution.

Said Orders are wholly arbitrary, capricious and unequal.

Sixth Affirmative Defense

Thirty-four. Defendant further alleges that it operates milk receiving stations at Oriskany Falls, Oneida County, N. Y., Solsville, Madison County, N. Y., and Bridgewater, Oneida Co., N. Y., receiving from and purchasing the milk of upwards of 300 milk producers residing in the vicinity of said plants, and whose milk is naturally tributary thereto. In that connection, defendant has a capital investment in physical assets, including land, building and machinery of upwards of more than $50,000.00, and in the City of New York, has a further capital investment in delivery trucks, milk bottles, cases, cans, and other paraphernalia necessary to its business, all of the value of upwards of more than $10,000.00.

Defendant's business in the City of New York, has been built up over a long period of years and at an actual out-of-pocket cost
141 of many thousands of dollars, and the good will value of the trade which defendant serves in New York City, is upwards of the sum of more than $10,000.00.

Under the Orders, defendant as a handler of fluid milk, is charged more than the uniform price. It pays its producers that price and the excess to the Market Administrator. For the month of September, defendant paid to said Administrator, under protest, the sum of $15,200.99 for the Producers' Settlement Fund, and the sum of $535.37, administrative expense, which defendant also paid under protest. Upwards of more than $3,000.00 of said sum, was taken from defendant's capital and constituted a capital loss for the month of September, 1938. Under the provisions of the Orders, the Administrator, on information and belief, has distributed the same to other handlers, who in turn, pay the same out to producers. Some of said sums were paid for marketing services.

If defendant succeeds in this action, it cannot trace the sums already paid by it through the hands of the Administrator to the handlers, and thousands of producers to whom they ultimately pass, and even if they could be so traced, it would be utterly impossible to recover the same through actions at law. If the prayer of the plaintiff, that a preliminary injunction issue, commanding this defendant to pay to the Administrator, the amounts demanded on account of October purchases of milk, this defendant will suffer irreparable damage, and if such compulsory payments are continued, defendant will be summarily destroyed in advance of any adjudication in this action. Such a mandatory preliminary injunction will also do this defendant irreparable injury and damage, in that thereby, it will continue to be the victim of unbridled and conscienceless unfair competition, at the hands of its competitors, to whom the price-fixing provisions of the Orders are not applicable.

By reason thereof, this defendant is wholly without any adequate remedy at law in the premises.

Thirty-fifth. No application was made by the defendant to the Secretary under the provisions of Title 7, 608c (15) (A), prior to the commencement of this action, for the reason that this defendant was threatened by Erskine M. Harmon, Market Administrator, appointed by the Secretary and plaintiff Commissioner, his agents and servants, and others working in concert with him, including the Bargaining Agency, its officers and members; the Dairymen's League, in-
142 cluding its Officers, agents, and members; one E. Manning Gaynor, appointee and agent of plaintiff Commisisoner, that if defendant sought relief in the Courts from the discriminatory provisions of said Orders, that it would be summarily forced out of business by interference with, and stoppage of defendant's milk supply, without which it could not continue in business. Reference is made to the complaint and amended complaint in an action brought in this Court by this defendant against Erskine M. Harmon et al., as to the details of such threats and acts of coercion and intimidation.

This defendant, on or about November 17, 1938, made application to this Court, for a preliminary injunction, restraining said Harmon, as agent of the Secretary of Agriculture and the other defendants

pending the trial and determination of its rights, and while said application for said preliminary injunction was pending, and before the granting thereof, and on November 23, 1938, this defendant was served with a complaint herein, and with an Order to show cause why a preliminary mandatory injunction should not issue against this defendant. The complaint herein was verified by Edwin W. Gaumnitz, as the appointee of the Secretary of Agriculture, and this action is brought in the name of the United States, by and on behalf of the Secretary of Agriculture, to enforce the provisions of Order No. 27 issued by said Secretary. By causing this action to be instituted, the Secretary has voluntarily submitted all questions of the lawfulness and/or legality of said Order to this Court, and has disqualified himself from acting in a quasi judicial capacity in any administrative hearing for review thereof.

Wherefore, defendant demands judgment as follows:

1. Dismissing the complaint on the following grounds:

a. That Order No. 27 and Official Order No. 126 are invalid, illegal and void as being violative of the Fifth and Fourteenth Amendments to the Constitution, and on the grounds separately stated in the affirmative defenses herein.

b. That the provisions of Title 7, Section 608c, U. S. Code and the provisions of Chapter 383 of the Laws of 1937 of the State of New York, are unconstitutional and void, as being violative of the Fifth and Fourteenth Amendments to the Constitution of the United States on the grounds separately stated in the affirmative defenses above set forth.

2. That the defendant have such further judgment, order and relief, as to the Court may seem just.

WILLARD R. PRATT,
Attorney for Defendant,
Office and P. O. Address: 201–202 U. G. & E. Bldg. Utica, New York.

143 In United States District Court

Civil Action No. 32. Consolidated Cause

[Title omitted.]

Motion to strike

The intervening plaintiff moves the Court as follows:

To strike from the amended answer filed by the defendant Jetter Dairy Company, Inc. to the complaint herein paragraphs twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, and thirty-fifth of said amended answer, because the said paragraphs of said amended answer, and each and every one of them,

(a) Fail to state a legal defense to plaintiff's claim, and

(b) Contain only allegations which are redundant, immaterial, impertinent and scandalous.

Milo R. Kniffen,
MILO R. KNIFFEN,
Attorney for Holton V. Noyes, Commissioner of Agriculture and Markets of the State of New York, Intervening Plaintiff, State Office Building, Albany, New York.

144 To: WILLARD R. PRATT, ESQ.,
Attorney for defendant, Jetter Dairy Company, Inc., 201-2 U. G. & E. Building, Utica, New York.

Please take notice that the undersigned will bring the above motion on for hearing before this Court, at the United States Court House, Albany, New York, on the 14th day of December 1938 at 2 o'clock P. M. of that day, or as soon thereafter as counsel can be heard.

MILO R. KNIFFEN,
Attorney for Holton V. Noyes, Commissioner of Agriculture and Markets of the State of New York, Intervening Plaintiff, State Office Building, Albany, New York.

Service of the above notice and copy of motion is hereby acknowledged.

Willard R. Pratt,
WILLARD R. PRATT,
Attorney for defendant Jetter Dairy Company, Inc.

145 In United States District Court

Civil Action No. 32. Consolidated Cause

[Title omitted.]

Order denying motions to strike

Filed March 21, 1939

This cause coming on to be heard on the plaintiffs' motion to strike from the Answer of the defendant, Rock Royal Co-Operative, Inc. the second of two consecutive paragraphs each numbered Fourteenth and paragraphs Fifteenth, Sixteenth and Seventeenth of said Answer, and to strike from the Answer of the defendant, Schuyler Junction New York Milk Shed Co-Operative, Inc., the second of two consecutive paragraphs each numbered Fourteenth and paragraphs Fifteenth, Sixteenth, and Seventeenth of said Answer, and on the motions of the plaintiff and of the intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York to strike from the amended Answer of the defendant, Jetter Dairy Company, Inc., paragraphs Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Thirtieth, Thirty-First, Thirty-

Second, Thirty-Third, Thirty-Fourth, and Thirty-Fifth; and having been argued by counsel, and upon consideration thereof, it is

Ordered, adjudged, and decreed, that the said motions be and the same hereby are denied.

Dated Albany, New York, March 21, 1939.

FRANK COOPER,
U. S. District Judge.

146 In United States District Court, Northern District of New York

UNITED STATES OF AMERICA, PLAINTIFF, AND HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, INTERVENING PLAINTIFF

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

John S. L. Yost, Charles J. McCarthy, Special Assistants to the Attorney General. Ralph L. Emmons, United States Attorney. Harold L. Schilz, Special Assistant to the Attorney General. E. O. Mather, Senior Attorney, Dept. of Agriculture. Milo R. Kniffen, Counsel, Department of Agriculture and Markets of the State of New York. Robert G. Blabey, Assistant Counsel. Willard R. Pratt, Utica, N. Y.; Charles W. Jenkins, Deposit, N. Y., Haskell & Foley, Cortland, N. Y., Attorneys for Defendants.

Opinion denying motions to strike

Filed Dec. 27, 1938

COOPER, J.: This is a motion by the plaintiff to strike from the answer of the defendant Jetter Dairy Company, Inc., and of other defendants, certain paragraphs relating chiefly to affirmative defenses.

The grounds of the motion are that said paragraphs:

147 (a) Fail to state a legal defense to plaintiff's claim, and

(b) Contain only allegations which are redundant, immaterial, impertinent, and scandalous.

The intervening plaintiff makes a like motion on the same grounds to strike out the same paragraphs.

The Jetter Dairy Company, Inc., is a New York State Corporation engaged in the business of buying fluid milk from producers and selling it to consumers through a jointly owned subsidiary corporation.

On August 5th, 1938, the Secretary of Agriculture of the United States, hereinafter called the Secretary, issued order No. 27 effective Sept. 1, 1938, under the provisions of the Agricultural Marketing Agreement Act as amended in 1937. This order was to be carried out under the direction of a market administrator appointed by the

Among other things Order 27 provided that the method for the fixing of prices monthly for prices to be paid to the producers and for the establishment of a so-called Milk Pool to which these handlers (meaning those who buy from the producers and sell to distributors or sell directly to consumers) should pay or from which they should receive certain sums fixed by the Market Administrator depending upon the use to which the milk received from the producers was put under the various classified uses specified in Order No. 27.

The Market Administrator determined upon the basis of the reports made by the defendant Jetter Dairy Company and other defendants that certain payments were due from the Jetter Dairy Company and the other three defendants.

This action is brought by the Government to compel payment of such moneys by injunction.

148 A like order was issued by the State Commissioner of Agriculture hereinafter called the Commissioner under State Statutes intended to bring about joint milk control, and price fixing in cooperation with the Secretary.

The same person appointed Federal Administrator was appointed State Administrator to make more effective the joint Federal and State Control of the production and distribution of Milk.

The State Commissioner's complaint seeks to compel like action if the milk is sold in intra-state and not interstate commerce, the Federal Act applying only to milk sold in interstate commerce or directly affecting interstate commerce.

It is conceded that the milk of the Jetter Dairy Company is sold in Interstate Commerce because it passes through New Jersey in going from farm to market. For present purposes it will be assumed that the milk of all defendants is sold in interstate commerce.

When it is sought to obtain the order of a Court of Equity requiring citizens to obey an order of an administrative or executive department of the Government, the conscience of the Court must be satisfied that the order should be issued. As sometimes stated, the order is in the sound discretion of the Court.

If it were otherwise, resort to a court would not be necessary.

Morrison v. Work, 266 U. S. 481.

Virginia Railway Co. v. System Fed. 84 Fed. (2nd) 641.

McNulty v. National Mediation Board, 18 Fed. Sup. 494.

The motion is to strike out the balance of the answer from paragraphs 25 to 35 inclusive. Paragraph 26 of the defendants amended answer alleges the incorporation of the Metropolitan

149 Cooperative Milk Producers Bargaining Agency with the Dairymen's League, Sheffield Cooperative and others.

It further alleges that agents of the Metropolitan Agency procured the formation of a cooperative association among milk producers delivering milk to independent non-cooperative handlers and that such cooperatives so formed were neither dealers, handlers nor

Paragraph 26 alleges that the Metropolitan Bargaining Agency formed a scheme to procure competitive advantages for several large cooperative dealers over the independents, proprietary dealers such as the defendant Jetter Company and others and to establish a monopoly under the Metropolitan Bargaining Agency.

Paragraph 27 constituting the first affirmative defense alleges the joint referendum by Federal and State agencies upon proposed Federal Order 27 proposed by the Metropolitan Bargaining Agency and State order 126 and alleges misstatements contained in the public notice issued by the Secretary and misrepresentations by printed statements of the Metropolitan Cooperative Bargaining Agency and by the Dairymen's League (alleged to handle 40% of all milk received in the Metropolitan Marketing Area) and that these misstatements and misrepresentations were a fraud upon the producers and induced them to believe that the terms of the orders were other than they actually were.

There are certain further allegations of speeches, letters or radio talks.

It is impracticable to refer to each of the remaining paragraphs of the answer, but it may be said that paragraphs 27 to 35 inclusive set forth defenses of these kinds, viz:—

1. Order 27 is invalid because it failed to comply with the Federal Statute under which it was issued; viz, the Agricultural Marketing Agreement Act of 1937.

150 The grounds are chiefly these:

The handlers having failed to approve the proposed order No. 27 the Act required a finding by the Secretary that two-thirds of the Producers favor the Order and permits a referendum of producers to determine such approval.

That the secretary directed the referendum to be conducted and such vote as was had in favor of the order was induced by misunderstanding or misrepresentations as to the terms and effect of order 27 and that the referendum, therefore, did not give true expression of approval by the producers and the Secretary's finding, therefore, based on the Referendum for the promulgation of the order was without any actual or substantial support.

The defendant's argument appears to be that the secretary having elected to ascertain the approval of the producers by the Referendum, cannot reply upon hearings or any other means of ascertaining the approval of the producers. That the order is not such as it was represented to be and has various discriminatory, confiscatory and other unconstitutional provisions and effects referred to hereinafter and that a Court of Equity cannot in good conscience find that the order was promulgated in accordance with the statute nor that it should be enforced.

Defendant's cite, to support their contention, among others:

Butler v. U. S., 78 Fed. (2nd) 1. Affirmed, 297 U. S. 1.

DiGiovanni v. Camden F. I. Company, 296 U. S. 64, 73, and certain railroad cases holding that in the absence of a finding of essential facts the order cannot be sustained.

Plaintiff urges that defendants nowhere allege that the result of the referendum would have been different had no such representations been made.

151 Assuming that there is no such specific allegation, the unmistakable and necessary inference to be drawn from defendant's affirmative allegations is to that effect.

The pleading on such a motion as this must be given every fair intendment that may be drawn therefrom. Plaintiff urges that the affirmative defenses are not a simple, concise and direct pleading, but are prolix, redundant, scandalous, and state no defense and constitute no defense.

Plaintiff's cite the N. Y. Civil Practice Act 8 (e) and the Federal Practice Act and cases such as

Cantanzaritti vs. Bedrin (Nor. Dist. Pa.). Not yet Reported.

Polk vs. Mutual Reserve Fund, 128 Fed. 524, and many cases relating to invulnerability from attack of legislative bodies and public officers.

This Court agrees that the motive behind the Legislation cannot be attacked for if the Courts could inquire into such subject, there would be danger of invasion by the Judicial branch upon the legislative branch of three branch constitutional form of Government.

The same is true in large measure of the Acts of Administrative Offices but here the statute is the guide and apart from motive, acts not in compliance with the statute are not valid or enforceable.

The plaintiff also urges upon the basis of a number of Supreme Court citations including—

Johnson v. Drew, 171 U. S. 93.

Williamsport vs. U. S. 277 U. S. 551.

Douglas vs. Noble, 261 U. S. 165.

Red (c) Oil Company vs. Board of Agriculture, 224 U. S. 380, that in a wide variety of situations discretionary administrative determinations of fact are conclusive, and that this order was such an administrative determination.

152 The statutes and the situations in those cases are not in close analogy.

The statutes here provided that the Secretary might avail himself of a Referendum to determine whether or not two-thirds of the producers approved the proposed order. Having done so that referendum should be held to be the basis of his action and if it was not in fact a referendum upon the proposed order the validity of the order may be affected thereby. Compliance with the statute is necessary to the validity of the order.

Fosgate Company vs. Kirkland, 19 Fed. (Supp.) 152, 160.

The defendant's allegations that the order was issued upon a referendum where the producers who voted were misled as to its

where if the allegations are true there was no other evidence before the Secretary justifying the promulgation of the order.

That there may be and perhaps is other support for the order which may be shown on the trial should not prevent the defendant's from being given their day in Court.

The evidence the defendant's may introduce upon the trial, however, must be documentary evidence and will not include any oral statements, radio speeches (unless the text thereof cannot be shown in writing by undisputable proof) nor letters to individuals but only letters shown to have been sent generally to producers or large numbers thereof.

The alleged publications, radio speeches, etc., of the Metropolitan Marketing Agency, Dairymen's League, etc., will be competent evidence if shown to have a large circulation among producers or to have been delivered over well known radio stations with the text preserved in writing.

It is quite true that the Secretary is not responsible for the
153 Acts of the non-governmental organizations but the proposed order was admittedly suggested by the Metropolitan Bargaining Agency, of which the Dairymen's League and others are members and had representation upon its board. It is not so important that the Secretary did not send out such publications as it is whether he had knowledge and whether or not the Referendum vote was induced thereby.

In this connection the fact that the Dairymen's League, through its officers and not through its members, could and did vote for approximately 20,000 producer members is not without significance.

The Secretary is not burdened to any extent with defending the acts of these non-governmental agencies, for only evidence as to which there can be little or no dispute will be received and these agencies can be made parties hereto if they desire to present any evidence they desire, but only with the consent of the plaintiff.

2. The remaining defenses allege the invalidity of the order on constitutional grounds and on the grounds of discrimination which results or may result in driving all but the large cooperatives from the milk business.

The grounds are chiefly these:

(a) The order exempts Cooperative handlers from paying producers the uniform price required to be paid by non-corrosive handlers and permits cooperative handlers to pay into the equalization fund a lesser base amount than non-cooperative handlers.

(b) The order fixes low prices to three large groups of handlers for milk in the lower brackets (sold for other than fluid milk consumption), and is in effect a rebate which can be and is applied in reducing the price by these groups for fluid milk; which preferred handlers sell 70% of the milk sold in the marketing area; that the order permits three large groups to pay lower prices for fluid
154 milk by permitting them to "blend" the price paid for milk

sold outside the marketing area, which latter price is not fixed in the order, all of which results in a competitive advantage to these groups.

(c) That unfair freight differentials are fixed in the order not based on actual freight costs, which is discriminatory.

(d) That no sale price to consumers or to distributors being fixed in the order the foregoing discrimination above set forth, and otherwise, permits the large dealers, or some of them, to reduce the price to those selling to consumers to a point below the costs of fluid milk to defendants and others in like situation to a point below the cost with the most efficient operation, and that the order procured, it is, alleged, by the large dealers, particularly Dairymen's League, was designed by them to so permit the underselling of defendants and others in like situation at a price below cost for the purpose of driving them out of business and creating a monopoly in such large dealers, and the payments into the milk pool sought to be enforced by the complaint results in a confiscation of their property to the point of total confiscation.

(e) There are certain other allegations of illegal and unlawful delegation of power to a majority or two-thirds, which permits the majority or the two-thirds to regulate the business of the minority for the benefit of the majority or two-thirds in violation of fundamental law.

The power to fix in the order the price to be paid to producers is not challenged, nor the fixed price itself.

The numerous authorities cited on this point need not be considered.

The contention is that the same price is not fixed for all but discrimination is practiced in the various ways above referred to, some of which appear on the face of the order and others of which can only be shown by proof.

155 Involved in this discrimination is the exactions of the milk pool which result in alleged discrimination in favor of certain large producers and against these defendants and others like them.

That a price fixing or price control when by reason of discrimination or otherwise it becomes an arbitrary discriminatory regulation having a demonstrably irrevalence to the legislative, is unconstitutional and an unwarranted interference with individual liberty is declared in Nebbia vs. New York, 291 U. S. 502, 539.

Plaintiff argues that the milk pool is only a stabilization fund by which the burden of the surplus may be shared by all producers and distributors citing Nebbia vs. New York, Supra, and various other cases.

But the defendants allege the milk pool as operated under and by the terms of the order is arbitrary and discriminatory and goes to the length of exacting from them, in connection with the price cutting by the big handlers and distributors especially cooperatives, and despite their effective operation, practically their entire capital assets in a series of periodic exactions.

Discrimination in favor of a cooperative association of farmers and laborers is not invalid but valid and approved, urges the plaintiff, citing

Matter of Mayflower Farms vs. Baldwin, 267 N. Y. 912.

Liberty Warehouse Company Burley T. G. Coop M. Assn., 276 U. S. 71, and other cases.

Some discrimination in favor of Farmer Cooperatives, when confined within reasonable limits, is undoubtedly valid, but, argues the defendants, a giant cooperative, controlling 40% of the milk supplied to the Metropolitan area and which uses its preferential treatment to combine with a few others to destroy competition and control the market is not the cooperative intended by the Statute, and in any event gets so much preference, under the whole scheme as to unlawfully take all of defendant's property if it would attempt to comply with the order.

Defendant's, to support their contention that the exactions for the milk pool under the order and in effect by reason of discrimination and otherwise is to take defendant's property and give the same to other competitors, cite

Thompson vs. Cons. Gas Company, 300 U. S. 53.

Railroad Retirement Board vs. Alton R. R., 295 U. S. 330.

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, and others.

These cases have no analogy of fact and are not under the commerce clause except the Alton case.

The question under discussion is one that could best be decided upon the evidence when presented and upon facts to be found therefrom.

Borden Company vs. Baldwin, 293 U. S. 194, 210, 213.

Moreover, a statute valid when enacted, may become invalid by a change in the conditions to which it applies.

Adkins vs. Childs Hospital, 294 U. S. 405, 415.

The defendants allege in substance that the statute delegates power to two-thirds of the producers to make the order binding on the remaining third and that such delegation is unlawful.

Defendant asserts that the statute here is like that in Carter vs. Carter Coal Company, 298 U. S. 238, 310, where such delegation as was there involved was held in violation of the 6th amendment.

Plaintiff asserts that there is no such delegation of power in the statute here involved as in the statute in the Carter Coal case and cites,

Edwards vs. U. S. 91 Fed. (2nd) 767.

U. S. vs. Whittenburg, 21 Fed. Supp. 713.

U. S. vs. Goldsmith Fruit Company, 19 Fed. Supp. 147.

However, the statute and an order thereunder have been held to constitute invalid delegation of power.

Fosgate Company vs. Kirkland, 19 Fed. Supp. 152.

It is not necessary to decide that question at this time but such allegations should not be stricken from the answer in view of the need for an early determination of this case it seems unnecessary and

undesirable to prolong the discussion of the defense since the Court is of the opinion that they should not be stricken out but that the defendants should have opportunity to present their defenses and the proof thereunder and that such defenses are not frivolous nor without some legal standing.

Some present doubtful questions, where the questions involved can best be decided on the evidence from which facts can be found. Especially is this so, where the suit in equity is to enforce an order.

The Court does not intend by this decision to express any opinion on the merits of the defenses but merely that they should not be stricken out on the grounds stated in the motion.

The Court understands that the defenses in all cases are or are to be the same.

Any questions of difference in standing on the part of the defendants appear not to be urged and are not now decided.

The motions are denied.

December 22, 1938.

158 In United States District Court

Amendments to amended answer of Jetter Dairy Company, Inc.

Add at the end of Paragraph "Twenty-sixth" of the answer, the following:

"Intervening plaintiff, Dairymen's League, was instrumental in procuring the passage by the Legislature of the State of New York, of Chapter 383 of the Laws of 1937, known as the Rogers-Allen Law, and after its passage, actively participated in creating and in incorporating the intervening plaintiff, Bargaining Agency.

Add at the end of Paragraph "Twenty-eighth," the following:

"Immediately after the promulgation of said Order No. 27 and Official Order No. 126, the Bargaining Agency and Dairymen's League, entered into a conspiracy to promote the illegal monopoly above set forth, and to put upon the defendant Jetter, and others in a like situation, a constraint upon their freedom in purchasing and selling milk upon a fair competitive basis, and by illegal coercion, intimidation, and threatened withholding of an adequate supply of milk to supply their trade, thereby to prevent said defendant and others in a like situation, from appealing to the Courts for protection, and to deprive them of the benefits of due process of law, and sustaining through the Courts, their constitutional rights. To that end, said intervening plaintiffs, Dairymen's League and Bargaining Agency, attempted to take into their own hands, enforcement of Order No. 27 and Official Order No. 126, and to appropriate to themselves, the functions of the Court and Judiciary, and to impose upon defendant Jetter, and others in a like situation, compliance with said Orders, regardless of their legality.

159 In carrying out said conspiracy, the intervening plaintiffs, Bargaining Agency and the Dairymen's League, with the aid

and assistance of E. Manning Gaynor, agent of the intervening plaintiff, Noyes, and Wellington Griffith, Jr., Referendum Agent of the Dairy Section, Department of Agriculture of the United States, Erskine M. Harmon, Administrator, and others, attempted to compel the defendant Jetter and others in a like situation, to comply with said Orders, and to refrain from prompt appealing to the Courts for an adjudication of their rights.

The specific acts of said intervening plaintiffs, their agents and servants, and others above named, are those concerning which proof has already been received in evidence on this trial.

160 In United States District Court

Civil Action No. 32. Consolidated cause

[Title omitted.]

Amended complaint of intervening plaintiff, Dairymen's League Co-Operative Association, Inc.

Filed Dec. 29, 1938

Intervening Plaintiff, Dairymen's League Co-Operative Association, Inc., by Seward A. Miller, its attorney, for its amended complaint against each defendant alleges upon information and belief:

1. The intervener, Dairymen's League Co-Operative Association, Inc., is a non-stock, non-profit co-operative association, organized in 1919 under Article XIIIA of the Membership Corporations Law of the State of New York, which Article was in 1926 incorporated in and made a part of the Co-Operative Corporations Law of said State and such Association is now subject to the provisions in Articles 1-3 thereof. The principal office of the Association is at Utica, New York.

2. That said Co-Operative Association is now and has been for several years last past engaged in making collective sales or marketing of milk or its products as agent for the producers thereof in interstate and also in intrastate commerce, and is duly qualified to
161 act under and is operating under the provisions of Act of Congress of February 18, 1922, known as the Capper-Volstead Act.

3. The United States of America has heretofore commenced an action against the defendants above named under Sec. 8a (6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a (6), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agriculture Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the said Act of May 12, 1933, as reenacted and amended, being hereinafter referred to as the "Act") investing the several district courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person

from violating any order issued by the Secretary pursuant to the provisions of Title I of said Act.

4. The claim of this intervening plaintiff arises out of the same controversy as that of the original plaintiff, insofar as the defendants above named are concerned, and the intervening complaint herein is ancillary to the original complaint of the plaintiff herein.

5. That largely because of the failure of the defendants to make the payments required by the Order hereinafter described, the Administrator of the Federal and State Orders has made extra deductions from the equalization fund in order that the equalization provided for by the Orders continue in effect and as a result thereof, monies which otherwise would be distributed by the Administrator to this intervener and other handlers have been withheld by him.

6. The defendant Rock Royal Co-operative, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Rock Royal, in the County of Delaware, State of New York.

162 7. The defendant Central New York Co-Operative Association, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in the City of Courtland, County of Courtland, State of New York.

8. The defendant Schuyler Junction New York Milkshed Co-Operative, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Schuyler Junction, County of Herkimer, State of New York.

9. The defendant Jetter Dairy, Inc., is a domestic business corporation of the State of New York, having its principal office and place of business at Oriskany Falls, Oneida County, State of New York.

10. This proceeding is brought to enforce Order No. 27 regulating the handling of milk in the New York Metropolitan Milk Marketing Area and to prevent and restrain the defendants from handling milk in violation of the provisions of said Order No. 27; or, if the court shall find, however, that those defendants who handle milk which does not cross state lines on its way to the marketing area for sale burden, obstruct or affect interstate commerce, to hold such defendants subject to the provision of Order No. 27, issued by the Secretary of Agriculture of the United States, and, if the court finds that such defendants are subject to the provisions of Order No. 27, to prevent and restrain them from violating such Order.

11. Pursuant to the provisions of Section 258-m of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), the Commissioner on April 29, 1938, gave notice of public hearings on a proposed order regulating the handling of
163 milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau

Suffolk and Westchester, all in the State of New York, the said area being hereinafter referred to as the "marketing area." On April 29, 1938, the Secretary of Agriculture of the United States gave notice of public hearings to be held at the same times and places on a Marketing Agreement and an order substantially identical with the aforesaid Order.

12. In accordance with the terms of the said notices, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, pursuant to Section 10-i of the Act, and Section 258-n of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), joint public hearings were conducted by Glenn J. Gifford, and employee of the Department of Agriculture of the United States, who was designated by the Secretary to conduct such hearings, and also designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on behalf of the State. In accordance with the terms of said notice, joint public hearings were conducted at Albany, New York, on May 16, 1938; at Malone, New York, on May 17, 1938; at Syracuse, New York, on May 18, 1938; at Elmira, New York, on May 19, 1938, and at New York, New York, on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, New York, on May 24, 25, and 26, 1938, and at Albany, New York, on June 3, 4, 5, and 7, 1938. At the times and places aforesaid, all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed Marketing Agreement and the proposed Federal and State Orders. The said hearings were attended by representatives of producers, handlers, and consumers of milk sold in the marketing area.

13. Upon the evidence introduced at the said hearings, and after giving opportunity to interested parties to file written
164 arguments in support of, or in opposition to, the findings and provisions, or any of them, of a proposed Order, the Secretary, on August 5, 1938, issued Order No. 27 regulating the handling of milk in the marketing area in the manner provided in the Act, said Order containing the terms and conditions authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner, as and made applicable only to, persons in the respective classes of industrial or commercial activity specified in the Marketing Agreement upon which hearings were held as aforesaid. Said Order provides that "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary, and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 per cent of the milk sold

in the marketing area, or, his determination approved by the President that the failure or refusal to sign tends to prevent the effectuation of the declared policy of the act, and that the issuance of the order is the only practical means of advancing the interest of producers pursuant to such declared policy of the act." On August 26, 1938, the Secretary having made all necessary findings, issued an order providing that Order No. 27 should become effective on September 1, 1938.

On August 5, 1938, the Commissioner of Agriculture and Markets, after giving opportunity to interested parties to file written arguments, issued proposed Official Order No. 126, which Order was substantially identical with Order No. 27. On August 25, 1938, the
165 Commissioner having duly conducted a poll to determine (Sec. 258–m of the Agriculture and Markets Law of the State of New York, Chapter 383 of the Laws of 1937) whether the issuance of Official Order No. 126 was favored by at least seventy-five per cent of the producers of milk produced in the production area for the marketing area and, having made all the findings required by the said Section 258–m of the Agriculture and Markets Law of the State of New York, declared Official Order No. 126 to be effective September 1, 1938.

14. Order No. 27 and Official Order No. 126 are administered by a Market Administrator who was appointed by both the Secretary and the Commissioner to administer both Orders. A handler is obliged to file the same reports and make the same reports whether subject to Official Order No. 126 or whatever Order the handler may be subject to. Compliance with one Order constitutes compliance with the terms of both.

15. Pursuant to Article 2 of said Order No. 27, the Secretary, on August 27, 1938, designated E. M. Harmon as Market Administrator under said Order. Pursuant to Article II of Official Order No. 126, the Commissioner of Agriculture and Markets of the State of New York, on September 2, 1938, designated E. M. Harmon as Market Administrator under said Order. Pursuant to Article V, section 3 of both Orders, the Market Administrator prescribed forms to be used by each handler in making final monthly reports in accordance with said Article and Section.

16. Order No. 27 is now and has, since September 1, 1938, been continuously in full force and effect. Official Order No. 126 is likewise now and has, since September 1, 1938, been continuously in full force and effect.

17. The purpose of said Order No. 27 is to promote, foster and protect commerce in milk among the states, and to effectuate the declared policy of the Act. The purpose of said Official Order No. 126 is to promote, foster, and encourage the
166 intelligent and orderly marketing of milk through producer-owned-and-controlled co-operative associations, and, in co-operation with the Federal Government, to protect the dairy industry and insure an adequate supply of milk for the inhabitants of the State of New York.

18. Section 2 of Article VI of each Order requires the Market Administrator to compute from the reports submitted by handlers a so-called uniform price to producers which is based upon the utilization of milk by all handlers in the various classes specified in the Order. The failure of any handler to file a correct report with the Market Administrator of a uniform price which is not based upon the total utilization of milk by all handlers, and, if the utilization of milk by a handler not reporting is higher than the average utilization of milk of all handlers, the uniform price announced by the Market Administrator is lower than it otherwise would be, and producers therefore fail to receive as high a price for milk as they would if all handlers reported. In addition, the failure of any handler to file a correct report makes it impossible for the Market Administrator to determine accurately the amount of money owed by such handler for milk received from producers.

19. Section 8 of Article VII of both Orders requires each handler whose net pool obligation for the preceding month (as defined in Section I of Article VI of the Orders) is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price to pay to the Market Administrator on or before the 18th day of each month for payment to producers through the Producer Settlement Fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. The Market Administrator is required by Section 9 of Article VII of both Orders to pay on or before the 20th day of each month to handlers whose net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price the amount of which such handler's net pool obligation is less than such amount. Unless the handlers who are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund make their payments on the 18th of each month as required, the Market Administrator will be unable to make the necessary payments to handlers having a credit against the Producer Settlement Fund, and such handlers in turn will be unable to pay the full uniform price to producers.

167

20. The defendant Rock Royal Co-Operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Rock Royal Co-operative, Inc., is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $3,616.56. The defendant Rock-Royal Co-Operative, Inc., is also indebted to the Market Administrator in the sum of $124.62 as its pro rata share of the expense of administration of the Orders pursuant to Article VIII hereof.

21. The defendant Schuyler Junction New York Milkshed Co-Operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Schuyler Junction New York Milkshed Co-Operative, Inc. is indebted

to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $1,603.00. The defendant Schuyler Junction New York Milkshed Co-Operative, Inc. is also indebted to the Market Administrator in the sum of $55.28 as its pro rata share of the expense of administration of the Orders pursuant to Article VIII thereof.

22. On October 14, 1938, which was four days after the report was due, the defendant Central New York Co-Operative Association, Inc., filed a report with the Market Administrator,
168 which report was incomplete and inaccurate, and was false and untrue inasmuch as it stated that all the milk handled by said defendant was received from said defendant's own farm. Said defendant neither owns nor operates any farm whatsoever. All the milk handled by it during the month of September 1938 was received from producers. If the defendant Central New York Co-Operative, Inc., had filed a true and correct report, such report would have shown an indebtedness to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $20,115.56, and the plaintiffs allege that such sum is actually due the Market Administrator from the defendant Central New York Co-operative Association, Inc. for payment to producers through the Producer Settlement Fund. This defendant is also indebted to the Market Administrator in the sum of $712.25 as its pro rata share of the expense of administration of the Orders pursuant to Article VIII thereof. Each of the defendants has failed and refused to pay its indebtedness to the Market Administrator, and is threatening to fail and refuse to comply with the provisions of the Orders.

23. Order No. 27 and Official Order No. 126 are identical in their terms and are administered by a Market Administrator, who was appointed to administer both Orders. As far as the effective regulation of milk in the marketing area is concerned, it is immaterial whether a handler is compelled to comply with one Order or with the other, in that compliance with the terms of one Order constitutes compliance with the terms of both. Unless the milk which moves in the current of interstate commerce, or which burdens and obstructs and affects interstate commerce and is therefore beyond the power of the state to regulate, is subject to the same regulation as the milk which is purely intrastate in character, regulation by the State of the latter milk will be ineffective. If the defendants are not subject to Official Order
No. 126, it follows that they are subject to the provisions of
169 Order No. 27, and the enforcement of Order No. 27 is necessary to insure the effective control of the purely intrastate milk subject to Official Order No. 126.

24. Each of the defendants is a competitor of other handlers in the marketing area, and, unless each of the defendants is immediately restrained from continuing to violate the Order to which it is subject, and is immediately compelled to comply with all of its provisions, other handlers will be encouraged, or compelled by economic necessity, to refuse to comply with the provisions of Order No. 27 and Official

Order No. 126, the prices received by producers for milk will be lowered, and the intervening plaintiff will suffer irreparable injury.

Wherefore, the intervening plaintiff demands:

(1) That the Court adjudge and declare that the defendants are subject to provisions of Order No. 27.

(2) That the court issue a preliminary injunction preventing and restraining the defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of said Order No. 27, regulating the handling of milk in the marketing area, during the pendency of this suit.

(3) That the court issue a preliminary injunction commanding each of the defendants to pay all amounts now due and owing by them under the provisions of said Order No. 27, and commanding each of the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said Order No. 27 during the pendency of this suit.

(4) That the court issue a preliminary injunction commanding the defendant Central New York Co-Operative Association, Inc., to file true and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(5) That the court issue a permanent injunction preventing and restraining the defendants, their agents, officers, attorneys,
170 employees, successors, and assigns from handling milk in the Marketing area until compliance with said Order.

(6) That the court issue a permanent injunction commanding the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all the provisions of said Order No. 27.

(7) That, if the court shall determine that any of the defendants are not subject to Order No. 27, the court adjudge and declare that such defendants are subject to the provisions of Official Order No. 126.

(8) That, if the court shall determine that any of the defendants are subject to Official Order No. 126, the court issue a preliminary injunction preventing and restraining such defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of Official Order No. 126, during the pendency of this suit.

(9) That if the court shall determine that any of the defendants are subject to Official Order No. 126, the court issue a preliminary injunction commanding each of such defendants to pay all amounts now due and owing by it under the provisions of Official Order No. 126, and commanding each of such defendants, its agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said Official Order No. 126, during the pendency of this suit.

(10) That, if the court shall determine that the defendant Central New York Co-Operative Association, Inc., is subject to Official Order No. 126, the court issue a preliminary injunction commanding said defendant Central New York Co-Operative Association, Inc., to file

true and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(11) That, if the court shall determine that any of the defendants are subject to Official Order No 126, the court issue a permanent injunction preventing and restraining such defendants,
171 their agents, officers, attorneys, employees, successors, and assigns from violating the provisions of Official Order No. 126.

(12) That, if the court shall determine that any of the defendants are subject to Official Order No. 126, the court issue a permanent injunction commanding such defendants, their agents, officers, attorneys, employees, successors and assigns to comply with all the provisions of Official Order No. 126.

(13) That the intervening plaintiff be given all such other, further, and different relief as to this court may seem just and proper.

Seward A. Miller

SEWARD A. MILLER,

Attorney for Dairymen's League Co-Operative Association, Inc., Applicant for Intervention, 11 West 42nd Street, Borough of Manhattan, City of New York.

172 In United States District Court

[Title omitted.]

Complaint of intervening plaintiff, Metropolitan Co-operative Milk Producers Bargaining Agency, Inc.

Filed Dec. 27, 1938

Intervening Plaintiff, Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., by Edmund F. Cooke, its attorney, for its complaint alleges:

1. The United States of America has heretofore commenced an action against the defendants above named under Sec. 8a (6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a (6), as amended August 24, 1935 (49 Stat. 750)), and as reenacted and amended by the Agriculture Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the said Act of May 12, 1933, as reenacted and amended, being hereinafter referred to as the "Act"), investing the several district courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the Secretary pursuant to the provisions of Title I of said Act.

2. The claim of the intervening plaintiff arises out of the same controversy as that of the original plaintiff, in so far as the defendants above named are concerned, and the intervening complaint herein is ancillary to the original complaint of the plaintiff herein.

173 3. The defendant Rock Royal Co-operative, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and

place of business at Rock Royal, in the County of Delaware, State of New York.

4. The defendant Central New York Co-operative Association, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in the City of Cortland, County of Cortland, State of New York.

5. The defendant Schuyler Junction New York Milkshed Cooperative, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Schuyler Junction, County of Herkimer, State of New York.

6. Upon information and belief, the defendant Jetter Dairy Company, Inc., is a corporation organized and existing under the laws of the State of New York, and having its principal office and place of business at Oriskany Falls, Oneida County, State of New York.

7. This proceeding is brought to enforce official order No. 126, regulating the handling of milk in the New York Metropolitan Milk Market Area, and to prevent and restrain the defendants from handling milk in violation of the provisions of said official order No. 126; or, if the court shall find, however, that those defendants who handle milk which does not cross state lines on its way to the marketing area for sale burden, obstruct, or affect interstate commerce, to hold such defendants subject to the provisions of order No. 27, issued by the Secretary of Agriculture of the United States, and, if the court
174 finds that such defendants are subject to the provisions of order No. 27, to prevent and restrain them from violating such order.

8. Pursuant to the provisions of Section 258–m of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), the Commissioner on April 29, 1938, gave notice of public hearings on a proposed order regulating the handling of milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York, the said area being hereinafter referred to as the "marketing area." On April 29, 1938, the Secretary of Agriculture of the United States gave notice of public hearings to be held at the same times and places on a Marketing Agreement and an order substantially identical with the aforesaid order.

9. In accordance with the terms of the said notices, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, pursuant to Section 10–i of the Act, and Section 258–n of the Agriculture and Markets Law of the State of New York (Chapter 383 of the Laws of 1937), joint public hearings were conducted by Glenn J. Gifford, an employee of the Department of Agriculture of the United States, who was designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on behalf of the State. In accordance with the terms of said notice, joint public hearings were conducted at Albany,

New York, on May 16, 1938; at Malone, New York, on May 17, 1938; at Syracuse, New York, on May 18, 1938; at Elmira, New York, on May 19, 1938, and at New York, New York, on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, New York, on May 24, 25, and 26, 1938, and at Albany, New York, on June 3, 4, 5, and 7, 1938. At the times and
175 places aforesaid, all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed federal and state orders. The said hearings were attended by representatives of producers, handlers, and consumers of milk sold in the marketing area.

10. Upon evidence introduced at the said hearings, and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of a proposed order, the Secretary, on August 5, 1938, issued order No. 27 regulating the handling of milk in the marketing area in the manner provided in the Act, said order containing the terms and conditions authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner, as and made applicable only to, persons in the respective classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as aforesaid. Said order provides that "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary, and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 per cent of the milk sold in the marketing area, or, his determination approved by the President that the failure or refusal to sign tends to prevent the effectuation of the declared
176 policy of the act, and that the issuance of the order is the only practical means of advancing the interest of producers pursuant to such declared policy of the Act." On August 26, 1938, the Secretary having made all necessary findings, issued an order providing that order No. 27 should become effective on September 1, 1938.

On August 5, 1938, the Commissioner of Agriculture and Markets, after giving opportunity to interested parties to file written arguments, issued proposed official order No. 126, which order was substantially identical with order No. 27. On August 25, 1938, the Commissioner having duly conducted a poll to determine (Sec. 258-m of the Agriculture and Market Law of the State of New York, Chapter 383 of the Laws of 1937) whether the issuance of official order No. 126 was favored by at least seventy-five per cent of the producers of milk produced in the production area for marketing area, and, having made

all the findings required by the said section 258-m of the Agriculture and Markets Law of the State of New York, declared official order No. 126 to be effective Sept. 1, 1938.

11. Order No. 27 and official order No. 126 are administered by a market administrator who was appointed by both the Secretary and the Commissioner to administer both orders. A handler is obliged to file the same reports and make the same reports whether subject to official order No. 126 or whatever order the handler may be subject to. Compliance with one order constitutes compliance with the terms of both.

12. Pursuant to Article II of said order No. 27, the Secretary, on August 27, 1938, designated E. M. Harmon as Market Administrator under said order. Pursuant to Article II of Official order No. 126, the Commissioner of Agriculture and Markets of the State of
177 New York, on September 2, 1938, designated E. M. Harmon as Market Administrator under said order. Pursuant to Article V, Section 3 of both orders, the Market Administrator prescribed forms to be used by each handler in making final monthly reports in accordance with said article and section.

13. Order No. 27 is now and has, since September 1, 1938, been continuously in full force and effect. Official order No. 126 is likewise now and has, since September 1, 1938, been continuously in full force and effect.

14. The purpose of said order No. 27 is to promote, foster, and protect commerce in milk among the states, and to effectuate the declared policy of the Act. The purpose of said official order No. 126 is to promote, foster, and encourage the intelligent and orderly marketing of milk through producer-owned-and-controlled co-operative associations, and, in cooperation with the Federal Government, to protect the dairy industry, and insure an adequate supply of milk for the inhabitants of the State of New York.

15. Section 2 of Article VI of each order requires the Market Administrator to compute from the reports submitted by handlers a so-called uniform price to producers which is based upon the utilization of milk by all handlers in the various classes specified in the order. The failure of any handler to file a correct report with the Market Administrator results in the announcement by the Market Administrator of a uniform price which is not based upon the total utilization of milk by all handlers, and, if the utilization of milk by a handler not reporting is higher than the average utilization of milk of all handlers, the uniform price announced by the Market Administrator is lower than it otherwise would be, and producers therefore fail to re-
178 ceive as high a price for milk as they would if all handlers reported. In addition, the failure of any handler to file a correct report makes it impossible for the Market Administrator to determine accurately the amount of money owed by such handler for milk received from producers.

16. Section 8 of Article VII of both orders requires each handler whose net pool obligation for the preceding month (as defined in

section I of Article VI of the orders) is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price to pay to the Market Administrator on or before the 18th day of each month for payment to producers through the Producer Settlement Fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. The Market Administrator is required by section 9 of Article VII of both orders to pay on or before the 20th day of each month to handlers whose net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price the amount of which such handler's net pool obligation is less than such amount. Unless the handlers who are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund make their payments on the 18th of each month as required, the Market Administrator will be unable to make the necessary payments to handlers having a credit against the Producer Settlement Fund, and such handlers in turn will be unable to pay the full uniform price to producers.

17. The defendant Rock Royal Co-operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Rock Royal Co-op-
179 erative, Inc. is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $3,616.56. The defendant Rock Royal Co-operative, Inc., is also indebted to the Market Administrator in the sum of $124.62 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof.

18. The defendant Schuyler Junction New York Milkshed Co-operative, Inc., has filed a report with the Market Administrator for the month of September. On the basis of such report the defendant Schuyler Junction New York Milkshed Co-operative, Inc. is indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the sum of $1,603.00. The defendant Schuyler Junction New York Milkshed Co-operative, Inc., is also indebted to the Market Administrator in the sum of $55.28 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof.

19. On October 14, 1938, which was four days after the report was due, the defendant Central New York Co-operative Association, Inc., filed a report with the Market Administrator, which report was incomplete and inaccurate, and was false and untrue inasmuch as it stated that all the milk handled by said defendant was received from said defendant's own farm. Said defendant neither owns nor operates any farm whatsoever. All the milk handled by it during the month of September 1938 was received from producers. If the defendant Central New York Co-operative, Inc., had filed a true and correct report, such report would have shown an indebtedness to the Market Administrator for payment to producers through the Pro-

ducer Settlement Fund in the sum of $20,115.56, and plaintiff alleges that such sum is actually due the Market Administrator from the defendant Central New York Co-operative Association, Inc.,
180 for payment to producers through The Producer Settlement Fund. This defendant is also indebted to the Market Administrator in the sum of $712.25 as its pro rata share of the expense of administration of the orders pursuant to Article VIII thereof. Each of the defendants has failed and refused to pay its indebtedness to the Market Administrator, and is threatening to fail and refuse to comply with the provisions of the orders.

20. The defendant Jetter Dairy Company, Inc., has filed a report with the Market Administrator for the month of October. On the basis of such report the defendant is indebted to the Market Administrator in the sum of $14,616.05. The defendant is also indebted to the Market Administrator in the sum of $535.37, as its pro rata share of the expenses of administration of the orders pursuant to Article VIII thereof. The defendant has failed and refused to pay its indebtedness to the Market Administrator and is threatening to refuse to comply with the other provisions of the order.

21. Order No. 27 and official order No. 126 are identical in their terms and are administered by a market administrator, who was appointed to administer both order. So far as the effective regulation of milk in the marketing area is concerned, it is immaterial whether a handler is compelled to comply with one order or with the other, in that compliance with the terms of one order constitutes compliance with the terms of both. Unless the milk which moves in the current of interstate commerce and is burdening and obstructing and affecting interstate commerce and is therefore beyond the power of the state to regulate, is subject to the same regulation as the milk which is purely intrastate in character, regulation by the State of the
181 latter milk will be ineffective. If the defendants are not subject to official order No. 126, it follows that they are subject to the provisions of order No. 27, and the enforcement of order No. 27 is necessary to insure the effective control of the purely intrastate milk subject to official order No. 126.

22. Each of the defendants is a competitor of other handlers in the marketing area, and, unless each of the defendants is immediately restrained from continuing to violate the order to which it is subject, and is immediately compelled to comply with all of its provisions, other handlers will be encouraged, or compelled by economic necessity, to refuse to comply with the provisions of order No. 27 and official order No. 126, the prices received by producers for milk will be lowered, and the intervening plaintiff will suffer irreparable injury.

Wherefore, the intervening plaintiff demands:

(1) That the court adjudge and declare that the defendants are subject to provisions of official order No. 126.

(2) That the court issue a preliminary injunction preventing and restraining the defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of official

order No. 126, regulating the handling of milk in the marketing area, during the pendency of this suit.

(3) That the court issue a preliminary injunction commanding each of the defendants to pay all amounts now due and owing by them under the provisions of official order No. 126, and commanding each of the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said official order No. 126 during the pendency of this suit.

182 (4) That the court issue a preliminary injunction commanding the defendant Central New York Co-operative Association, Inc., to file true and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(5) That the court issue a permanent injunction preventing and restraining the defendants, their agents, officers, attorneys, employees, successors, and handling of milk in the marketing area.

(6) That the court issue a permanent injunction commanding the defendants, their agents, officers, attorneys, employees, successors, and assigns to comply with all the provisions of said official order No. 126.

(7) That, if the court shall determine that any of the defendants are not subject to official order No. 126, the Court adjudge and declare that such defendants are subject to the provisions of Order No. 27.

(8) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a preliminary injunction preventing and restraining such defendants, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of order No. 27, during the pendency of this suit.

(9) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a preliminary injunction commanding each of such defendants to pay all amounts now due and owing by it under the provisions of order No. 27, and commanding each of such defendants, its agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said order No. 27 during the pendency of this suit.

183 (10) That, if the court shall determine that the defendant Central New York Co-operative Association, Inc., is subject to order No. 27, the court issue a preliminary injunction commanding said defendant Central New York Co-operative Association, Inc., to file true and correct reports on the forms prescribed by the Market Administrator during the pendency of this suit.

(11) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a permanent injunction preventing and restraining such defendants, their agents, officers, attorneys, employees, successors, and assigns from violating the provisions of order No. 27.

(12) That, if the court shall determine that any of the defendants are subject to order No. 27, the court issue a permanent injunction commanding such defendants, their agents, officers, attorneys, em-

ployees, successors, and assigns to comply with all the provisions of order No. 27.

(13) That the intervening plaintiff be given all such other, further, and different relief as to this court may seem just and proper, together with judgment for costs.

Edmund F. Cooke
EDMUND F. COOKE,
Attorney for Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., Applicant for Intervention, 611 Walbridge Building, Buffalo, New York.

184 In United States District Court, Northern District of New York

UNITED STATES OF AMERICA ET AL., PLAINTIFF

vs.

ROCK ROYAL CO-OPERATIVE INC., ET AL.

Findings of fact, conclusions of law and order directing judgment

Filed March 21, 1939

The issues of this fact raised by the answers of the defendants, Rock Royal Co-operative, Inc., Schuyler Junction New York Milk Shed Co-operative, Inc., and Jetter Dairy Company, Inc., having duly come on to be tried by the Court at a term held by the undersigned without a jury, in the City of Albany, Northern District of New York, on the 27th day of December, 1938, and said trial having continued until January 17, 1939, and the plaintiff, United States of America, having appeared by John S. L. Yost, Charles J. McCarthy, and Harold L. Schilz, Special Assistants to the Attorney General; E. O. Mather, Senior Attorney, Department of Agriculture; Ralph L. Emmons, United States Attorney; and the intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and markets, having appeared by Milo R. Kniffen and Louis S. Wallach, Esqs.; and the intervening plaintiff, Dairymen's League Co-operative Association, having appeared by Seward A. Miller, Edward Schoeneck, and Paul J. McCauley, Esqs., and the intervening plaintiff, Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., having appeared by Edmund F. Cooke and Richard Cooke, Esqs., and the defendants, Schuyler Junction New York Milk Shed Co-operative, Inc., and Jetter Dairy Company, Inc., having appeared by Willard R. Pratt, Esq.; the defendant, Rock Royal Co-operative, Inc.; having ap-
185 peared by Charles W. Jenkins, Esq.; and Samuel Rubinton, Esq., and the Central New York Co-operative Association, Inc., having appeared by Messrs. Haskell & Foley, and Leonard Acker, Esq., and the allegations and proofs of the parties having

been fully heard, and due deliberation having been had, I decide and find as follows:

Findings of fact

1. The defendant Rock Royal Co-operative, Inc., is a cooperative corporation organized and existing under and by virtue of the Laws of the State of New York, and having its principal office and place of business at Rock Royal, in the County of Delaware, State of New York, at which place, it operates a milk receiving station, receiving milk from 82 producers in August 1938.

2. The defendant Central New York Co-operative Association, Inc., is a cooperative corporation organized and existing under and by virtue of the Laws of the State of New York and having its principal office and place of business in the City of Cortland, County of Cortland, and State of New York, operating milk receiving stations at Maybury Mills, Youngs Crossing, Kortright, and Sheds, N. Y., receiving milk from 484 producers in the month of August, 1938.

3. The defendant Schuyler Junction New York Milk Shed Co-operative, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Schuyler Junction, County of Herkimer, and State of New York, operating a milk receiving station at Schuyler Junction, N. Y., and in August, 1938, received milk from 60 producers.

4. Defendant Jetter Dairy Company, Inc., is a business
186 (proprietary) corporation, organized and existing under and by virtue of the stock corporation law of the State of New York, and having its principal place of business at Oriskany Falls, Oneida County, N. Y. Said corporation operates milk receiving stations at Solsville, Madison County, N. Y., Oriskany Falls, Oneida County, N. Y.; and Bridgewater, Oneida County, N. Y., receiving a minimum of more than 40,000 quarts of milk daily from milk producers. Said milk is all re-sold in the City of New York.

5. On June 7th, 1937, a Certificate of Incorporation of "Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.," hereinafter referred to as "Bargaining Agency," was filed in the Office of the Secretary of State, of the State of New York, whereby there was created a membership corporation. Said Certificate provided in part:

"10. The membership of the corporation, shall be limited to co-operative associations organized under or subject to the provisions of the Cooperative Corporations Law of the New York State, or of similar laws of any other State, and organized and controlled by milk producers."

Shortly thereafter, the Dairymen's League and Sheffield Cooperative became members of said new corporation or Bargaining Agency. Other cooperatives, operating country receiving plants, were solicited to become members of the Bargaining Agency, and some did so. The

officers, members, agents and servants of the Bargaining Agency, assisted in the formation of cooperative corporations among the milk producers delivering milk to plants owned by independent dealers, including defendant Jetter.

Said Bargaining Agency is the intervening plaintiff.

6. The Bargaining Agency, presented to the Secretary of Agriculture of the United States, and to the Commissioner of Agriculture of the State of New York, a proposed marketing agree-
187 ment and Order, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and requested a hearing thereon under the authority of the Act, and under the provisions of Chapter 383 of the Laws of 1937 of the State of New York. A true, correct and complete copy of such proposed marketing agreement and order, together with the notice of hearing thereon, is attached as Exhibit 21 to the stipulation of agreed facts, hereinafter referred to as "stipulation."

7. Pursuant to the provisions of Section 8b and 8c of the Agricultural Marketing Agreement Act of 1937 (Public No. 137, 75th Congress; 50 Stat. 246; 7 U. S. C. 601 et seq.) (hereinafter referred to as the "Act"), the Secretary of Agriculture of the United States (hereinafter referred to as the "Secretary"), on April 29, 1938, gave notice of public hearings on a proposed marketing agreement and a proposed Order regulating the handling of milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York, the said area being hereinafter referred to as the "Marketing Area." On April 29, 1938, the Commissioner of Agriculture and Markets of the State of New York pursuant to the provisions of Chapter 383 of the Laws of 1937 of New York, gave notice of public hearings to be held at the same times and places on an Order substantially identical with the aforesaid Order.

8. Pursuant to the terms of the said notices, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, pursuant to Section 10 (i) of the Act, and Chapter 383 of the Laws of 1937 of New York, joint public hearings were conducted by Glen J. Gifford, an employee of the Department of Agriculture, who was designated by the Secretary to conduct such hearings, and also designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on
188 behalf of the State. In accordance with the terms of said notice, the aforesaid public hearings were conducted at Albany, N. Y., on May 16, 1938; at Malone, N. Y., on May 17, 1938; at Syracuse, N. Y., on May 18, 1938; at Elmira, N. Y., on May 19, 1938; and at New York, N. Y., on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, N. Y., on May 24, 25, and 26, 1938, and at Albany, N. Y., on June 3, 4, 5, and 7, 1938. At the times and places aforesaid, all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed Order. The said hearings were attended by producers, representatives of pro-

ducers, handlers and consumers of milk sold in the marketing area. All of the defendants knew of said hearings, but none of the defendants appeared or were represented at any hearing.

9. On the 5th day of August 1938, the Secretary, pursuant to the provisions of Section 8c of the Act, made a finding and proclaimed that, as to milk produced for sale in the marketing area, the purchasing power of such milk during the base period, August 1909 to July 1914, could not be satisfactorily determined from available statistics of the Department of Agriculture, but that the purchasing power of such milk could be satisfactorily determined from available statistics of the Department of Agriculture for that portion of the post-war period between August 1921 and July 1929, inclusive.

10. Upon the evidence introduced at the said hearings, and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of the proposed Order (which notice was published in the Federal Register on July 23, 1938), the Secretary, on August 5, 1938, issued Order No. 27, regulating the handling of milk in the marketing area in the manner provided in the Act, said Order con-
189 taining the terms and conditions held by the Secretary to be authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner, as, and made applicable only to persons in the respective classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as aforesaid. Said order also contains the findings by the Secretary, required by the applicable provisions of the Act, to be made by him.

11. Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of, or in opposition to the findings and provisions, of any of them, of the proposed Order, the Commissioner of Agriculture and Markets, on August 5, 1938, made the findings required by Chapter 383 of the Laws of 1937 of New York, and issued proposed Official Order No. 126 which Order is substantially identical with Order No. 27 and contains the terms and conditions held by the Commissioner to be authorized by the applicable provisions of Chapter 383 of the Laws of 1937 of New York and no others.

12. On the 5th day of August 1938, the Secretary tentatively approved a marketing agreement regulating the handling of milk in the marketing area, and on or about August 6, 1938, delivered copies thereof to all handlers who would be subject to the provisions of the Order, but prior to the issuance of said Order, handlers of more than 50 per cent of the volume of milk covered by said Order, which was marketed within the marketing area, failed or refused to sign said marketing agreement.

13. Under authority of the provisions of Section 8c (19) of the Act, Secretary conducted a referendum of producers in order to assist him in determining whether the issuance of the Order was approved or favored by at least two-thirds of the producers who,

during the month of May 1938 (said month having, on the
190 25th day of July 1938, been determined by the Secretary to be a representative period), were engaged in the production of milk for sale in the marketing area. The referendum was held at the times and places set forth in a schedule of polling places issued by the Department of Agriculture prior to said referendum.

14. After conducting said referendum and after the refusal or failure of handlers of more than 50 per cent of the volume of milk covered by said Order, which was marketed within the marketing area to sign the tentatively approved marketing agreement relating to milk, the Secretary on the 24th day of August, 1938, made a determination, which determination was approved by the President:

(a) That the refusal or failure of said handlers to sign such marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(b) That the issuance of the Order is the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and

(c) That the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May, 1938, were engaged in the production of milk for sale in the marketing area, and who voted in the above-mentioned referendum.

Said findings and determination were published by the Secretary in the Federal Register on August 27, 1938, a copy of which is attached as Exhibit II to stipulation.

15. On August 25, 1938, the Commissioner of Agriculture and Markets, pursuant to the provisions of Chapter 383 of the Laws of 1937 of New York, found, after conducting a poll, that the issuance of Official Order No. 126 was favored by at least 75 per cent of
191 the producers of milk produced in the production area for the marketing area, and declared Official Order No. 126 to be effective on September 1, 1938. Said Order has not been terminated.

16. On August 26, 1938, the Secretary issued an Order which was published in the Federal Register on August 27, 1938, said Order providing that Order No. 27 should become effective on September 1, 1938. Order No. 27 has not been terminated.

Order No. 27 and Official Order No. 126 are hereinafter referred to as the "Order."

17. The Order established prices to be paid for milk according to its utilization. Milk for fluid consumption, known as Class I, is fixed arbitrarily, depending upon the market price of butter. Class 2A milk, utilized in the manufacture of cream for fluid consumption, is likewise arbitrarily fixed. Under such provisions, the price for fluid milk, has been since September 1, 1938, $2.45 per cwt.

Prices for milk manufactured into various milk products are the assumed market values thereof, based on market prices of the products into which said milk is manufactured, and which products are sold in country-wide competition. These prices are determined monthly by the Administrator in accordance with the formulas therefor contained in the Order.

18. The Metropolitan Marketing Area, as defined by the Order, includes the City of New York, and territory adjacent thereto, wholly within the territorial boundaries of the State of New York.

19. Milk dealers, licensed as such, under the provisions of Sections 253 and 257 of the Agriculture and Markets Law of the State of New York, alone, have the right to engage in the purchase and sale of milk in said Marketing Area, and the term "milk dealer" includes

"Any person who purchases or handles or sells milk, including * * * cooperative corporations and unincorporated cooperative associations."

192 A "dealer" who handles milk received at an approved plant is a handler within the meaning of the Order. All of the defendants are handlers as defined in the Order.

20. All handlers purchasing milk in the production area, are required to report to the Market Administrator monthly, a statement of the amounts of milk purchased by such handler, and the utilization thereof, Article V, Section 3. Based on the total reports, the Administrator computes the total value of the milk of such handler, based on the prices provided for in the Order, Article VI, Sec. 1. The result of such computation, is the handler's "net pool obligation."

21. By the provisions of Article VI, Section 2, the Administrator computes from all reports of all handlers, a so-called "uniform price," which is deemed to be the average price payable to producers for milk for such month, subject to certain differentials which are hereinafter referred to. Such computation is made after subtracting certain special payments to cooperatives, and to proprietary handlers, under the provisions of Article VII, Sections 5 and 6.

22. By the provisions of Article VII, Section 1, on or before the 25th day of each month, "each handler which is not a cooperative association of producers," is required to pay to each producer, the uniform price for all milk delivered by producers during the preceding month, and which was sold in the marketing area.

23. Cooperative associations, which are handlers, are not required to make payment for similar milk at the uniform price, or at any stated price.

24. All handlers are required by the provisions of Article VII, Section 8, on or before the 18th day of each month, to pay to the Market Administrator, for the Producer Settlement Fund "the amount by which his net pool obligation for the preceding

193 month is greater than the amount obtained by multiplying the net pool milk of such handler, by the uniform price." Applied to fluid milk, under this provision, each handler is required to pay to the Producer Settlement Fund, for all milk so utilized, the difference between $2.45 per cwt. and the uniform price, for all Class I milk.

25. Handlers selling milk received from producers in the production area, but marketed outside of the marketing area, are under no requirement to pay the uniform price for such milk, nor do they

pay into the Producer Settlement Fund for the difference between the uniform price and the actual market value of such milk, or otherwise. Such handlers are permitted to blend prices paid or purported to have been paid for such milk sold in other markets, with the uniform price announced by the Administrator for milk sold in the area, thereby reducing the actual price paid by such handlers, for milk sold in the Metropolitan Area, in competition with milk sold by the defendants.

The construction placed upon said provisions of Order No. 27 by the Secretary, is set forth in a pamphlet issued by the United States Department of Agriculture, Dairy Section, in October 1938, on the cover of which is printed "Market Administrator, New York Metropolitan Milk Marketing Area, 95 Madison Avenue, New York, N. Y." Page 14 of said pamphlet states:

"Uniform Pool Prices for Producers

"Handlers are required to pay the uniform pool, or blended price, calculated by the Market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class I milk outside of the Marketing Area. In such instance, the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. For the remainder of each producer's milk, the handler may pay such prices as he sees fit, but is required to furnish the producer with a statement of the percentage of the producer's milk paid for the uniform price."

194 Thus, the handler may multiply the total pounds of milk sold by it in the area by the uniform price; multiply the total pounds of milk sold in other markets and which is called "unpriced milk," by "such prices as it sees fit;" add the totals, and divide by the total pounds of milk, to obtain the average of "blended" price paid producers for all milk. If the price figured by the handler for unpriced milk, is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof.

26. While cooperative corporations are exempted from any requirement to pay either the uniform price to its producers, or any stated proportion thereof, and are permitted to blend prices of milk received in the production area in accordance with their sales of portions thereof in the marketing area, and portions in other markets, in addition, said cooperatives are, by the provisions of Title 7, Section 608c (5) (F), U. S. Code, permitted to "blend" any prices actually paid, with prices obtained or charged for unpriced milk produced outside of the production area.

27. The principal health authority in the Metropolitan Milk Marketing Area, as described by the Order, is the Department of Health of the City of New York, which inspects country receiving plants,

farms, dairies and other facilities of milk producers, as well as bottling and distributing facilities covering all milk sold within the City of New York.

Some of the milk receiving stations in the production area which are approved by the Department of Health of the City of New York, are also approved by the Health authorities of the City of Newark, State of New Jersey, and by the State of New Jersey for delivery to Newark and other cities and communities in said State.

195 28. The Official records of the Department of Health of the City of New York, as of August 1938, disclosed that there were 54,111 milk producers whose dairies had been inspected and approved for the production of Grade B milk for shipment to and sale in the City of New York; 6,109 milk producers, whose dairies had been approved for the production of Grade A milk for shipment to, and sale in the City of New York, making in all 60,220 milk producers. Said producers were located in the States of New York, Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania, and Vermont, herein referred to as the "production area." Included therein, are the producers delivering to defendant's plants.

29. Approximately 420 country receiving plants have been approved for the receiving and shipping of Grade B milk, and approximately 86 milk receiving plants have been approved for receiving and shipping Grade A milk, making a total of approximately 506 milk receiving stations in all, in said production area. Included therein, are defendants' receiving stations.

30. At all times hereinafter mentioned, defendant Jetter Dairy Company, hereinafter referred to as "Jetter," was a competitor of, and has sold milk in its business, in competition with dealers operating the country milk receiving stations in the New York Milk Shed above referred to, and who shipped milk received at said stations to the Metropolitan Area and sold the same in competition with milk sold by said defendant. The defendants Rock Royal Cooperative, and Schuyler Junction Cooperative, at all the times herein mentioned, have been and now are, selling milk to independent dealers for resale in competition with milk received at the country plants described in the next preceding paragraph.

196 31. Defendants' principal competitors are as follows:

a. The Borden Company and various corporations subsidiary thereto hereinafter referred to as "Bordens."

b. Various subsidiaries of National Dairy Products Corporation, hereinafter referred to as "National Dairy."

c. Dairymen's League Cooperative Association, Inc., hereinafter referred to as "Dairymen's League."

d. Other dealers, known in the industry as "independent dealers." Defendant Jetter is an independent dealer.

The defendant Jetter, the dealers purchasing the milk supply of the defendants Rock Royal and Schuyler Junction, and said competitors

above enumerated, insofar as they are engaged in the sale of milk for fluid consumption in the City of New York are all "milk dealers" as defined by Section 253 of the New York Agriculture and Markets Law, and are all "handlers" as defined by Article I, Subdivision 6 of Order No. 27 and Official Order No. 126.

32. Defendant Jetter, customers of defendants Rock Royal and Schuyler Junction, and their competitors, are also known in the industry as distributors. The Dairymen's League occupies a dual capacity as a cooperative agent of producers and as a distributor. The Dairymen's League, as a distributor, sells milk in competition with the defendant Jetter and other distributors, including distributors purchasing their supplies from it, and is a factor in the price which defendant Jetter and their competing dealers can demand and procure for fluid milk.

33. Dairymen's League was in August 1938 operating 109 approved milk receiving plants in the New York Milk Shed, receiving milk from 11,391 producers.

34. The records of the Department of Health of the City of New York, show that as of August 1938 Bordens operated 65 approved milk receiving stations, receiving milk from 8,404 producers.
197 All of said producers were and are members of Dairymen's League; milk of said producers is delivered to Bordens and payment therefor, is made by Bordens to said Dairymen's League, which in turn pays said producers, and also pays producers delivering milk to its own plants.

35. The number of approved producers included in Dairymen's League membership was in August 1938 upwards of 19,500.

Reports to the Market Administrator, show that total utilization of milk in the marketing area by all handlers, was as follows:

	For month	Per day
	Pounds	*Pounds*
September	203, 478, 066	6, 782, 602
October	211, 945, 396	6, 836, 980
November	204, 742, 807	6, 824, 743

36. The Dairymen's League, which has receiving stations approved for the Metropolitan Area, and also for the State of New Jersey, and various localities therein, reported a total utilization of milk in Class I in the marketing area, as follows (Exhibits 11–12–54):

	Total for month	Total per day
	Pounds	*Pounds*
September	61, 553, 968	2, 051, 798
October	71, 137, 678	2, 294, 763
November	70, 033, 283	2, 334, 427

Gain per day October over September, 242,965 pounds; November over October, 39,664 pounds.

	Total unpriced Class I milk reported to producers, Exhibits 11, 12, 54	Total unpriced milk sold in New Jersey, Exhibit 81	Total unpriced milk reported sold in market other than New Jersey
Sept.	35,586,543	10,208,500	4,632,91
Oct.	36,619,930	10,457,155	5,737,68
Nov.	35,374,848	10,143,275	

37. The Milk Control Board of the State of New Jersey, fixed a base price of $2.76 per cwt. to producers for 3.5 milk F. O. B.
198 country milk plants, which price was in effect in New Jersey from September 1st and still continues.

Said Milk Control Board of the State of New Jersey fixed the wholesale price from dealers to stores, at 11¢ per quart of milk bottled in glass in two rural districts, and at 12¢ per quart of milk in glass from dealers to stores in the three more heavily populated districts in the State, and fixed a minimum price to consumers out of stores in the two rural districts, of 12¢ per quart, and in the three heavily populated districts, of 13¢ per quart.

No resale prices are fixed in the State of New York, either from dealers to stores, or stores to consumers.

The fair market value of "unpriced" Class 1 milk produced in the production area and sold by handlers in New Jersey (based on producers and resale prices fixed by Control Board, in September, October, and November 1938, was $2.76 per cwt.

38. The uniform price for 3.5 milk in the 200 milk zone fixed by the Administrator, was as follows: September, $1.87; October, $1.91; November, $2.10.

The Dairymen's League paid its producers a base price for 3.5 milk in the 200 mile zone, in cash and certificates of indebtedness (considered as cash), as follows: September, $1.75 per cwt.; October, $1.81 per cwt.; November, $2.01 per cwt.

The difference between the value of Class 1 milk sold by the Dairymen's League in New Jersey (as fixed by the New Jersey Control Board), and the prices paid for the same to producers per cwt., was as follows: September, $1.01 per cwt.; October, 95¢ per cwt.; and November, 75¢ per cwt.

$1.01 per cwt. on 10,208,500 pounds of milk sold in New Jersey, equals $103,105.85.

39. The amount by which the price actually paid for Class 1 milk sold in the marketing area was reduced by "blending" proceeds of New Jersey milk with proceeds of New York milk, as applied generally to the Dairymen's League, was as follows:

	Total volume sold in New Jersey	Difference between New Jersey price and price paid producers
	Pounds	
pt.	10,208,500	$103,105
t.	10,457,153	99,342
v.	10,143,275	76,074

The Dairymen's League, as a distributor, was engaged only in the holesale or dealer-to-store and dealer-to-institutions trade. Total les reported by the Dairymen's League of Class 1 milk sold in the arketing area, included its own wholesale business and amounts of lass 1 milk furnished to the Borden Company, delivered to its wn stations and milk sold to other distributors. The following is statement of the total amounts of milk utilized by the League in s own wholesale trade; the total amount of milk sold by it in lass 1, including amounts handled by Bordens, other dealers, and e League in its own distributing business, and a statement by which e Class 1 price would be reduced by applying the difference beween the actual value of milk sold in New Jersey and the total tual price paid therefor to producers by the League:

	Total amount of milk sold by Dairymen's League in class 1, including other dealers	Gain on N Jersey milk applied to all sales class 1 milk sold to dealers and in own business, in area
	Pounds	*Per hundredweight*
tember	61,553,968	$. 1674
ober	71,437,678	.1396
vember	70,033,283	.1086

	Total sales by league in marketing area in its own wholesale business	Gain on New Jersey milk applied to all class 1 milk sold by league in its own wholesale business
	Pounds	*Per hundredweight*
tember	11,292,149	$0.9130
ober	12,236,083	.8118
vember	10,692,429	.7114

40. The Administrator paid to cooperatives under the provions of Article VII, Section 5, the sums hereinafter stated, which are divided into total payments, payments to Dairymen's 0 League, and payments to other cooperatives:

	Total payments to cooperatives	Paid Dairymen's League	Sheffield producers	Paid to cooperatives
tember	$66,374.80	$59,455.59	$5,949.88	$969.33
ober	70,062.29	60,794.07	5,894.88	3,372.34
vember	71,805.51	57,280.32	4,824.50	9,700.69

41. The amounts received by the Dairymen's League under Article VII, Section 5, when applied to all milk sold by it in Class 1, including sales to Bordens and other dealers, and when applied only to milk sold by it in its own business as distributor, were as follows:

	Applied to all milk	Applied to own distributing business
	Per hundredweight	*Per hundredweight*
September	$0.0965	[illegible]
October	.0868	[illegible]
November	.0817	[illegible]

42. The Dairymen's League was paid by the Administrator under Article VII, Section 6 (1) for receiving milk which was moved to other plants for manufacture, 23¢ per cwt. plus certain mileage charges for transportation. These figures, broken down, are as follows:

	Total lbs. of milk	Total amount paid	Total allowance for receiving milk
September	28,374,541	$91,530.17	$65,261.4[illegible]
October	22,920,087	73,994.62	52,716.[illegible]
November	(1)	6,228.27	(1)

[1] NOTE.—No records are available as to the pounds of milk on which market service payments were claimed, nor is there any information in the record as to whether manufacturing plants shipped fluid milk and received the 30¢ differential provided for by Article VII, Section 6 (2).

The market service payments made for receiving milk, when applied to Class 1 milk reported by the League, both in its own business and as to total sales, including other dealers:

201

	Applied to all class 1 sales	Class 1 sales on own business
	Per hundredweight	*Per hundredweight*
September	$0.1060	$0.5779
October	.0741	.4380
November	(1)	(1)

[1] No adequate data available.

43. Applying the base price paid by the Dairymen's League to the uniform price fixed by the Administrator (see finding No. 39), shows payments by the League, less than the uniform price, as follows:

	All milk utilized in area	League price less	Total payment less than uniform price
	Pounds	*Per hundredweight*	
September	118,911,179	$0.12	$142,693
October	121,588,142	.10	121,588
November	114,560,639	.09	103,204

Payments less than the uniform price (paid on milk in the area only), when applied to all Class 1 milk sold by the League, including Bordens and other dealers, and when applied to sales in League's own distributing business, were as follows:

	Total amount	Applied to all milk	Applied to own business
		Per hundredweight	
ptember	$142,693	$0.2318	$1.2636
ctober	121,588	.1709	.9936
ovember	103,204	.1473	.9652

44. Summarizing the total competitive advantage to the Dairymen's League from sales in New Jersey, payments under Article VII, Sections 5 and 6, Producer Settlement Fund, and by payment to producers for milk at less than the uniform price, the Dairymen's League had the following competitive advantages, as shown by the preceding tables:

Competitive advantage applied to all sales

	September	October	November
	Per hundredweight	*Per hundredweight*	*Per hundredweight*
J. Sales	$0.1674	$0.1396	$0.1086
. VII, Sec. 5	.0965	.0868	.0817
. VII, Sec. 6	.1060	.0741	(1)
payment less than uniform price	.2318	.1709	.1473
	.6017	.4714	[2].3376

NOTE.—No adequate data as to the amounts involved or on which payment was made market service in November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, Section 6 (2) was claimed or paid.
NOTE.—November missing.

Competitive advantage if applied only to League Distributing Business

	September	October	November
	Per hundredweight	*Per hundredweight*	*Per hundredweight*
. sales	$0.9130	$0.8118	$0.7114
VII, Sec. 5	.5265	.4969	.5357
VII, Sec. 6	.5779	.4380	(1)
payment less than uniform price	1.2636	.9936	.9652
	3.3010	2.7403	[2]2.2123

NOTE.—No adequate data as to the amounts involved or on which payment was made for market service in November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, Section 6 was claimed or paid.
NOTE.—November missing.

45. Sheffield Farms Company, a subsidiary of National Dairy, in September utilized 40,083,075 pounds of Class 1 milk in New York State, and 6,426,443 pounds of milk in New Jersey, as well as milk from other markets. For out-of-market milk, on September 24, 1938, the Company negotiated with its producers to pay the uniform price in full payment for such out-of-market milk. The base price paid by Sheffield Farms was accordingly $1.87, or 89¢ per cwt. less the

price fixed by the New Jersey Control Board. This amounted to $57,191.96. Applied to Class 1 milk used in the area (40,083,075 pounds), this amounted to $.1427 per cwt. on said milk, and the Class I price paid by the Sheffield Farms Company was thereby reduced in that amount. The Sheffield Company received payments under Article VII, Section 6, from the Producer Settlement Fund for market service payments, $38,224.57, which, when applied to Class 1 milk, amounted to $.0936 per cwt., and was equivalent to a discount
203 thereon. Combining the two figures, the Sheffield Company has a competitive advantage of $.2363 arising out of said two items for September milk.

In October the Sheffield Company sold 6,737,848 pounds of milk in New Jersey, for which it paid $1.88 per cwt. The difference between the New Jersey Control price of $2.76 and said price was 88¢, and totalled $59,292.64. The Sheffield Company paid its producers for all milk used in the area, at a base price of $1.87 per cwt., or 4¢ under the uniform price, on 67,306,590 pounds of milk, amounting to $25,922.63. The Company also received a market-service payment of $26,430.96. The three concessions aggregate $91,656.23, which, when applied to 43,662,117 pounds of Class 1 milk, amounted to a concession or reduction of $.2099 per cwt.

46. No evidence was received showing the actual operations of the Borden Company, either quantity or utilization of milk purchased through the Dairymen's League, nor was any evidence received as to quantity of milk purchased by Sheffield Farms Company from cooperatives, or the prices paid by either Bordens or Sheffields for milk purchased from cooperative sources.

47. By the provisions of the Order, proprietary handlers are required to pay producers the minimum prices stated therein and are obliged to pay their own plant receiving costs. Dealers buying from cooperatives are required by the Order to pay cooperatives only the minimum prices without any necessity upon such handlers to pay, or upon such cooperatives to charge, any sum as a handling charge to be applied on the cost of operating the milk-receiving station.

48. The average daily fluid shipments of milk to New York City for the months of August and September 1938 were approximately as follows:

	Quarts
By rail, in tank cars	1,380,000
By rail, in 40-quart cans	140,000
By automobile tank trucks	1,560,000

204 Fluid milk shipments to New York are approximately 50% by rail and 50% by tank truck.

The allowances for trucking milk which are provided in Article VII, Section 6, Sub-section 1 of Order No. 27 and Official Order No. 126, represent the approximate cost of shipping milk by tank trucks.

The standard rate, approved by the Interstate Commerce Commission, for shipments of milk by rail in tank cars from points 201–210

miles from New York City, is 2.7 cents per gallon equivalent to 31.2 cents per hundredweight. The freight differentials in Order No. 27 and Official Order No. 126, are approximate to the nearest half-cent of the differences per hundredweight between this standard tank car rate for the 201–210 mile zone and such rate for each other ten-mile zone. These standard tank car rates are 70% of the standard rate for the shipment of milk in 40-quart cans in less than carload lots. Truck competitive rates have been established at certain points which are somewhat lower than the approved standard tank car rates for those points.

Where shipment is made by rail in tank cars or in cans to a city plant not on railroad tracks, there is an additional cost for transportation between the rail terminal and the city plant. Where shipment by tank truck is from country receiving plants to city plants, the tank truck delivers the milk to the city plant and the trucker's charge or truck operating cost covers such delivery to the city plant.

The truck rates for the first 25 miles are 9¢ per cwt., and beyond that zone, $\frac{1}{10}$ of 1¢ per cwt. for each additional mile, amounting to 1¢ for each 10 miles.

49. Establishment of freight differentials was designed to make the base delivered cost of all milk to New York City the same.

205 Milk delivered to New York by truck, in the various zones, costs the handler, according to zones, the actual freight, plus or minus freight differentials, according to whether the point of origin is less or more than 200 miles. Without reducing the schedules to each 10-mile unit, the net freight cost, after applying the differentials, in various typical zones, is as follows:

Zone	Actual freight	Differential	Total cost
3-mile	0.09	+0.13	0.22
0-mile	.115	+.105	.225
0-mile	.165	+.07	.235
0-mile	.215	+.035	.25
0-mile	.265	.00	.265
0-mile	.305	−.02	.285
0-mile	.315	−.02	.295
0-mile	.365	−.045	.32
0-mile	.415	−.08	.335
0-mile	.465	−.09	.375
0-mile	.515	−.115	.40
0-mile	.565	−.14	.425

The Jetter Dairy Company, being in the 231–240 mile zone (actually 250 miles by highway), its total freight cost is 6½¢ more per cwt. than milk in the 25-mile zone. It is also higher than in any intermediate zone. Defendant, Schuyler Junction Cooperative's plant is at Schuyler Junction, N. Y., in the same zone; the plant of defendant, Rock Royal Cooperative is in the 176–180 mile zone, and the plants of the defendant Central Cooperative are principally beyond the 200-mile zone, so that the total delivered cost of said milk is greater than the delivered cost of upwards of —% of all milk sold in the area.

Milk by volume within various zones is as follows:

206

Miles from New York	Percent
Within 50	1
" 100	
" 150	
" 200	

50. By the provisions of Article VI, Section 8, handlers receiving milk in 18 counties therein enumerated, in making return to the Administrator, are permitted to deduct 20¢ per cwt. for all net pool milk received from producers at plants in said counties. Producers in said counties are paid 20¢ per cwt. more for all milk, than producers in other localities, including all producers delivering to the several defendants herein.

Accordingly, the price received by producers delivering to the three Cooperative defendants, is reduced by the increased amount of payments to producers in said 18 preferred counties, and in effect, moneys paid by handlers for milk of said defendant cooperatives, are in part expropriated to make such preferential payment to producers in the counties receiving such preferential payments.

51. In effect, the uniform price return directed to be paid to producers delivering to the Jetter Dairy Company, is reduced by payment to producers in the 18 preferential counties, and moneys of said producers delivering to defendant Jetter, and other proprietary handlers, ouside of said preferred counties, are expropriated to make payment to producers therein of payment of 20¢ per cwt. in excess of the uniform price.

52. All producers do not receive the same base price for milk. By the terms of the Order, and by its application in practice, there is a differentiation between producers, in payments made as follows:

a. Cooperative corporations are not required to pay the uniform price.

207 b. Cooperative handlers, which are also distributors, may sell milk direct to storekeepers and consumers at less than prices fixed by the Order, plus processing and delivery charges, and reduce payments to producers, to the extent of such underselling.

c. Cooperative corporations may charge back to their producers losses in operations as milk distributors whereas proprietary handlers cannot do so.

d. Producers in the 18 counties enumerated in Article VII, Section 8, receive 20¢ per cwt., preferential payment, on all their milk.

e. Payment to producers outside of the 18 counties above referred to, is reduced below the true uniform or average price for all milk, by the amounts deducted from them to make up the 20¢ plus paid to producers in said 18 counties.

f. Prices paid to producers delivering to handlers, whether cooperative or proprietary, which sell fluid milk in the Metropolitan Area, and also in the State of New Jersey and other markets, are paid less than the actual value of milk delivered by them, by the process of "blending" arbitrary prices for milk sold outside of the

market, which bear no true relations to the actual value thereof, with prices charged for milk sold in the area.

g. Prices received by all producers delivering to either proprietary or cooperative handlers which do not receive the cooperative payments provided for by Article VII, Section 5 of the Order (the greater part of which is paid to the Dairymen's League Cooperative Association), are reduced by the amounts deducted from the uniform price, and paid from the Producer Settlement Fund to the Dairymen's League Cooperative Association, and such other cooperatives as receive such payments.

53. Grade B milk sold for fluid consumption in the Metropolitan Area, brings the same price, regardless of butterfat content.

54. Handlers receiving milk containing more than 3.5 butterfat content are at a disadvantage in finding markets, by reason of the extra price for each point of butterfat in excess of 3.5 required to be paid to producers by the provisions of Article VII, Section 3 of the Order. Said handlers are, in effect, required to pay a greater base price for said milk by utilization, than is paid by handlers purchasing lower testing milk, and must either sell at a loss or lose their customers.

208 55. Handlers whose milk receiving stations are beyond the nearby freight zones, are at a disadvantage in selling milk, in that the base price of said milk delivered in New York, is increasingly high, as the handlers' receiving stations are at increasing distances from New York.

56. By the terms and application of the Order, there is a differentiation between handlers who sell milk at wholesale and retail in the marketing area, and the prices required to be paid by said handlers for fluid milk, in the following particulars:

a. Cooperative handlers, who are also distributors, are under no requirement to pay any stated price for milk sold to stores and consumers.

b. The price accounted by cooperative handlers to the Producer Settlement Fund, is reduced by payments to them out of said Fund, pursuant to Article VII, Section 5.

c. The large handlers, both cooperative and proprietary, being principally National Dairy subsidiaries, Borden's and subsidiaries, Dairymen's League and several smaller companies, including Queensboro Farm Products, Inc., and the several companies operated by Aaron J. Rubenfeld, which are engaged in manufacturing milk into milk products, receive so-called "market service payments" under Article VII, Section 6, which are not and cannot be received by small handlers, who combine fluid milk operations with manufacturing on a small scale in their own plants, thereby, in effect, substantially reducing the prices paid by such large handlers for milk utilized in fluid form.

d. Proprietary handlers purchasing direct from producers, are obliged to pay for the cost of maintenance and operation of milk

receiving stations, and the cost of receiving milk, whereas handlers purchasing from cooperative associations, are required to pay only the base price for such milk. Such receiving station or plant handling costs are from 15¢ to 30¢ per cwt.

e. By the terms and application of the Order, the same large handlers referred to in the next preceding paragraph, both proprietary and cooperative, in making payment for all milk purchased in the production area, are permitted to pay a blended price, which price is computed upon the prices fixed in the Order for milk sold in the marketing area, and with arbitrary prices fixed by such handlers as they see fit, for milk sold outside of the area, which milk is known as "unpriced milk," thereby, in effect, reducing the price paid by such handlers for fluid milk sold in the marketing area.

209 None of the defendants are engaged in the manufacture of milk products. None of said defendants are engaged in marketing milk outside of the marketing area.

f. National Dairy subsidiaries, including Sheffield Farms and the Borden Company, purchase milk from cooperatives. The Dairymen's League, which is also a distributor, is a cooperative. Said companies, by the reports filed with the Administrator, handle more than 50% of the fluid milk sold in the area, and the greater part of milk sold out of the area.

g. Handlers purchasing milk in areas producing milk of high butterfat content, pay a higher price for milk utilized in fluid form than handlers purchasing milk of less butterfat content, although the resale price of such milk in New York City, is neither greater nor lesser by reason of butterfat content.

h. Handlers purchasing milk beyond the 25-mile zone, in each succeeding zone, pay a greater delivered cost for milk delivered to the marketing area, for the reason that the freight differentials established by the provisions of Article IV, Section 3, are not comparable to the actual difference in freight costs, said unfavorable difference increasing from ½¢ per cwt. in the 50-mile zone, to 22½¢ per cwt. in the 500-mile zone.

1. Defendant Rock Royal's plant is in the 176–180-mile zone; the plants of the defendant Jetter and Schuyler Junction Cooperative are in the 231–240-mile zone, and the several plants of the defendant Central Cooperative, are beyond the 200-mile zone.

57. The Market Administrator has no facilities for checking the actual disposition of milk reported by various handlers, nor for checking whether cream withdrawn from storage, is cream which was already in storage, or is cream delivered to the storage plant and immediately withdrawn. The size and complicated nature of utilization of milk by the large companies, their plant-to-plant transactions within their own business, and their in-market and out-of-market sales, make it impractical for the Administrator to check the accuracy of reported utilization, and disposition except from the books of such large handlers.

58. In the fierce competition for fluid milk business in the Metropolitan Area, hereinafter referred to, there is a strong incentive
210 to manipulate milk between plants and in and out of the market by the large companies, having facilities so to do, for the purpose of obtaining a competitive advantage. Such large companies have made full use of such competitive advantage in application of the Order to their businesses.

59. Prices fixed by the Administrator pursuant to the formulas contained in the Order, for approved milk utilized in the manufacture of cheese for the months of September and October 1938, were less than the prices paid by cheese factories purchasing unapproved milk, which was not subject to regulation of any health authority, to the extent of 20¢ per cwt. The cost of producing unapproved milk is less than the cost of producing approved milk. Bordens, National Dairy, and the League were able to, and did purchase approved milk for such cheese porposes, since they are also engaged in such business, and thereby enjoy discriminatory advantage.

60. The Dairymen's League News, for May 17, 1938, Exhibit 24 in evidence, states "Today, More than half of all milk sold in the Metropolitan district, is handled through stores."

The average minimum delivered cost per quart of fluid milk delivered to stores in New York City, by handlers, based on the prices fixed in the Order, has been since September 1st 1938, and now is, ¼¢ per quart.

61. On September 1, 1938, a majority of the handlers selling Grade milk in the dealer-to-store trade, raised the price of such milk to ¼¢ per quart.

62. On September 1, 1938, the Jetter Dairy Company had been selling to one Weintraub, 30 cases of milk daily, at 9¾¢ per quart. On September 4, 1938, intervening plaintiff, Dairymen's League solicited said account, and by selling at 9¢ per quart, acquired 10 cases of said trade. Gold Medal Farms, Inc., by same price cutting, as the League, on same day also acquired 10 cases of said trade.
1 In order to retain the balance of 10 cases of such trade, Jetter Dairy Company was compelled to and did reduce its price to 9¢ per quart on September 5, 1938.

63. Within two weeks after September 1st, milk was being sold generally in the dealer-to-store trade in the City of New York at from 8¢ to 9¢ per quart. The Sheffield Farms Company, in order to capture the trade of Herman Lavender, furnished said Lavender milk at 9¾¢ per quart; rebated to said Lavender ¾¢ per quart on purchases, and in addition thereto, delivered 13 quarts per case, one extra quart of milk further reducing the price ¾¢ per quart, making the net cost to said Lavender, 8¼¢ per quart.

The Sheffield Company sold milk to one Rose Paley; gave her 35 cases of milk free, in order to induce her to buy "Breakstone milk." Prior to that time, the Dairymen's League had given the same with 35 cases of free milk to procure her to buy Dairymen's League

milk. The Grandview Dairy Company refused to give Mrs. Paley any free milk, and she discontinued buying from them, obtaining her requirements from Sheffields and Dairymen's League, who made the concessions above referred to. Sheffields billed milk to Mrs. Paley at 9¾¢ per quart, collected that amount, and rebated to her in cash at the rate of ¾¢ per quart. The Dairymen's League charged her 9¢ per quart.

64. The practices above referred to were general throughout the milk industry, and the capture of trade by price cutting is known as "chiseling."

65. Certain producer dealers, with large number of cows, are not subject to the Order. The Balsam Dairy Company, selling milk in Brooklyn, sold milk to Israel Hock, a storekeeper, at 8½¢ per quart in September 1938.

66. It is common practice in the marketing area for storekeepers to buy milk from several dealers, varying the quantities pur-
212 chased from each in accordance with the price concessions, free milk, or other concessions, which such storekeepers can obtain from one dealer as against another.

67. From September 1st, 1938, to January 1st, 1939, the Jetter Dairy Company lost 240 cases of daily trade to competitors by reason of concessions. It recaptured upwards of 40 cases of this trade, but in doing so was obliged to give in free milk, cream, and cash, several hundreds of dollars. In addition, said defendant sustained a loss on each quart of milk sold by it through the Jetter Dairy Company or the Triboro Milk & Cream Co., which sells milk received from producers delivering to the Jetter Dairy Company. In order to stop further losses of trade captured by competitors who undersold the Jetter Dairy Company and Triboro Milk & Cream Company, the said defendant was obliged to reduce the price of milk charged to all customers to prices ranging from 8¢ to 9¢ per quart, in order to meet such competition. The principal stockholders of Jetter Dairy Company and Triboro Milk & Cream Co. are identical.

68. The Order contains no provision prohibiting unfair methods of competition and unfair trade practices, as permitted by Title 7, Section 608c (7) (A).

69. Intervening plaintiff, Dairymen's League is a member of a so-called "Farm Conference Board," being the only member of the Board engaged in the purchase and sale of milk. Said Farm Conference Board proposed, and the Dairymen's League actively sponsored and supported in the New York State Legislature, a proposed Act known as the "Rogers-Allen Bill," which was enacted as Chapter 383 of the 1937 Laws of the State of New York. Pursuant to the provisions or purported provisions of said Act, hereinafter referred to as the "Rogers-Allen Law," the intervening plaintiff, Bargaining Agency, was formed. Several directors of the Dairymen's League acted as incorporators of said corporation, and were active in the creation and organization thereof.

213 70. Following incorporation of the Bargaining Agency, its officers, directors, and employees procured producers selling milk to proprietary handlers, to form many cooperative corporations for the purpose of joining the Bargaining Agency. Cooperatives were formed around the three plants operated by the defendant Jetter; which were known as the Solsville Milk Producers Cooperative, Inc.; the Oriskany Falls Milk Producers Cooperative, Inc., and the Bridgewater Milk Producers Cooperative, Inc. Only the Bridgewater Cooperative joined the Bargaining Agency. The Bargaining Agency, in some instances, advanced the fees for filing certificates of incorporation.

71. In July 1937, E. M. Harmon addressed a meeting of the Bargaining Agency with regard to "government aid" in a marketing program. On October 25, 1937, a committee of attorneys was appointed by the Bargaining Agency to prepare a surplus program or plan. In November 1937, Allan Miller, attorney for the Dairymen's League, presented to said committee, a proposed milk-marketing agreement. E. M. Harmon, employee of the Dairy Section of the Department of Agriculture of the United States, spent three days monthly commencing with November 1937, with representatives of the Bargaining Agency.

Conferences continued through January and February 1938, and February 20, 1938, a directors' meeting of the Bargaining Agency was held in Syracuse, N. Y., in which the program, which ended in the adoption of the Federal and State marketing orders, was formally launched. An account thereof is contained in Exhibit 23–C to the stipulation in evidence, which quotes Edmunde F. Cooke, counsel for the intervening plaintiff, Bargaining Agency in this action, as saying, "in the long run, the Producers' Bargaining Agency will prove to the milk industry of the State that their program is the right one."

In the Market News issued by the Bargaining Agency for April 1938, reference was made to said Marketing Order program. Said news stated, "just as soon as this plan has met the approval of the Federal Officials, he will present it to our readers complete, and Chairman Rolfe, with the assistance of Executive Secretary Baldwin and fieldman, have arranged many meetings among the members, in which the plan will be discussed in detail."

72. Thereafter, the Bargaining Agency presented to the Secretary of Agriculture of the United States and to the Commissioner of Agriculture of the State of New York, the proposed marketing order, referred to in the 6th Finding of Fact herein. The referendum described in Finding No. 13 hereof, was then held.

73. Prior to the referendum, there were sent to each producer as to whom available information indicated that he might be eligible to vote in said referendum (a) a copy of the Order as issued August 1938, by the Secretary; (b) a schedule of polling places (Exhibit to stipulation); (c) a pamphlet prepared by the United States

Department of Agriculture, entitled "Questions and Answers on the Federal-State Milk Program for New York" (a copy of which pamphlet is Exhibit 8 to stipulation); and (d) a pamphlet prepared by the United States Department of Agriculture, entitled "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27" (a copy of which pamphlet is Exhibit 9 to stipulation). Approximately 70,000 copies of the said Order, the said schedule of polling places, and the said pamphlets were sent through Federal-State Agencies to such producers. A copy of letter accompanying such material sent to producers in New York State is Exhibit 10 to stipulation.

74. Prior to said referendum and poll, the Bargaining Agency and Dairymen's League, in furtherance of their scheme, carried on an elaborate campaign of false and misleading propaganda through the medium of newspapers, radio speeches, letters, pamphlets, and otherwise, calculated to influence milk producers entitled to vote therein, or whose votes were entitled to be cast on their behalf by cooperatives.

215 On April 29, 1938, the Secretary signed a notice of hearing on the proposed Marketing Order, and published said notice to the producers in the New York Milk Shed, accompanied by a proposed Order, stating however:

"The provisions proposed by the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., are set forth below as possible provisions of a marketing agreement and of an order. Their publication in this form is for the convenience of interested parties and is not to be considered as in any way signifying their approval by the Secretary of Agriculture."

Hearings on the proposed Federal and State Orders were held jointly thereafter. Coincident therewith, and on or about April 28, 1938, the Bargaining Agency, issued a 24-page booklet, on the cover of which was contained the following statement: "Mr. Dairyman * * * Save this Booklet. The Plan it Explains May Save your Farm." Said booklet contained statements which were grossly untrue, and in particular stated on page 1:

"Principles Upon Which the Order Is Based

"The fundamental requirements of the industry which this Order seeks to establish are five in number, viz.:

"1. An equal purchase price to be paid by all dealers for milk for the same use.

"2. An equal share to each producer of the benefits of the fluid market.

* * * * * * *

"Complete simplicity in the terms of the Order is impossible partly because of the complexity of the subject dealt with and partly because of the impossibility of giving the desired legal effect to certain pro-

ently believed that the present Order can successfully withstand any ssaults upon its legality."

Prior to the vote on said proposed orders, widespread, innumerble statements and representations were made to all producers in the rea, by both the Bargaining Agency and Dairymen's League, their nembers, agents, servants, and affiliates, to the effect that all handlers ould be required to pay the uniform price to all producers, and that no handler had a competitive advantage over the other. Specifically, as an example, the Dairymen's League News, the official newspaper of the Dairymen's League on August 16, 1938, contained the following statements on page 5:

"Uniform Pool Prices for Producers

"The order requires handlers to pay the uniform pool, or blended rice, calculated by the market administrator, to all producers delivering milk during month unless the handler has received milk and old it as Class 1 milk outside of the marketing area. In such an nstance the handler is required to pay the uniform price to each roducer on that part of the milk received which is equal to the roportion of his milk to which minimum prices are applicable.

* * * * * * *

"Operation of the pool assures all handlers the same cost for milk old in the marketing area, and assures for that milk payments to ll producers at a uniform rate except for the transportation and ther differentials provided."

Thereafter, the Department of Agriculture in August, 1938, issued printed pamphlet under the seal of the Department, stating on ages 12 and 13:

"The order requires handlers to pay the uniform pool, or blended rice, calculated by the market administrator, to all producers delivering milk during any month unless the handler has received milk nd sold it as class 1 milk outside of the marketing area.

* * * * * * *

"Operation of the pool assures all handlers the same cost for milk old in the marketing area, and for that milk assures payments to ll producers at a uniform rate except for the transportation and ther differentials provided."

The foregoing statements were and are untrue. Identical provisions of Article 1 of said Orders, provide:

"5. 'Producer' means any person who produces milk which is delivered to a handler at a plant which is approved by any health uthority for the receiving of milk to be sold in the marketing area.

"6. 'Handler' means any person who engages in the handling of ilk, or cream therefrom, which was received at a plant approved y any health authority for the receiving of milk to be sold in the arketing area.

* * * * * * *

217 "This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment."

The only provision in said Orders directing payment to producers is as follows:

"Article VII. Payments to Producers

"Section 1. Time of Payment.—On or before the 25th day of each month, each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article."

218 75. Said representations as to the text and effect of said proposed marketing Order, were untrue. There was no provision requiring payment of a uniform price to all producers, or any requirement that any stated price or any price bearing relation to the prices by the Order, be paid to producers of cooperatives including the Dairymen's League. By reason of the differentiation between various producers as to locality, and otherwise, stated in Finding No. 52 herein, there was no general equality of payments to producers.

76. The statement to the effect that all handlers pay the same cost for milk in the marketing area, was also untrue for the reasons stated in paragraphs 54 through 58, inclusive.

77. Many of the producers who voted in the referendum and poll, expressed only their favor or disfavor with regard to a marketing order which assured equal treatment and equal payments to all producers, and an equal price to be paid for milk by all handlers.

78. The results of the aforesaid referendum were as follows: 45,644 votes cast, of which 7,017 were rejected as invalid. Of the 38,627 votes counted as valid, 33,663 votes, or 87.1 percent were in favor of the issuance of the Order, and 4,964 votes, or 12.9 percent were opposed thereto. Of the 7,017 votes which were rejected, 6,547 votes were rejected either because the voters were members of cooperative associations which had cast ballots for all of their members, or because the voters were not qualified to vote, not having delivered milk to an approved plant during the month of May 1938. Of the votes rejected for this reason, 5,110 votes were in favor of the issuance of the Order, and 1,437 votes were opposed thereto. 470 votes were rejected because the voter had failed to mark his ballot either for or against the Order, or because it was not possible to determine whether the ballot was marked for or against the Order.

79. The finding that the Order "was approved or favored by at least two-thirds of the producers who * * * voted in the above-mentioned referendum," was unsupported by any substantial evi-

dence, and said referendum determined only that many of the
219 producers voting therein "favored an Order which required equal payments to all producers, and payment of the same price for milk by all handlers." The inference to be drawn from such vote, was that such producers did not favor or approve an Order which exempted large handlers from payment of the uniform price to their producers, and which did not require equal prices to be paid by all handlers, but on the contrary, permitted certain large handlers to pay reduced prices for their milk supply.

80. The Dairymen's League actively sponsored the proposed Federal and State Marketing Orders, and, as disclosed by the hearing, Exhibit A-3 to the stipulation, by its attorneys, attended all hearings, examined various witnesses and introduced elaborately prepared evidence in book form. The Dairymen's League News, its official organ, actively advocated adoption of the Order and attacked persons, newspapers and others, who were either actually against adoption of the Order or who were claimed to be against the same.

81. The Bargaining Agency, of which the Dairymen's League was the largest member, expended between December 1st, 1937, and June 1, 1938, $63,338.76 for salaries of employees and directors, publicity, printing, radio ($4,405.51), and other expenses while carrying on the Federal-State Order program; from June 1st to September 1st, a three-month period, the Agency spent $45,299.15; radio expenditures increased to $7,029.05, and advertising and publications (exclusive of "Market News"), $7,979.79. From September 1st, 1938, to December 1st, 1938, the Agency expended $31,348.98; there were no expenditures for radio and advertising and publications dropped to $2,871.91.

82. The activities of the Bargaining Agency are partly reviewed in Exhibit 59. E. C. Bardin, in his report printed therein, stated (Dec. 1938):

"With field men and other directors, I have travelled approximately 20,000 miles spreading the gospel of cooperation. I have not tried to discuss the details of the Order, but have dealt with the broad general program."

Homer S. Rolfe, in the President's address at the same time, said (see Defendants' Exhibit 59):

0 "Last year at the first annual meeting of the Metropolitan Cooperative Milk Producers Bargaining Agency, I said that the occasion marked a new forward step in cooperative effort. I was referring to the fact that producers had been given the right to work together cooperatively by the enactment of the Rogers-Allen law and now had an opportunity to solve their marketing problems."

* * * * * * * *

"The Bargaining Agency is generally credited as being the force which and the medium through which this plan was prepared and accepted by producers and with their support made effective. History will record that the long sought permanent marketing program control surplus was established in 1938 on a solid foundation.

backed by Federal-State assistance, and put into operation with united producer support.

* * * * * * * *

"On February 7, several representatives of the Federal and State Departments of Agriculture met with the Board of Directors. Work was started on drafting a marketing agreement to incorporate the principles that had been agreed upon.

* * * * * * * *

"The first hearing was held at Albany on May 16th and the final one was held on June 4th. At hearings, members of Bargaining Agency appeared as proponents of Order.

* * * * * * * *

"It was not until August 18, 19, and 20 that voting took place. This gave the Bargaining Agency sufficient time to comply with requests for information and with the assistance of State and Federal officials, extension departments, and many volunteers, it was possible to acquaint producers generally with the provisions of the Order.

"In doing this many meetings were held, the mail brought every producer copy of Order and official explanation; the American Agriculturist, dairy papers, and newspapers brought out the facts and objectives; advertisements by newspapers and by radio, all combining, brought forth a well-informed and united producer sentiment for adoption of a surplus control plan as provided for in the Federal-State Marketing Order.

"On August 25th, the result of the vote was announced and producers were delighted to find that the Order had been approved by approximately 87% of the qualified producers voting.

* * * * * * * *

"The magnitude of the vote and the speed and determination with which it was put into effect were impressive."

83. The Dairymen's League cast 22,287 votes in favor of Order No. 27, and 17,361 votes in favor of Official Order No. 126.

Defendant Jetter, as a distributor, was permitted no vote.

The producers under contract with the Dairymen's League, or who were members thereof, were permitted no vote.

84. The Dairymen's League, having been accredited the privilege of casting 22,287 votes out of a total of 60,220 milk producers, the remaining milk producers in the production area together, if all voted, could not cast the two-thirds vote necessary to promulgate a marketing order agreeable to them. The Dairymen's League cast approximately two-thirds of the total number of 33,663 votes counted in favor of the issuance of the Order.

221

85. The Orders were issued as a result of the program of the intervening plaintiff, Dairymen's League, begun with sponsoring of the Rogers-Allen Law and continued through the formation of the Bargaining Agency formulation and proposal by the Bargaining Agency, of the proposed Federal Orders, and finally adoption of

same by the casting of 33,663 votes in favor of the Order, of ch 22,287 were cast by the Dairymen's League.

. The purpose and effect of said program and Order was to give he Dairymen's League a competitive advantage over its com- tors, including the defendants, and to create in said Dairymen's gue and the Bargaining Agency, and in handlers buying milk n them, to the exclusion of the defendants and all others, the rol of fluid-milk business in the marketing area. To that end, Dairymen's League, Bargaining Agency, and E. Manning Gaynor ein referred to as Gaynor), who was personal representative of rvening plaintiff Noyes, entered into a conspiracy to establish aid Dairymen's League, Bargaining Agency, and dealers pur- ing milk from Bargaining Agency members, including Dairy- 's League, an illegal monopoly in the purchase and sale of milk aid marketing area.

. One Charles H. Baldwin, acting individually and as Executive etary of the Bargaining Agency herein called "Baldwi"), one ner Rolfe and one Jay C. Treat, acting individually and as ident and Secretary, respectively, of the intervening plaintiff gaining Agency and intervening plaintiff Dairymen's League, ed and published certain letters, pamphlets, official newspapers, it: The Bargaining Agency News and the Dairymen's League s, which said letters and other printed statements contained ats against any dealers who might appeal to the Courts for any dication of its rights, and entered upon a campaign to compel ributors and dealers of milk in the same position as defendants to sign contracts which surrendered their rights to due process. Said printed utterances were circulated among producers.

88. Gaynor procured one Faulkner, a producer delivering to defendant Jetter, to visit said Gaynor at Leonardsville, ., and there requested Faulkner to arrange for withholding milk e defendant Jetter unless it signed a marketing agreement; said nor requested one Dake to withhold delivery of substantial ntities of milk from Eisenberg Farms, Inc. Said Dake withheld milk until said Eisenberg signed, and then released the milk. nor told Eisenberg that his milk would be released when he ed a marketing agreement in the Administrator's office. Eisen- signed at the Administrator's office, and his milk was released.

aldwin, executive secretary of the Bargaining Agency, solicited Dumont, who had been active in a milk strike during 1937, to y to the Market Administrator for a "job," which was to include ing localities where dealers "refused to go along with the Order" "drying up" the milk stations of such dealers by withholding until they complied.

. Said Gaynor, in public speeches and privately over the tele- ne, threatened and caused to be threatened, all dealers, with sum- y withholding of their milk supplies, unless they signed mar- ng agreements.

90. On August 29th, 1938, E. H. Baldwin, acting individually and as executive secretary of defendant Bargaining Agency, caused to be issued and distributed to producers delivering milk to defendant Jetter and to other producers in the marketing area, a letter, which letter contained the following:

"Dear Producer: Before you receive this letter, a Federal-State Milk Marketing Order covering the Metropolitan New York Milk Market, will have been signed by the President. This Order will, no doubt, become effective September 1st.

"To the casual observer, a wonderful battle has been won, but we who have known the opposition, realize that the real battle is ahead.

* * * * * * *

"As you know, the dealers in Boston took the Boston Order into Court and have held up its full operation for over a year. Over two million of the farmers' money has been held up by the dealers.

* * * * * * *

223 "This producers can stop by inducing dealers to consent to the operation of the Order as an agreement. Your dealer, by such consent, voluntarily refrains from using the Courts to block the Order. * * * We want results through compliance with the Order, not law suits.

* * * * * * *

"You will be contributing greatly towards that end if you singly or collectively with other producers insist that your dealer cooperate with others in signing this order at once. If you have not already done this, won't you please take care of it immediately?

"Won't you also cooperate with me by giving your advice on questions that you will find on the enclosed page?"

Attached to said letter was purported questionnaire, which in part contained the following:

"Questionnaire to be returned to C. H. Baldwin, Ex. Sec., Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., Room 118, Onondaga Hotel, Syracuse, N. Y.

"1. Can you stand continued low prices while dealers argue this matter out in the courts?

"3. In your opinion are farmers in your community ready for a movement to compel the buyers to sign the Order, pay the price and live up to its terms?

"6. Will you support the Bargaining Agency in that move if others will?

"7. In Boston the dealers tied up over two million dollars of the farmers' money in the courts. Do you think farmers will work together to prevent dealers here from doing this?

"NOTE.—The information on this questionnaire will be held in the strictest confidence by me, and your name will not be used in any way."

91. On September 21st, 1938, Jay C. Treat, individually and as an Officer of the intervening plaintiff, Bargaining Agency, issued a let-

er which was circulated throughout the New York Milk Shed, and among producers delivering milk to defendant Jetter. This letter stated in part:

"almost every dealer in the Metropolitan Market has signed the agreement. In some instances, it has been necessary to exert producer pressure and the willingness of producers to cooperate in withholding or offering to withhold their milk until their dealer signed has been encouraging and gratifying."

92. During the early part of September, 1938, Gaynor was principally engaged in directing producers and cooperative associations in a program of withholding milk from dealers who refused to sign the proposed agreement, or who did not make reports and comply with the Order. Milk which was so withheld was chiefly diverted to the intervening plaintiff Dairymen's League, which acted in concert and in cooperation with said Gaynor.

In the weekly newspaper of the plaintiff Dairymen's League, known as the "Dairymen's League News," and particularly in the copy thereof dated September 6th, 1938, on the first page thereof, was contained the following statement:

"Dealers Sign Up

"Fred H. Sexauer, president of the Dairymen's League, estimated the new program would raise League members' September returns $1,000,000 over what they receive for August milk.

"More than 75 per cent of New York's milk supply was under voluntary agreement when the plan began operating. Included were distributors buying from the Dairymen's League. They handle 60%—approximately 50,000 cans daily—of the market's supply."

On page 14 of said issue, was the following statement:

"'NO FOOLIN',' " Say Sub-District 17–A Members

"At the August Meeting of sub-district 17–A, held in the Congregational Church at Kiantone as guests of Kiantone and Fresburg Locals, delegates and associate delegates informed Director Grout in no uncertain terms that the membership of the sub-district will not allow dealers to nullify the benefits of the new marketing Order, by passing unanimously the following resolution:

* * * * * * *

"'Whereas, in Boston with a similar order dealers have tied up the cream of the milk check in court litigation, and threats of similar actions are circulated in this area: Therefore be it

"'Resolved, that sub-district 17–A in regular meeting ask and demand that our Association and officers insist on our full rights from the start of the State and Federal Marketing Order, and be it further

"'Resolved, that all dealers be required to give satisfactory proof of the acceptance of the terms of the order, or no milk be sold them

and in carrying out this plan, we pledge our officers our cooperat and support in agreeing to any diversion necessary to accomp their purposes.'"

On page 15 of said issue, the M'rket Administrator, Harmon, quoted as saying:

"It is my duty to administer the rules and regulations that h been formulated and approved by producers. It is my purpose to just that, and to do it to the best of my ability. This may at tim not be to the liking of some people, some may be made u happy."

225 93. In the issue of the Dairymen's League News of Septe ber 20, 1938, the following item appeared on the front page:

"Producers Ready to Divert Milk From Non-Complying Deale

"League Gets Vote of Thanks from Bargaining Agency for It Offer of Marketing Facilities.

"Volunteer enforcement agents—100 strong—were riding the road last week explaining to farmers how they could convince recalcitran metropolitan milk handlers of the advantages of complying with the law by obeying the rules and regulations of the new federal-stat marketing program.

"This action followed a meeting of delegates of the Metropolitan Cooperative Milk Producers' Bargaining Agency in Syracuse, September 10. The delegates voted to have 100 farmers go out as volunteer enforcement agents to "crack down" on dealers who have not signed the marketing agreement. They were to explain to producers delivering to such dealers that they could divert their milk and not lose money. Such diversion it was believed would quickly bring the few New York holdouts into line."

The same article on pages 1 and 2 quoted Gaynor as follows:

"In a spirited speech, Mr. Gaynor told the dairymen that they 'need not think about dealers for two minutes.' He explained the provisions for diverting milk from dealers who fail to comply with the regulations. 'The Dairymen's League plants are open—and others too,' said Mr. Gaynor. 'Call me up, I'll tell you where to put the milk. You won't have to divert very long before these dealers will be ready to sign up.'"

The Dairymen's League News of September 27th, 1938, on the front page thereof, contained the following statements:

"J. C. Treat, secretary of the New York metropolitan Cooperative Milk Producers Bargaining Agency, made the prediction in Syracuse that all the larger dealers would be signed up by the end of last week. Except for a few small handlers, Mr. Treat predicted the sign-up would be almost 100 per cent. None of these smaller dealers handle more than 50 or 75 cans a day and practically all of them are in the 'spot buyers' class, he said.

"Mr. Treat also reiterated a former statement made by the Bargaining Agency to the effect that the squad of 100 producer volunteers were still on duty in the milk shed and that shipments of milk

would be diverted from those buyers who declined to pay full prices as called for by the order or who might attempt through court action to obstruct administration of the order."

The foregoing quotations constitute only a small part of the program of propaganda carried on by the intervening plaintiffs
226 Dairymen's League and Bargaining Agency.

94. In the October 11th issue of the Dairymen's League News, on the first page thereof, was contained the following:

"Producers Stop Dealer's Milk—He Signs Up

"Buffalo Milk 70% Under New State Order—Bargaining Agency Puts Pressure on Procrastinators."

* * * * * * *

"Producers Prepared for Non-Compliers

"N. Y. C. Marketing Order Calls for Dealers' Reports Oct. 10

"Preparations to apply 'farmer pressure' to any milk handlers who fail to comply with requirements of the federal-state milk marketing agreement were being formulated last week by the Metropolitan Cooperative Milk Producers' Bargaining Agency."

On page 2 of said issue, was contained the following statement:

"The farmer's opportunity lies in mass action through business cooperative organization. Farmers today depend more and more on their own responsible leaders for information. Elected cooperative leaders must know reasons for low prices and be prepared with constructive plans."

95. In the "Milk Producers' Market News," the official paper of the plaintiff Bargaining Agency, for the month of October 1938, published prior to October 15th of said month, and copies of which were distributed generally to the producers delivering milk to defendant's (Jetter's) plants, were contained among others, the following statements:

"Please bear in mind that our able Secretary, J. C. Treat, who is in charge of the "MINUTE MEN," is doing a fine job and these men, who are distributed throughout the milk shed, are on the watch at all times for disturbances, chiseling, and other items that are not for the best interests of your producers."

Page 18:

"Remember that in the last issue of the Market News, on the front page, your writer advised you producers to watch out for the small minority of trouble makers and see to it that they are kept in their place. We also suggested that whenever you find one of them sticking their nose in the picture and trying to disrupt what you have approved, then a good idea is to swat the nose and talk afterwards."

Page 24:

227 "Pressure Is Put on Milk Dealers

"Syracuse, N. Y., October 13 (A. P.).—Milk producers supplying the New York City markets began withholding milk today

from dealers failing to abide by provisions of the federal-state marketing agreement.

"The producers diverted 1,300 cans from a New York dealer who E. M. Harmon, administrator of the agreement, said failed to file the first monthly report of milk sales.

"Homer S. Rolfe, president of the Metropolitan Cooperative Milk Producers Bargaining Agency, said the agency ordered the milk diverted from the dealer to cheese plants. The agency, he added, will pay the difference between the cheese plant price and the price they would have received from the dealer."

* * * * * * *

"Some mighty fine work has been carried on at Bridgewater * * * by the leaders in the past few weeks.

"An orchid to Eddie Gaynor, of Leonardsville, who is doing some mighty fine work in assisting the groups working for the success of the Federal Order. We want to welcome the Young-Maybery Cooperative Association, one of the new members of the Bargaining Agency. They start off with over 200 members."

Page 25:

"The Bargaining Agency, plus, Treat, plus Baldwin, plus Andover Cooperative, created a headache for what large New York dealer!

"Secretaries of all Cooperatives—We have added nearly 2,000 names to the individual mailing lists since the last issue was sent out. If you have not already sent in your list, do so at once and you will no longer be bothered with the bundles of Market News and the troubles of distributing same."

Page 28:

"Hot Stuff"

* * * * * * *

"We farmers are like the tramp who stopped at a lady's door and asked for something to eat. She gave him some bread and said: 'Now, I don't give you this bread for your sake, but for the Lord's sake.' The farmer looked to the dry bread and turning to the woman, said: 'Then for Christ's sake, put some butter on it.' Now, if the dealers won't give us a living price for milk for our sake, perhaps they will for Christ's sake. Not bad!"

The reference to the "mighty fine work" alleged to have been carried on at Bridgewater refers to activity among patrons delivering milk to the defendant Jetter.

228 96. Sub district president of plaintiff Dairymen's League (Dist. No. 11), has canvassed producers delivering to defendant Jetter, since September 1st, 1938, and represented to such producers, that payments for their milk were in danger; that said producers should leave Jetter and deliver milk to the plaintiff Dairymen's League before such procedures sustained loss of payment for milk delivered.

Plaintiff Dairymen's League, with knowledge that the defendant Jetter and others similarly situated, could not survive continued enforcement of the Federal Order when accompanied by the destructive competition of the League, the National Dairy and Borden subsidiaries and affiliates, in the October 11th issue of the Dairymen's League News, printed the following statement:

"How Can the 'Cheap Milk' Dealer Pay?

"Apprehension was felt in some quarters that some producers may receive something of a shock when they get paid for their milk.

"This uneasiness was due to the fact that it is well known that a lot of milk is being sold to stores in New York City at less than cost. There is a considerable question as to whether some of the firms selling this milk cheap will have money with which to pay producers at the rates established by the market administrator."

97. The Market News issued by the Bargaining Agency for December, 1938 (Exhibit 23 to stipulation), states on page 30:

"Syracuse, Nov. 21.—There will be no let up in activities of the Metropolitan Co-operative Milk Producer's Bargaining Agency to obtain full compliance with the Federal-State milk marketing program, declared Charles H. Baldwin, Executive Secretary today.

"Mr. Baldwin made this statement following a conference with his attorney, Edmund F. Cooke, and other lawyers who argued against an application by Jetter Dairy Company to restrain Mr. Baldwin, the Bargaining Agency and the Dairymen's League Co-operative Association before United States Judge Frank Cooper in Albany Saturday.

"The Jetter Dairy sought to restrain these defendants and Metropolitan Market administrator E. M. Harmon and officials of the State Department of Agriculture and Markets from enforcing the marketing program which was instituted September 1 under The Rogers-Allen law and the Agricultural Adjustment Act.

* * * * * * *

"The Jetter case marks a new milestone in the progress of New York Milk Shed dairy farmers. Never before have dealers sought to enjoin farmers, although there have been cases where dairymen have had to seek protection of the courts from the acts of dealers. Starting of this case seems to indicate the desperate desire of dealers to wreck this program and frighten producers into acceptance of less money for their milk. The effect, however, will be the opposite. Indignation is running high among farmers all through the State, and I believe they will now be more insistent than before that every dealer comply in every respect with this marketing program, which has already added more than $2,500,000 to dairymen's income."

Statistics contained in plaintiff's Exhibit A–3 show that the Dairymen's League pool return, including plant volume differentials, location differentials, certificates of indebtedness, were as follows:

	1936	1937	193
September	$1.95	$1.90	$1.8
October	1.90	2.00	1.8

Note.—The actual cash return, including certificates of indebtedness, considered as cash, was less than the prices stated. In 1938, the September net cash price, including certificates of indebtedness, was $1.75 per cwt. and for October, $1.81 per cwt. (Exhibits 11, 12).

Sheffeld Farms Company, in corresponding years, paid its producers net, as follows:

	1936	1937	193
September	$1.96	$2.20	$1.8
October	1.90	2.20	1.8

The statement that "this marketing program * * * has already added more than $2,500,000 to dairymen's income" is contrary to the statistics in evidence, as part of Exhibit A–3.

97–a. Intervening plaintiff, Dairymen's League, by its acts in procuring the passage of the Rogers-Allen Law, the formation of the intervening plaintiff, Bargaining Agency, and through its own activities and those of the intervening plaintiff, Bargaining
230 Agency, has conspired to convert the provisions of Title 7, Section 608c U. S. Code, as amended, and of the Rogers-Allen Law (Chapter 383 of the Laws of 1937 as amended), as instruments of coercion, restraint of trade and monopoly. In furtherance of such conspiracy, said intervening plaintiffs aided in procuring the promulgation or issuance of Order No. 27 and Official Order No. 126, and, by specific acts referred to in Findings Nos. 90 to 97 inclusive hereof, have practiced coercion and intimidation upon the defendants and others in a like situation, to compel defendants and others, to comply with said Orders, regardless of their legality. At the time of the trial, the intervening plaintiffs were continuing such coercive measures.

98. In August, 1938, the Dairymen's League caused to be transferred all of the fluid milk business theretofore carried on by its several wholly owned subsidiary stock corporations, to itself, and since September 1st, 1938, said distributing business has been conducted by said intervening plaintiff, wholly in its own name.

99. Since September 1st, 1938, Bordens and the Dairymen's League have withdrawn from approval by the health authority in the marketing area, a number of milk receiving stations, which are listed on defendants' exhibit 53.

100. The Dairymen's League utilized the same facilities owned and operated by it, and owned and operated by the Borden Company prior to September 1, 1938, that it has utilized since said date, and the services performed by it prior to September 1, 1938, were substantially the same as those performed since said date, except for withdrawal of certain plants from approval within the marketing area.

101. The intervening plaintiff Dairymen's League is engaged in business as a distributor of milk in the Newark, New Jersey, district.

231 102. Defendant Central New York Cooperative Association, Inc., engages in the handling of milk received at plants approved by a duly authorized health authority for the receiving of milk to be sold in the marketing area.

103. Approximately one-third of the milk sold in the marketing area is produced in states other than New York. Approximately one-third of the milk produced in New York and sold in the marketing area passes through other states on its way to the marketing area. A large part of the milk produced in the State of New York and sold in the marketing area which does not pass through other states on its way to the marketing area, is inextricably intermingled with milk which is produced outside of New York or which passes through other states on its way to the marketing area. Unless all milk sold in the marketing area is subject to the same regulation, milk which is regulated will be discriminated against.

104. The members of Central New York Cooperative Association, Inc., at all times have been and are dairy farmers producing milk upon their own farms, all of which are in New York State.

105. Central New York Cooperative Association, Inc., operates four milk plants located at Sheds, Youngs Crossing, Maybury Mills and Fortright, which plants and the contents thereof it leases from Hegton Milk Corporation.

106. Central New York Cooperative Association, Inc., owns all the issued and outstanding stock of Hegeman Farms Corporation, Hamilton Milk and Cream Co., Inc., and Cato Milk Company, Inc.

107. Central New York Cooperative Association, Inc., receives the milk of its members and of approximately seventy-five producer patrons whose milk is marketed on the same basis as the milk of its members at the aforesaid milk plants and ships said milk to the said Hegeman Farms Corporation, Hamilton Milk and Cream Co., Inc., and Cato Milk Company, Inc., all of the stock of which it owns, to be sold in the marketing area on behalf of the members and the producer patrons of Central New York Cooperative Association, Inc. The milk is sold by Hegeman Farms Corporation, Hamilton Milk and Cream Co., Inc., and Cato Milk Company, Inc., in the mar-
232 keting area to retail stores and consumers and all of the proceeds of such sales less the expenses entailed in the distribution of the milk are remitted to Central New York Cooperative Associa-

tion, Inc., which distributes the net proceeds pro rata among its members and producers patrons.

108. Central New York Cooperative Association, Inc., is holding in its treasury a sum in excess of $5,000.00, which represents the difference between the aggregate distributions to its members and producer patrons for September 1938, at the uniform price and the total amount available for distribution and which otherwise would have been distributed to said members and producer patrons.

109. In addition to the foregoing Findings of Fact which were requested by defendants, the Court finds the facts to be as stated in paragraphs numbered 10 to 14, inclusive; 17 to 21, inclusive; 24, 27, 30 to 40, inclusive; 50, 53, 54, and 55 of the proposed Findings of Fact submitted by the plaintiff, subject to the changes, additions, omissions, and qualifications noted on the margins thereof, and such paragraphs of plaintiff's proposed findings subject to such changes, additions, omissions, and qualifications, are hereby adopted as the findings of the Court.

233 *Conclusion of Law*

1. Order No. 27 is discriminatory against the defendant Jetter Dairy Company and so-called proprietary handlers, in that they are required to pay producers, the uniform price fixed in the Order, for all milk sold in the marketing area, whereas cooperative corporations which are milk dealers of the same class engaged in the sale of milk to stores and consumers in direct competition with defendant Jetter, and other proprietary handlers, are under no requirement to pay the uniform price or any stated price to producers for such milk.

2. Order No. 27 is discriminatory as against the Jetter Dairy Company and other proprietary handlers, in that said handlers are required to account to the Producer Settlement Fund for the difference between the uniform price and the prices stated in the Order, whereas the price accounted into said Fund by cooperative handlers, is reduced by payments to them out of said Fund, pursuant to Article VII, Section 5 of the Order.

3. Order No. 27 is discriminatory against all of the defendants and against other cooperative and proprietary handlers, which are not engaged in the manufacture and sale of milk products in that the large handlers, both cooperative and proprietary, being principally National Dairy subsidiaries, Bordens and subsidiaries, Dairymen's League and several smaller companies, including Queensboro Farms Products, Inc., and the several companies operated by Aaron J. Rubenfeld, which are engaged in manufacturing milk into milk products, receive so-called "market service payments" under Article VII, Section 6, which are not and cannot be received by small handlers, who combine fluid milk operations with manufacturing on a small scale in their own plants, thereby in effect, substantially reducing the prices paid by such large handlers for milk utilized in fluid form.

4. Order No. 27 is discriminatory against certain handlers, including all the defendants, in that the same regulates all of the businesses of handlers dealing only in the marketing area, while regulating only part of the business of the larger handlers, whose businesses extend to adjacent markets outside of the area.

By the terms and application of the Order, the same large handlers referred to in the next preceding paragraph, both proprietary and cooperative, in making payment all milk purchased in the production area, are permitted to pay a blended price, which price is computed upon the prices fixed in the Order for milk sold in the marketing area, and with arbitrary prices fixed by such handlers as they see fit, for milk sold outside of the area, which milk is known as "unpriced milk," thereby, in effect reducing the price paid by such handlers for fluid milk sold in the marketing area.

None of the defendants are engaged in the manufacture of milk products. None of said defendants are engaged in marketing milk outside of the marketing area.

5. Order No. 27 is discriminatory as against proprietary handlers purchasing milk direct from producers, in that such handlers 34 are obliged to absorb the cost of maintenance and operation of their milk receiving station, and the cost of receiving milk therein, whereas handlers purchasing milk from cooperative corporations are required to pay only the base producer price for such milk, and are not obliged to pay such cooperative associations, any part of the so-called handling charge, or in any manner for services rendered by the cooperative association in that regard. Such receiving station or plant handling costs were from 15¢ per cwt. to 30¢ per cwt.

6. Application of the provisions of Order No. 27 to handlers, coupled with competitive practices of handlers in the marketing area, has resulted in a loss to all dealers selling wholesale fluid milk in the area, and has confiscated capital of proprietary handlers engaged principally in sales of fluid milk at wholesale to stores. The Order is discriminatory as to such handlers, including the defendant Jeter Dairy Company, and in favor of other handlers, both cooperative and proprietary, whose operations include other markets; who are engaged in the manufacture of milk and milk products, and who receive payments from the Producer Settlement Fund, under the provisions of Article VII, Sections 5 and 6.

7. The provisions of Order No. 27 are discriminatory as to the defendants, Rock Royal Cooperative and Schuyler Junction Cooperative, and in favor of the Dairymen's League and other large handlers, which receive payments under the provisions of Article VII, Sections 5 and 6, and which blend "unpriced" milk with milk sold in the market, in that such larger handlers are able to undersell said defendants.

8. Order No. 27 is discriminatory as to the defendants who are engaged principally in the fluid milk business and operating wholly within the marketing area, in that moneys of said defendants are [illegible]ated to be paid to competitors of said defendants, and in

effect to give to such competitors, consisting principally of the Dairymen's League, Bordens' and Sheffields, a subsidy from the capital account of the defendants and others in a like situation, whereby monopoly may be created in said large competitors, and the several defendants be forced out of business by exhaustion of capital and by inability to meet competitive prices of said preferred companies.

9. Order No. 27 is discriminatory as between producers, in that there is no requirement that cooperative associations be required to pay the uniform price or any price to producers delivering to such associations.

Cooperative handlers, which are also distributors, may sell milk direct to storekeepers and consumers at less than the minimum delivered cost thereof, based on prices contained in the Order and deduct the losses occasioned by such price cutting from the prices paid to producers.

Cooperative handlers may sell milk to other dealers without making any charge for handling or receiving costs, thereby in effect reducing prices charged for milk, and deduct the sums so rebated to such handlers from payments made to producers.

10. Order No. 27 is discriminatory as between producers, in that producers in 18 counties, enumerated in Article VII, Section 8, receive 20¢ per cwt., preferential payment on all of their milk.

235 Prices paid by cooperatives to producers outside said preferred counties, are also reduced by such preferential payments to producers in the 18 preferred counties, in the adjustments made with the Producer Settlement Fund.

11. Order No. 27 is discriminatory as to producers delivering to handlers, whether cooperative or proprietary, whose businesses are only partly regulated by the Order, which sell fluid milk in the Metropolitan Area, and also in the State of New Jersey and other markets, in that the producers are paid less than the actual value of milk delivered by them, accomplished by "blending" arbitrary prices for milk sold outside of the area, which bear no true relation to the actual value thereof with prices charged for milk sold in the area.

12. Order No. 27 is discriminatory as to all producers delivering to handlers, whether cooperative or proprietary, which producers do not receive the cooperative payments provided for by Article VII, Section 5, of the Order (the greater part of which is paid to the Dairymen's League Cooperative Association, Inc.), and whose prices are reduced by the amounts deducted from the uniform price under Art. VII, Sec. 5, and which are paid from the Producer Settlement Fund to the Dairymen's League Cooperative, and such other cooperatives as receive such payments.

13. Order No. 27 is discriminatory as to all producers delivering to either proprietary or cooperative handlers, which handlers do not have facilities to receive payments under the provisions of Article VII, Section 6, and payments made to such producers are reduced

the amounts deducted and paid from the Producer Settlement
d under the provisions of Said Article VII, Section 6.

. The Act as applied in Order No. 27 denies to the several de-
lants equal protection of the law, and tends to confiscate the
perty of the defendants without due process of law, and are vio-
ve of the Fifth and Fourteenth Amendments to the Constitu-
of the United States and to Article I, Subdivision 6, of the New
k State Constitution.

. The provisions of Title 7, Section 608c (5) (A) (B) (ii), and
er No. 27 are violative of the Fifth Amendment to the Con-
tion of the United States on the ground that they are discrimi-
ry as between proprietary handlers purchasing milk from pro-
ers and proprietary handlers of milk of the same class, purchas-
milk from cooperative associations.

. The provisions of Title 7, Sec. 608c (E), and Order No. 27
violative of the Fifth Amendment to the Constitution of the
ted States, in that the same provide for payments to cooperative
dlers of milk which are denied to proprietary handlers, for iden-
l services, said handlers all being milk dealers of the same class.
reby proprietary handlers are denied the right to purchase milk
the same terms and conditions, no more and no less, as those
lied to cooperative handlers.

. The provisions of Title 7, 608c (B) (ii), U. S. Code, are viola-
of the Fifth Amendment to the Constitution of the United
es, in that they expropriate money from dealers and producers
the benefit of competing dealers and of producers selling to said
dealers, without due process of law.

18. The provisions of Title 7, 608c (B) (ii) U. S. Code, are
invalid and are unauthorized by the Constitution, or the Com-
ce Clause thereof. The equalization payments authorized therein,
titute a subsidy to be paid by dealers and producers, having well
blished fluid milk markets, to competing dealers and producers.

. The Finding by the Secretary, that Order No. 27 is approved
avored by two-thirds of the producers producing milk in the pro-
ion area, is invalid; is unsupported by any substantial probative
lence and amounts merely to an expression of opinion by the
etary.

. The intervening plaintiff Dairymen's League and the interven-
plaintiff, Bargaining Agency, have been and now are, engaged
conspiracy in restraint of trade or commence against the defend-
Jetter, Rock Royal Cooperative, Schuyler Junction Cooperative;
dlers buying from said cooperatives, and other handlers, for the
pose of controlling the purchase and sale of milk, and destroying
petitors of the Dairymen's League and its customers, including
defendants, in violation of the provisions of Title 15, U. S. Code,
ions 1 to 7. Said intervening plaintiffs and others have been and
are, engaged in a scheme or conspiracy to discriminate in price
ween purchasers of commodities of like grade and quality, which

discrimination is against the defendants Jetter, Rock Royal Cooperative, and Schuyler Junction Cooperative, and is violative of the provisions of Title 15, U. S. Code, Sections 12–14, inclusive.

21. The provisions of Order No. 27 are violative of the provisions of Title 15, U. S. Code, Sections 1–7, 12–14, and the intervening plaintiffs Dairymen's League and Bargaining Agency, in violation of the provisions of said Title 15, U. S. Code, which are known as the Federal Anti Trust Laws, are now engaged in an unlawful combination and conspiracy and are now threatening, by coercion, intimidation and the other unlawful acts stated in the Findings and Conclusions of Fact therein, to impose upon the defendants Jetter, Schuyler Junction Cooperative, and the Rock Royal Cooperative, compliance with the illegal and unlawful terms of Order No. 27; and to restrain them from exercising their legal right of engaging in the purchase and sale of milk, free from any constraint or discrimination, after the decision of this case and regardless of any decision rendered herein.

22. The complaint of the plaintiff, United States of America should be dismissed as to each defendant.

23. The complaint of the intervening plaintiff, Holton V. Noyes, should be dismissed as to each defendant.

24. The complaint of the intervening plaintiff, Dairymen's League Cooperative Association, Inc., should be dismissed as to each defendant.

25. The complaint of the intervening plaintiff, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., should be dismissed as to each defendant.

26. The said regulation set forth in Order No. 27 is not a valid regulation of interstate commerce, and said order is null and void.

237 27. The Act provides that an order containing provisions such as found in Order No. 27 may become effective only when approved by producers of two-thirds of the milk shipped to be sold in the marketing area affected by the order.

28. Order No. 27, insofar as it requires payment to the Producer Settlement Fund in respect of milk produced by members of Central New York Cooperative Association, Inc., takes without compensation from said members the difference between the amount which said members are and will be entitled to receive for their milk, pursuant to the manner in which said milk is distributed and the lesser amount which said members will receive for their milk if they are paid therefor an amount calculated upon the uniform price. Through the device of the Producer Settlement Fund the amount so taken is turned over to other producers of milk. The order thereby deprives the members of Central New York Cooperative Association, Inc., which members it represents and appears for in this suit, of their property without due process of law, contrary to the Fifth Amendment to the Federal Constitution.

29. Defendant Central New York Cooperative Association, Inc., is entitled to judgment dismissing the complaint on the merits.

n addition to the foregoing Conclusions of Law which were
ed by defendants, paragraphs numbered 2, 3, 4, 6, 11, 12, 13,
of the proposed Conclusions of Law submitted by plaintiff,
to the changes, additions, omissions, and qualifications noted
margin thereof, are hereby adopted by the Court as its addi-
Conclusions of Law.

he defendants are entitled to one Bill of Costs against the
ing plaintiffs, Dairymen's League Cooperative Association,
nd Metropolitan Cooperative Milk Producing Bargaining
, Inc. The Court having directed that the evidence be taken
aphically, and having appointed a stenographer for that pur-
e fees of said stenographer are hereby fixed by the Court at
4, and shall be taxed as part of the costs herein, and are
allowed.

eby direct entry of judgment in favor of the defendants and
the plaintiffs as above stated, with one Bill of Costs and dis-
ents in favor of all the defendants against the intervening
fs, Dairymen's League Cooperative Association, Inc., and Met-
an Cooperative Milk Producers Bargaining Agency, Inc.
nd disbursements to be allowed will be taxed by the Clerk on
ays' notice to the intervening plaintiffs, Dairymen's League
ative Association, Inc., and Metropolitan Cooperative Milk
ers Bargaining Agency, Inc.

d Albany, N. Y., March 21, 1939.

FRANK COOPER,
U. S. District Judge.

In United States District Court

Civil Action No. 32. Consolidated Cause

e omitted.]

Plaintiff's proposed findings of fact

Filed March 9, 1939

ie as Defts. 1.) 1. The defendant, Rock Royal Co-operative, a cooperative corporation organized and existing under and ue of the laws of the State of New York, and having its al office and place of business at Rock Royal, in the County ware, State of New York.

ie as Defts. 2.) 2. The defendant Central New York Co-ve Association, Inc., is a co-operative corporation organized sting under and by virtue of the laws of the State of New nd having its principal office and place of business in the Cortland, County of Cortland, State of New York.

(Same as Defts. 3.) 3. The defendant Schuyler Junction Ne
York Milk Shed Co-operative, Inc., is a co-operative corporati
organized and existing under and by virtue of the laws of the Sta
of New York and having its principal office and place of bu
239 ness at Schuyler Junction, County of Herkimer, State of Ne
York.

(Same as Defts. 4.) 4. The defendant Jetter Dairy Company, In
is a corporation organized and existing under and by virtue of th
laws of the State of New York and having its principal office an
place of business at Oriskany Falls, Oneida County, State of Ne
York.

(Same as Defts. 8.) 5. Pursuant to the provisions of Section
and 8c of the Agricultural Marketing Agreement Act of 1937 (Publ
No. 137, 75th Congress; 50 Stat. 246.7, U. S. C. 601 et seq.) (hereu
after referred to as the "Act"), the Secretary of Agriculture of th
United States (hereinafter referred to as the "Secretary"), on Apr
29, 1938, gave notice of public hearings on a proposed marketin
agreement and a proposed order regulating the handling of milk i
the area which includes the territory within the boundary lines of th
City of New York and the Counties of Nassau, Suffolk, and Wes
chester, all in the State of New York, the said area being hereinaft
referred to as the "Marketing Area." On April 29, 1938, the Co
missioner of Agriculture and Markets of the State of New Yor
pursuant to the provisions of Chapter 383 of the laws of 1937 o
New York gave notice of public hearings to be held at the same tim
and places on an order substantially identical with the aforesai
order.

(Same as Defts. No. 9.) 6. Pursuant to the terms of the sai
notices, and upon the request of the Commissioner of Agricultur
and Markets of the State of New York, pursuant to Section 10 (i
of the Act, and Chapter 383 of the Laws of 1937 of New Yor
joint public hearings were conducted by Glen J. Gifford, an employe
of the Department of Agriculture, who was designated by the Se
retary to conduct such hearings, and also designated by the Com
missioner of Agriculture and Markets of the State of New York
conduct such hearings on behalf of the State. In accordanc
240 with the terms of said notice, the aforesaid public hearing
were conducted at Albany, New York, on May 16, 1938;
Malone, New York, on May 17, 1938; at Syracuse, New York, o
May 18, 1938; at Elmira, New York, on May 19, 1938, and at Ne
York, New York, on May 20, 1938. The hearings were then recesse
until May 24, 1938, and were continued at New York, New York, o
May 24, 1938, May 25 and 26, 1938, and at Albany, New York, o
June 3, 4, 5, and 7, 1938. At the times and places aforesaid all i
terested parties were afforded an opportunity to be heard concernin
the provisions of the proposed marketing agreement and the pro
posed order. The said hearings were attended by producers, repr
sentatives of producers, handlers, and consumers of milk sold in th

marketing area. All of the defendants knew of said hearings but none of the defendants appeared or was represented at any hearing.

(Same as defts. No. 10.) 7. On the 5th day of August 1938 the Secretary, pursuant to the provisions of Section 8c of the Act, made a finding and proclaimed that, as to milk produced for sale in the marketing area, the purchasing power of such milk during the base period, August 1909 to July 1914, could not be satisfactorily determined from available statistics of the Department of Agriculture, but that the purchasing power of such milk could be satisfactorily determined from available statistics of the Department of Agriculture for that portion of the post-war period between August 1921 and July 1929, inclusive.

(Substantially same as defts. No. 11.) 8. Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of the proposed order (which notice was published in the Federal Register on July
342 23, 1938), the Secretary, on August 5, 1938, issued Order No. 27, regulating the handling of milk in the marketing area in the manner provided in the Act, said order containing terms and conditions authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner as, and made applicable only to persons in the respective classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as aforesaid. Said Order also contains the findings by the Secretary, required by the applicable provisions of the Act, to be made by him. Said order was published in the Federal Register of August 9, 1938.

(Same as defts. No. 12.) 9. Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of the proposed order, the Commissioner of Agriculture and Markets, on August 5, 1938, made the findings required by Chapter 383 of the Laws of 1937 of New York, and issued proposed Official Order No. 126, which order is substantially identical with Order No. 27 and contains terms and conditions authorized by the applicable provisions of Chapter 383 of the Laws of 1937 of New York and no others.

(Granted.) 10. A true, correct, and complete stenographic transcript of the oral testimony introduced at the said hearings was made, consisting of 2,979 pages. Eighty-eight exhibits of documentary character were introduced into evidence at said hearing, which exhibits in general contained statistics, descriptive information, and economic studies pertaining to the milk industry in the area comprising the New York milk shed. Briefs and written arguments were submitted to the Secretary and to the Commissioner at the conclusion of
342 said hearing on the evidence introduced at said hearing on behalf of the following parties:

Crowley's Milk Producers' Cooperative Association, Inc.
L. Daitch & Company, Inc.
Daitch & Dubin Dairy Stores, Inc.
Delaware County Dairies.
Niagara County Milk Producers' Cooperative, Inc.
West Martinsburg Cheese Factory.
New York State Milk Committee.
Sheffield Producers' Cooperative Association, Inc.
South Jersey Inter-State Milk Market.
Bennington County Cooperative Creamery, Inc.
New Jersey State Grange.
New Jersey Farm Bureau.
Karsten Dairies, Inc.
New York Metropolitan Distributors' Bargaining Agency.
Sheffield Farms Company, Inc.
W. H. Kinney.
Morris County (New Jersey) Board of Agriculture.
Edward Gaudern.
O. P. Jordal.

Thereafter the Secretary by publication in the Federal Regist on July 23, 1938, notified all interested persons of his findings mad on the evidence introduced at the said hearings and of the terms an provisions found and determined by him to be proper in an ord regulating the handling of milk in the marketing area, and in sai notice invited the filing of briefs and written arguments in suppor of, and in opposition to, said findings and said terms and provision In response to said notice, briefs were filed with the Secretary by o on behalf of the following parties:

New York State Milk Committee.
Metropolitan Cooperative Milk Producers' Bargaining Agency Inc.
Crowley's Milk Producers' Cooperative Association, Inc.
Circleville Milk Producers' Cooperative Association, Inc.
Slate Hill Milk Producers' Cooperative, Inc.
Sheffield Producers' Coop. Assn., Inc.
Dairymen's League Cooperative Assn., Inc.
Chester Milk Producers' Cooperative, Inc.
Sheffield Farms Company, Inc.
United Milk Producers of New Jersey.
Sussex County Co-operative Milk Producers' Association.
John Kane Mills.
New York State Guernsey Breeders' Co-Operative, Inc.
Association of Ice Cream Manufacturers of New York State.
Adler's Creamery, Inc.
John W. Jones.
Milk Industries, Inc.
Vogt's Dairies, Inc.
Breyer Ice Cream Company.
243 Breyer Ice Cream Company, Inc.
Hydrox Ice Cream Company, Inc.

Consolidated Dairy Products Co., Inc.
Castles Ice Cream Company, Inc.
Castles Ice Cream Company.
New York Metropolitan Milk Distributors' Bargaining Agency.

(Granted.) 11. Substantial evidence supporting all of the findings of the Secretary and the terms and conditions contained in Order No. 27, and the findings of the Commissioner and the terms and conditions contained in Official Order No. 126 was introduced at the said hearing.

(Granted that there was such evidence but these are not all found as facts.) 12. With respect to the finding of the Secretary that orderly marketing conditions for milk flowing into the New York Metropolitan marketing area were so disrupted as to result in impairment of the purchasing power of such milk and that the issuance of Order No. 27 would tend to effectuate the declared policy of the Act, there was evidence introduced at the said hearing showing that:

(Granted.) (A) The furnishing of an adequate and reliable supply of fresh wholesome milk to a large and populous metropolitan area presents problems peculiar to the milk industry. These problems are inherent in the handling and production of milk and spring from the nature of that commodity. Pure wholesome milk is a very important element of diet. It is also a highly perishable commodity and unless handled promptly and under proper sanitary conditions it deteriorates very rapidly and becomes unfit for use as fluid milk. For this reason the various health authorities in the marketing area require that all milk that is sold in the marketing area in fluid form be produced on farms and handled at plants approved by them and operated in accordance with stringent sanitary regulations. Milk produced on unapproved farms or delivered to unapproved plants is not permitted to be sold in the marketing area.

244 (Granted if "greatly" in the 2nd line and "substantially" in the 8th line are eliminated.) (B) Compliance with the sanitary regulations imposed by the various health authorities greatly increases the cost of producing milk. While milk which is produced on farms and handled at plants which do not comply with these sanitary regulations cannot be sold as fluid milk in the marketing area, it is suitable for use in the manufacture of dairy products such as evaporated milk, butter, and cheese. As milk can be produced on unapproved farms which are under less strict sanitary conditions at a substantially lower cost, the producer whose milk is approved for sale in the marketing area cannot compete in the general market for milk and its products and he cannot, therefore, afford to produce milk in compliance with the applicable sanitary regulations unless he can market a reasonable proportion of his milk as fluid milk at prices higher than the prices paid for milk used for manufacturing purposes.

(Granted.) (C) If the approved farms produced just enough milk at all seasons of the year to satisfy the demand of the consumers for fluid milk, or if milk could be stored for a considerable period of time, the problems with which Order No. 27 deals would not exist, but the

factors involved in the production of milk prevent an exact correlation between supply and demand and the physical nature of milk makes its storage in fluid form impossible. The demand for fluid milk fluctuates, to some extent, from day to day but is relatively stable throughout the entire year. The production of milk, on the other hand, is subject to wide seasonable fluctuations. The amount of milk produced by a cow depends on the weather, the food supplied to the cow and the cow's stage of lactation. Cows normally freshen in the spring and produce their greatest flow of milk on pasture during the early summer. Because of the biological cycle and the fact
245 that feeds are less plentiful and more expensive during the fall and winter, the supply of milk in the spring will normally be greatly in excess of the supply during the fall and winter and also greatly in excess of the demand. During the year 1936, for example, in the area producing milk for the New York market, the June production of milk was approximately one and two-thirds times as great as the November production.

(Granted except last two lines which are refused.) (D) In order to insure an adequate supply of milk at all times it is necessary for the health authorities in the marketing area to approve sufficient producers to supply adequately the market demand for milk during the winter or short season, including a surplus sufficient to take care of daily fluctuations in demand. Conservative estimates place the necessary daily surplus at from 10 to 20% of the daily fluid requirements. Producers normally are able to market approximately 80% of their milk as fluid milk during the month of November, but during the month of June, by reason of the increased quantity of milk produced, they can market only 50% of their milk as fluid milk. The other 50% must be sold, if at all, for manufacturing purposes in competition with milk produced on unapproved farms under less exacting sanitary conditions and cannot be sold at prices which will compensate the producer for his compliance with the sanitary regulations.

(Granted.) (E) The nature of the milk industry makes a surplus of milk inevitable, and the burden of this surplus, if distributed equitably among all producers, can be borne by the industry without hardship. (Refused.) The troubles which have beset the industry in the past have sprung mainly from the failure to distribute this burden equitably, and the terms and provisions of Order No.
246 27 would tend to effectuate such a distribution. (Granted.) Experience has shown that failure to distribute this surplus among producers inevitably leads to ruinous competition and demoralization of the market, resulting in injury to all producers and to the general public.

(Granted.) (F) The problems of the dairy industry of the State of New York have been a matter of concern to the state legislature for many years. Numerous studies have been made by various legislative committees, and other bodies. Among the various studies which have been made in the milk industry in New York, are the following: investigations by the Wicks Committee in 1916 and 1917;

investigation by the Committee of Eleven in 1924; investigation by the Ten Eyck Committee in 1926 and 1927; investigation by the Emergency Committee of the New York Milk Shed in 1932. The reports of these various committees were considered in connection with a comprehensive investigation made in 1932 and 1933 by a joint legislative committee, and the report of that committee to the Legislature (Legislative Document, 1933, No. 114) resulted in the creation in April 1933 of a Milk Control Board which was given broad powers to regulate the entire dairy industry of the State, including power to fix prices to be paid to producers and to be charged to consumers for milk. The Milk Control Board thus formed was replaced in 1934 by the Division of Milk Control in the Department of Agriculture and Markets, to which Division the powers and duties of the Milk Control Board were transferred. Authority to fix milk prices was extended by the acts of three successive Legislatures, but was permitted to expire on April 1, 1937.

247 (Granted.) (G) This program failed to produce all of the beneficial results expected, largely because of the State's inability to regulate prices to be paid to producers in other states. By reason of the State's inability to regulate such prices, the New York market was demoralized with milk purchased from producers in other states at prices lower than those paid in New York. In consequence of this situation, New York State producers were threatened with the loss of their market; and actually suffered such loss in many instances. In order to protect their market, New York producers were forced to meet this competition by selling their milk at disastrously low prices. Immediately prior to the promulgation of Order No. 27 and for a considerable period prior thereto, the prices paid for milk to producers in the New York milk shed were so low as seriously to impair the purchasing power of the producers.

(Granted that there was some evidence but these are not found as facts.) 13. With respect to the findings and the terms and conditions of Order No. 27 and the terms and conditions of Official Order No. 126 which are challenged in this case, there was evidence introduced at said hearing showing:

(A) Reasonableness of the Class III–A, IV–A, and IV–B Prices

(Granted.) The products manufactured from milk classified as Class III–A, IV–A, and IV–B compete with similar products produced in other sections of the country. Unless the Order prices for milk in these classes are at a level which will enable them to compete with similar products manufactured in other sections of the country, handlers will be unable to manufacture the surplus milk.

248 The formulas contained in Article IV of Order No. 27 and Official Order No. 126 reflect nation-wide factors of supply and demand and establish prices at a level which enable the New York handler to compete with manufacturers of similar products produced elsewhere.

The formula for pricing Class III–A milk represents the cost of milk at the large evaporated milk plants in the North Central States plus 10¢ which represents the difference between the cost of transporting the evaporated milk equivalent of 100 pounds of milk from such plants to New York City and the cost of transporting the same quantity of evaporated milk from the 201–210 mile zone to New York City. This is the same formula which was in effect under State Milk Control and is the formula previously used by the large classified price buyers in the New York market. The minimum prices paid for milk at the evaporated milk plants listed in Article IV have been since May 31, 1935, fixed by the Federal Evaporated Milk Marketing Agreement. The alternative formula is the formula for the Northeastern States contained in the aforesaid Federal Evaporated Milk Marketing Agreement.

The formula for pricing Class IV–A milk is the average of the highest prices for 92 score butter at wholesale in the New York market, less 4¢ allowance for making, plus 20% for over-run, multiplied by 3.5 which is the butterfat content of the milk; 92-score butter is the highest grade commercial butter. The over-run allowance is a recognition of the fact that cream containing one pound of butterfat will make approximately 1⅕ pounds of butter. The formula which was in effect under New York State Milk Control and which has been used historically in the New York market was identical except that the over-run allowance was only 16%. Twenty per cent for over-run results in a somewhat higher price for the milk. Skim milk which results as a by-product has very little commercial value, especially during the spring and summer. The cost of manufacturing butter at a plant which operates only intermittently is
249 higher than the cost at a plant which operates throughout the entire year at a relatively stable level. Under conditions existing at New York approved plants, four cents is approximately the average cost of making a pound of butter, and twenty percent is the approximate over-run which can reasonably be expected.

The formula for pricing Class IV–B milk represents the average of the weekly quotations at the Wisconsin Cheese Exchange (plus 1¢ per pound representing the difference in cost between shipping a pound of cheese from Wisconsin to New York City and shipping a pound of cheese from the 201–210 milk zone to New York City), the Gouverneur Cheese Board at Gouverneur, New York, and the Cuba Board of Trade at Cuba, New York, less 3¢ allowance for making and multiplied by 9.45 which is the average yield from 100 pounds of 3.5 per cent milk. The Class IV–B formula is the same formula which was in effect under State Milk Control and is the formula which had previously been used by the large classified price buyers in the New York market. The cost of manufacturing cheese at a plant which operates only intermittently is higher than the cost at a plant which operates throughout the entire year. Under conditions existing at New York approved plants three-cents is the ap-

roximate average cost of making a pound of cheese and 9.45 pounds the approximate average yield from 100 pounds of 3.5 per cent ilk.

(B) Transportation Differentials

(Granted.) The standard tank car rate approved by the Interstate ommerce Commission for shipments of milk by rail in tank cars om points in the 201–210 mile zone is 2.7¢ per gallon, equivalent to 1.2¢ per cwt. The transportation differentials in Order No. 27 and fficial Order No. 126 are approximate, to the nearest half cent, of e differences per hundred-weight between the standard tank car rate the 201–210 mile zone and such rate for each other 10 mile zone. The andard tank car rates are 70% of the standard rates for the shipment of milk in 40-quart cans in less than carload lots. Truck competitive rates have been established at certain points which are somewhat lower than the approved standard tank car rates r these points. The Interstate Commerce Commission has not approved rates for shipping milk in tank trucks. Such rates are fixed r individual contract. The transportation differentials follow a stom of long standing in the industry. Under State Milk Control differentials were based on the less than carload rates approved the Interstate Commerce Commission. The largest part of the lk shipped to the marketing area formerly traveled in 40-quart ns, but a very small percentage of the milk traveling to New York ty now travels in 40-quart cans; slightly under 50% travels by ilroad tank cars and slightly over 50% by tank trucks.

(C) Butterfat Differentials

(Granted.) Butterfat is the most important single constituent in lk. The butterfat content of milk delivered by producers to ndlers varies from day to day, from season to season, and beeen different producers. For a long time it has been the custom the New York market to establish prices on the basis of milk ntaining 3.5 percent butterfat, with an appropriate differential for lk containing more or less than 3.5 percent butterfat. The tterfat differentials established by Section 2 of Article I of der No. 27 and of Official Order No. 126 follow a custom of g standing, and are the same differentials which were in effect der state milk control. Such differentials are reasonable and re-t the approximate difference in value of milk containing varying tterfat content.

(D) Payments to Cooperatives

(Refused as not relating to demonstrable facts.) A cooperative ociation of producers which has its entire activities under the con-l of its members and which has and exercises full authority in sale of the milk of its members, using its best efforts to supply

Class I milk to the marketing area in times of short supply and to secure utilization of milk in times of long supply in a manner to assure the greatest possible return to all producers, can and
251 does perform valuable services for the market as a whole. The extent to which a cooperative can perform such services depends upon the degree of control which it exercises over the utilization of the milk of its members. The payments authorized by Section 5 of Article VII to be made to the different types of cooperatives for performing such services for the market are a reasonable compensation for the services performed by such cooperatives.

The effectiveness of the plan embodied in Order No. 27 and Official Order No. 126 is largely dependent upon the utilization of surplus milk in such a manner as to afford the greatest return to producers and the greatest stability to the market. This in turn requires that a market be provided at all times for all the milk of all the producers; that the milk be transported the shortest possible distance, and that as much of the surplus as possible be manufactured in the higher surplus classifications. The proprietary handler being actuated only by the profit motive, will handle sufficient milk to meet his fluid requirements and will handle surplus milk only when he sees the possibility of handling it profitably. The cooperative association, on the other hand, is interested in securing the utilization of all the milk of all its members in such a manner as to return the highest possible amount to producers. The maintenance of surplus facilities and the handling of surplus milk for the benefit of the market as a whole, instead of for the purpose of making a profit on the manufacturing operations, results in substantial extra expense to cooperatives. Since such operations benefit the market as a whole the cost thereof should be distributed among all producers and should not be charged only to the producers who are members of the cooperatives. The cooperative payments provided by Section 5 of Article VII are a necessary step in the distribution of the burden of surplus milk equitably among all producers and are therefore essential to the effective administration of Order No. 27 and Official Order No. 126.

252 (E) Market Service Payments

(Refused for same reason.) The market service payments for which provision is made in Article VII, Section 6, Subsection 1 of Order No. 27 and Official Order No. 126 are designed to reimburse a handler for the actual cost involved in transferring milk from a receiving and shipping plant to a plant where it can be manufactured in the classes specified in the aforesaid subsection when the milk is not needed as fluid milk in the marketing area. The allowance of 2¢ per cwt. is approximately the average cost of handling milk at a country receiving station. The mileage allowances represent approximately the average cost of transporting milk by truck. These allowances, therefor, simply reimburse the handler for the actual out-of-pocket cost involved in shipping surplus milk to a manufacturing

plant. In the absence of some provision in the Order enabling a handler to recoup the expenses so incurred, it would be necessary for him either to refuse to accept the milk of some of his producers or to ship the milk to the marketing area regardless of the price which it would bring.

The market service payments for which provision is made in Article VII, Section 6, Subsection 2 of Order No. 27 and Official Order No. 126 are designed to reimburse a handler who operates a plant which is primarily a manufacturing plant for the increased unit cost involved in the curtailment of his manufacturing operations resulting from the shipping of fluid milk to the marketing area during the short season. The allowance of 30¢ per cwt. is a reasonable allowance and represents approximately the average increased cost. Such market service payments are necessary to secure the utilization of surplus milk during the flush season and an adequate supply of milk to the fluid market during terms of short supply and are, therefore, essential to the administration of Order No. 27 and Official Order No. 126.

(F) The Marketing Area

(Granted.) The marketing area, as defined in Order No. 27 and Official Order No. 126, is identical with the Metropolitan area which was regulated under the New York State Milk Control, except that Rockland County is not included in the present marketing area. The marketing area is bounded by the Atlantic Ocean, Long Island Sound, and the Hudson River, as natural boundaries. It has not been the custom for wholesale or retail routes in the marketing area to cross the Hudson River into New Jersey, and routes which operate both in and outside of the marketing area are found only in the upper boundaries of Westchester County.

(Granted.) 14. The prices paid to producers for milk sold in the State of New Jersey but produced outside the state have never been regulated either by the State of New Jersey or by the State of New York and the competitive situation was unchanged by the issuance of Order No. 27 and Official Order No. 126. Milk approved for sale in the marketing area which is produced in states other than New Jersey and sold in New Jersey must therefore compete with milk not approved for sale in the marketing area which is produced in states other than New Jersey and sold in New Jersey. Prior to the adoption of Order No. 27 and Official Order No. 126 this competitive situation resulted in the payment of not more than the prevailing market price to producers delivering milk to approved plants, which milk was sold in New Jersey. (Refused.) The prevailing market price during the months preceding the adoption of the orders was substantially below the uniform prices which have since been in effect under Order No. 27 and Official Order No. 126. (Granted.) Since the adoption of these orders there is constant pressure from producers to require handlers subject to the orders to pay the uniform price for all milk delivered to approved plants regardless of where

sold. The resale prices in the State of New Jersey have not changed since the adoption of Order No. 27 and Official Order No. 126. At least one New York handler ceased selling milk in the State of New Jersey on the date on which the orders went into effect. At least two companies which sell fluid milk both in the marketing area and
254 in the State of New Jersey and which are also engaged in manufacturing operations, have lost a portion of their fluid milk business in the marketing area since September 1, 1938.

(Same as Defts'. No. 13.) 15. On the 5th day of August, 1938, the Secretary tentatively approved a marketing agreement regulating the handling of milk in the marketing area, and on or about August 6, 1938, delivered copies thereof to all handlers who would be subject to the provisions of the order, but prior to the issuance of said order, handlers of more than 50 per cent of the volume of milk covered by said order which was marketed within the marketing area failed or refused to sign said marketing agreement. Subsequent to the issuance of Order No. 27 a marketing agreement which regulates the handling of milk in the same manner as Order No. 27 and is applicable only to persons in the respective classes of industrial or commercial activity specified in Order No. 27 was signed by handlers of more than 50 per cent of the volume of milk covered by Order No. 27.

(Substantially same as Defts'. No. 14.) 16. Under authority of the provisions of Section 8c (19) of the Act, the Secretary conducted a referendum of producers in order to assist him in determining whether the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938 (said month having, on the 25th day of July, 1938, been determined by the Secretary to be a representative period), were engaged in the production of milk for sale in the marketing area. The referendum was held at the times and places set forth in a schedule of polling places issued by the Department of Agriculture prior to said referendum. Said schedule of polling places contained 308 designated polling places located as follows:

Connecticut	1
Maryland	1
Massachusetts	1
New Jersey	16
New York	233
Pennsylvania	35

255 The location of the polling places was such that every producer delivering milk to a plant approved by an authorized health authority for the receiving of milk to be sold in the marketing area had ready access to one or more polling places.

(Granted except as to the last sentence.) 17. Prior to the referendum there were sent to each producer as to whom available information indicated that he might be eligible to vote in said referendum (a) a copy of the order as issued August 5, 1938 by the Secretary; (b) the schedule of polling places above mentioned; (c) a pamphlet prepared by the United States Department of Agriculture, entitled "Questions and Answers on the Federal-State Milk Program for

New York;" and (d) a pamphlet prepared by the United States Department of Agriculture, entitled, "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27." Approximately 70,000 copies of the said order, the said schedule of polling places, and the said pamphlets were sent through Federal-State Agencies to such producers. (Although said pamphlets did not undertake to explain in detail all of the provisions of the Order, it cannot be said that statements contained in said pamphlets were inaccurate or misleading.)

(Granted.) 18. The proposed Order No. 27 received widespread publicity throughout the entire milk shed. The complete text of the order was published in "The Dairymen's League News," "The Bargaining Agency News" and "The Dairy Farmer's Union," all of which are dairy papers having a wide circulation. (Refused.) The proposed order was discussed both favorably and unfavorably by the aforesaid papers and by farm papers and newspapers generally. It cannot be said that explanations of Order No. 27 contained in "The Dairymen's League News" and "The Bargaining Agency News" were inaccurate or misleading.

256 (Granted.) 19. Prior to the referendum exhaustive and painstaking efforts were made to secure a complete and accurate list of all co-operative associations who might be qualified to vote in the referendum. Such efforts included consultations with county agents, extension workers from various universities in the Northeastern States, and officials of local departments of health throughout the area, examination of the corporation records in the office of the Secretary of State of the State of New York, conferences with leaders of producer groups and of handlers' organizations, with officials of the New York State Department of Agriculture and Markets and with other informed sources. After weeks of work a list of 193 co-operative associations was secured, which was, as far as could be ascertained, a complete list of co-operative associations whose producers delivered milk to plants approved by health authorities in the New York Metropolitan Milk Marketing Area.

(Granted.) 20. On July 8, 1938, a letter was sent to the last known address of each of said co-operative associations over the signature of E. W. Gaumnits, Chief of the Dairy Section, Agricultural Adjustment Administration, United States Department of Agriculture, and that of Mr. Kenneth F. Fee, Director, Division of Milk Control, Department of Agriculture and Markets, State of New York. This letter advised the co-operative associations of the steps which must be taken by them in order that they might be determined to be qualified to express the approval or disapproval of producers belonging to such association.

(Granted.) 21. Copies of the letter mentioned above were sent to the Central New York Cooperative Association, Inc., at Cortland, New York, and to the Schuyler Junction New York Milk Shed Cooperative, Inc., at Schuyler Junction, New York. These letters were never returned as unclaimed, but no reply was received from either

of these associations. The defendant Rock Royal Cooperative Association, Inc., did not start receiving milk from producers until August 6, 1938, and its name did not appear on any list as having been a co-operative association receiving milk from producers during the month of May 1938.

257 (Same as Defts. No. 80.) 22. The results of the aforesaid referendum were as follows: 45,644 votes cast, of which 7,017 were rejected as invalid. Of the 38,627 votes counted as valid, 33,663 votes, or 87.1 per cent, were in favor of the issuance of the order and 4,964 votes, or 12.9 per cent, were opposed thereto. Of the 7,017 votes which were rejected, 6,547 votes were rejected either because the voters were members of co-operative associations which had cast ballots for all of their members or because the voters were not qualified to vote, not having delivered milk to an approved plant during the month of May 1938. Of the votes rejected for this reason, 5,110 votes were in favor of the issuance of the order, and 1,437 votes were opposed thereto. 470 votes were rejected because the voter had failed to mark his ballot either for or against the order or because it was not possible to determine whether the ballot was marked for or against the order.

(Refused in favor Defts. No. 15.) 23. After conducting said referendum and after the refusal or failure of handlers of more than 50 per cent of the volume of milk covered by said order which was marketed within the marketing area to sign the tentatively approved marketing agreement relating to milk, the Secretary on the 24th day of August 1938 made a determination, which determination was approved by the President;

(a) That the refusal or failure of said handlers to sign such marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(b) That the issuance of the order is the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and

258 (c) That the issuance of the order was approved or favored by at least two-thirds of the producers who, during the month of May, 1938, were engaged in the production of milk for sale in the marketing area, and who voted in the above mentioned referendum.

Said findings and determination were published by the Secretary in the Federal Register on August 27, 1938. There was substantial evidence before the Secretary supporting the said findings and determinations. The evidence showed that conditions in the marketing area and in the milk shed supplying the marketing area were such that without regulation of the industry in such a manner as to insure adequate prices to producers and to bring about an equitable distribution of the burden of necessary surplus milk in the market, the purchasing power of milk in the base period set forth in Order No. 27 could not be reestablished and maintained.

(Granted.) 24. The Commissioner of Agriculture and Markets of the State of New York, pursuant to the provisions of Chapter 383 of

the Laws of 1937 of New York, conducted a poll to assist him in determining whether the issuance of Official Order No. 126 was favored by at least 75 per cent of the producers of milk produced in the production area. This poll was conducted at the same times and places as the referendum conducted by the Secretary of Agriculture. All producers located within the State of New York who had delivered milk to approved plants at any time after January 1, 1936, were permitted to vote in said poll and co-operative associations of producers were permitted to vote for their members in the same manner in which they voted in the referendum on Order No. 27. The results of such poll were as follows: 29,883 votes counted as valid were cast, of which 25,935 votes or 86.8 per cent were in favor of the issuance of the order and 3,948 votes or 13.2 per cent were opposed thereto.

259 (Same as defts.' No. 16.) 25. On August 25, 1938, the Commissioner of Agriculture and Markets, pursuant to the provisions of Chapter 383 of the Laws of 1937 of New York found, on the basis of such poll, that the issuance of Official Order No. 126 was favored by at least 75 per cent of the producers of milk produced in the production area for the marketing area and declared Official Order No. 126 to be effective on September 1, 1938. Said order has not been terminated.

(Substantially same as defts.' No. 17.) 26. On August 26, 1938, the Secretary issued an order which was published in the Federal Register on August 27, 1938, said order providing that Order No. 27 should become effective on September 1, 1938. Order No. 27 has not been terminated.

(Granted.) 27. A co-operative association of producers is a handler in competition with other handlers to the extent that it operates a country receiving plant or engages in the wholesaling of milk. (Refused.) The primary interest of the co-operative is in securing for its members the highest possible return from the sale of their milk. (Granted.) Order No. 27 recognizes that a co-operative association which engages in the handling of milk must be treated as a handler and required to participate in the market-wide pool, as otherwise the pool would not represent the market-wide utilization of milk and a co-operative whose market was largely a fluid market would not be bearing its fair proportionate share of the burden of surplus milk and would receive an unconscionable advantage over other handlers. (Refused.) It would not be feasible, however, to require a co-operative to return to its producers the exact uniform price each month because of the nature of the co-operative association and its relationship to its producer members.

260 (Refused as largely argumentative.) 28. A co-operative association of producers is under constant pressure from its producer members to secure the highest possible return for the milk which it handles and is also required to find some means of utilization for all the milk produced by its members. In the absence of a market-wide pool, a co-operative association would be under the same

economic compulsion as other handlers to compete for the fluid milk market and might be under constant temptation to cut prices in order to secure a larger proportionate share of that market. With a market-wide pool in operation, the same compulsion does not exist and the interests of the producer members of co-operatives can be better served by disposing of the surplus milk in the form of manufactured products than in selling fluid milk at a price which will not reimburse the co-operative association for the expenses which it has incurred in handling such milk. If a co-operative association sells milk for fluid purposes at a price which will not compensate it for the handling, it is unable to return to its producers the uniform price. Instead of selling its milk at such a price, the co-operatives can cause this milk to be made into manufactured products and, if these manufactured products can be sold at a price which will compensate the co-operative for the cost of handling, the co-operative can return to its producer members the full uniform price. The co-operative is therefor relieved of the incentive which formerly compelled it to meet the competition of the proprietary handlers in the fluid milk market.

(Refused as mere opinion.) 29. Co-operative associations may have as producer members anywhere from a few to several thousand farmers. These farmers are losely held together by reason of membership in the co-operative, but if the co-operative returns to them month after month a price substantially lower than the uniform price, these members will cease to do business with the co-
261 operative. The possibility that co-operative associations might be able to undersell other handlers by paying their producers less than the uniform price was carefully considered during the time that Order No. 27 was in process of formulation, but it was realized by all concerned that the interest of the producers in securing the highest possible return for their milk would make such a result not only improbable but impossible. To assume that a co-operative association would set out deliberately to capture the fluid market by underselling proprietary handlers, would require the assumption that the thousands of producers involved would deliberately make a sacrifice of thousands or hundreds of thousands of dollars per month in the hope of ultimately securing domination of the fluid milk market. Experience has shown that such a hope would be futile. Long experience in dealing with agricultural problems has also demonstrated that such a concerted long range program could never be successfully carried on by thousands of scattered farmers even when joined together through a co-operative association.

(Refused.) 30. The co-operative association must dispose of all the milk of its producer members whereas a proprietary handler is subject to no such compulsion. A proprietary handler, by closing plants or selection of producers, can limit its purchases to its business needs but a co-operative association must find an outlet for all the milk of all its producers even though the finding of such an outlet may result in substantial extra expense. The expenses necessarily incurred in performing this service may cause its expenses for a

eriod to exceed its income from its handling operations and if the o-operative were forced to return each month to its producers the niform price without deducting such expenses, it might be forced either to go out of business or to cease performing these serv-
22 ices. It has (Granted) long been the policy both of Congress and of the State of New York to foster the development f co-operative associations. Since it is only through cooperation at the producers are enabled to meet handlers on anything approaching even terms, any provision in the order which might make impossible for co-operatives to exist would be an unwarranted scrimination against them.

(Granted.) 31. The Dairymen's League, which is the largest cooperative engaged in the wholesaling of milk in the New York Metropolitan marketing area, has lost part of its wholesale business since ptember 1, 1938, although its total fluid milk sales, which include les of milk to other handlers have somewhat increased. (Refused.) he Dairymen's League did not initiate price-cutting in the market- g area and has not engaged in price-cutting. Price-cutting was ini- ted by some of the so-called independent operators and has been gaged in most actively by the aforesaid independents.

(Granted.) 32. Approximately one-third of the milk produced for e in the marketing area is produced in states other than the State New York. Approximately one-third of the milk produced in State of New York for sale in the marketing area passes through er States on its way to be sold in the marketing area; a large part the milk produced in the State of New York for sale in the mar- ing area which does not pass through other States on its way to sold in the marketing area is physically and inextricably inter- ngled with that milk which is produced outside of the State of w York for sale in the marketing area or which is produced in the te of New York for sale in the marketing area but which passes ough other States on its way to be sold in the marketing area.

(Granted.) 33. Each of the defendants has been since prior to ptember 1, 1938, and is now, engaged in the handling of milk shipped to the marketing area received by it at one or more plants operated by it and approved by the New York City Health Department for the receiving of milk to be sold in the rketing area. Milk received by the defendant Jetter Dairy Com- y, Inc., at its receiving plant located at Bridgewater, New York, hipped to the marketing area by rail through the State of New sey. Milk received by defendant Central New York Co-operative ociation, Inc., at its receiving plants is shipped to its New York y depot by tank trucks, which since October 1, 1938, have usually owed a route entirely within the State of New York. Prior to ober 1, 1938, such trucks often passed through the State of New sey en route to New York City. When tank trucks are not avail- e, milk is shipped to New York City via Delaware, Lackawanna Western Railroad and via Lehigh Valley Railroad through the te of New Jersey. All milk handled by the defendants is sold in

the marketing area in competition with milk produced in States other than the State of New York and shipped to the marketing area from receiving plants approved by a health authority for the receiving of milk to be sold in the marketing area and in competition with milk produced in the State of New York and shipped to the marketing area from receiving plants approved by a health authority for the receiving of milk to be sold in the marketing area through States other than New York State. Unless the milk produced for sale in the marketing area which does not travel directly in the current of interstate commerce is subject to the same regulation as the milk which travels directly in the current of interstate commerce, the result will be discrimination against the milk which travels directly in the current of interstate commerce. Such handling of milk by the defendants is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce, and each of the defend-

264 ants is a handler as defined in Order No. 27.

(Granted.) 34. Pursuant to Article II of Order No. 27, the Secretary on August 27, 1938, designated E. M. Harmon as Market Administrator under said Order, and pursuant to Article II of Official Order No. 126, the Commissioner of Agriculture and Markets of the State of New York designated said E. M. Harmon as Market Administrator under Official Order No. 126. Said E. M. Harmon, in the execution of his duties as Market Administrator under said Orders, has supplied all handlers, including the defendants, with forms prescribed in accordance with the provisions of the Orders upon which to report purchases, sales, and use use of milk, and said E. M. Harmon has been and now is acting as Administrator under said Orders. Each of the defendants has filed the reports which were due on October 10th, November 10th, and December 10th, but have not paid the amounts of their obligations to the Producer Settlement Fund. The amounts due from such defendants to the Market Administrator for payment to producers through the Producer Settlement Fund as shown by said reports are as follows:

	September	October	November
Jetter Dairy Co	Paid	14,616.05	9,039.77
Rock Royal	3,616.56	3,055.24	1,508.34
Schuyler Junction	1,603.00	1,337.40	731.64
Central New York	20,115.56	19,581.00	11,069.13

(Granted.) 35. The defendant Central New York Cooperative Association, Inc., does not own any farms. It handles milk produced by its members upon their own farms and also the milk of approximately 75 producers who are not members of and have no written contracts with Central New York Cooperative Association, Inc.

265 (Granted over Deft's. 7.) 36. The Dairymen's League is a nonstock, nonprofit cooperative association, organized in 1919 under Article XIII A of the Membership Corporations Law of the State of New York, which Article was in 1926 incorporated in and made a part of the Cooperative Corporations Law of said State, and

such Association is now subject to the provisions of Articles 4 and 6 of such law as well as the general provisions in Articles 1–3 thereof. The principal office of the Association is at Utica, New York.

(Granted.) 37. The Dairymen's League is now and has been for a number of years engaged in making collective sales of milk and its products as agent for the producers thereof in interstate and also in intrastate commerce, and is duly qualified to act under and is operating under the provisions of the Act of Congress of February 18, 1922, known as the "Capper-Volstead Act."

(Granted.) 38. The Dairymen's League, in cooperation with the New York State Conference Board of Farm Organizations, of which it is a member and the sole member representing milk producers only, sponsored and supported the enactment of Chapter 383, New York, Laws of 1937, commonly known as the "Rogers-Allen Law."

(Granted.) 39. After the passage of such act and on or about the 7th day of June 1937, representatives of the Dairymen's League and representatives of other cooperative associations of the state organized and incorporated the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., under the Cooperative Corporations Law of the State of New York.

(Granted.) 40. About November 1, 1937, the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., appointed a lawyers' committee composed of Edmund F. Cooke, Esq., attorney for the Bargaining Agency, Frank B. Lent, Esq., an attorney for the Dairymen's League, and Lloyd Anderson, Esq., attorney for Crow-
266 ley Milk Producers' Association, Inc., to act as a committee to draft a form of marketing agreement for submission to the Bargaining Agency. Shortly thereafter, Henry S. Manley, Esq., became attorney for the Sheffield Producers' Cooperative Association, Inc., and, as such, became a member of the committee. There was submitted to this committee a proposed draft of a volutary agreement prepared by Allan D. Miller, Esq., one of the attorneys for the Dairymen's League.

(Same as Deft's. 6.) 41. Early in 1938 the Metropolitan Co-operative Milk Producers' Bargaining Agency, Inc., presented to the Secretary of Agriculture of the United States and to the Commissioner of Agriculture and Markets of the State of New York, respectively, petitions for the issuance of federal and state orders, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 and of Chapter 383, New York, Laws of 1937, commonly known as the "Rogers-Allen Law," and accompanied said petition with a proposed form of order regulating the handling of milk in the New York metropolitan marketing area.

(Refused.) 42. The Bargaining Agency did not enter upon a program or scheme to procure for any of its member co-operatives an unlawful competitive advantage in the purchase and/or sale of milk over the defendant Jetter Dairy Company, Inc., and other proprietary corporations and dealers similarly situated.

(Refused.) 43. The Bargaining Agency did not enter upon a program or scheme to establish in the Bargaining Agency, its members, companies dealing with it or its members, or any of the aforesaid, a monopoly in the purchase and/or sale of milk in the marketing area.

(Refused.) 44. The Bargaining Agency did not enter upon a program or scheme with the object or intent of confiscating any of the property rights of the defendant, Jetter Dairy Company, Inc.

(Refused.) 45. The Bargaining Agency was not at any time dominated or controlled by the Dairymen's League and the Sheffield Co-operative, or either of them.

267 (Refused.) 46. During the period that Order No. 27 and Official Order No. 126 have been in effect the Dairymen's League has not engaged in any program designed or intended to take away customers from the defendant Jetter Dairy Company, Inc.

(Refused.) 47. The average price returned by the Dairymen's League to its producers for milk delivered by them during the month of September 1938, after the blending of all of its sales in all markets and the deduction of all of its expenses, including a charge for general administrative expenses of approximately 5¢ per hundred weight and including an amount of 5¢ per hundred weight retained by the League as a loan from its producers, pursuant to the terms of its contract with them, and including differentials, was approximately 4¢ per hundred weight below the uniform price announced by the Market Administrator.

(Refused.) 48. The average price returned by the Dairymen's League to its producers for milk delivered by them during the month of October 1938, after the blending of all of its sales in all markets and the deduction of all of its expenses, including a charge for general administrative expenses of approximately 5¢ per hundred weight and including an amount of 5¢ per hundred weight retained by the League as a loan from its producers, pursuant to the terms of its contract with them, and including differentials, was approximately 4¢ per hundred weight below the uniform price announced by the Market Administrator.

(Refused.) 49. The average price returned by the Dairymen's League to its producers for milk delivered by them during the month of November 1938, after the blending of all of its sales in all markets and the deduction of all of its expenses, including a charge for general administrative expenses of approximately 5¢ per hundred weight and including an amount of 5¢ per hundred weight retained by the League as a loan from its producers, pursuant to the terms of its contract with them, and including differentials, was approximately 3¢ per hundred weight below the uniform price announced by the

268 Market Administrator. However, producers of 82% of the milk delivered to the League during the month of November received an additional differential of 20¢ per hundred weight, which brought the average payment to all of its producers considerably above the uniform price announced by the Market Administrator.

(Granted.) 50. The reasonable wholesale delivered cost per quart of milk in glass bottles to stores in New York City upon the basis of the Class I price, including operation of country receiving plants, freight, processing, bottling, delivery costs, taxes, license fees, and reasonable overhead expenses, was from 9¢ to 9¾¢ per quart, during the months of September, October, and November, 1938.

(Refused.) 51. The Dairymen's League, during the period that Order No. 27 and Official Order No. 126 have been in effect, has not achieved or attempted to achieve a monopoly in the handling or sale of milk in the metropolitan milk market.

(Refused.) 52. Order No. 27 and Official Order No. 126 in no way tend to create or effectuate a monopoly.

(Granted.) 53. During the months of September, October, and November, 1938, the prices fixed by the New Jersey Milk Control Board were for milk delivered at the dealer's plant in New Jersey. Such prices were applicable only to milk produced and sold in New Jersey and did not apply to milk produced in other states, such as New York and Pennsylvania, and sold, for example, in Northern New Jersey markets. (Refused.) No price being fixed for such milk, the market for milk imported into New Jersey from other states was a highly competitive one.

(Granted.) 54. During the months of September and October 1938, the Dairymen's League paid into the Producer Settlement Fund approximately $110,000.00.

(Granted.) 55. The Market Administrator, E. M. Harmon, at no time coerced or intimidated any handler of milk; nor did he threaten to use or use his influence to cut off any handler's supply of
269 milk in order to induce said handler to sign a marketing agreement or to comply with Order No. 27 or for any other purpose; nor did any person, agency, or association, acting under the said E. M. Harmon's direction or with his advice or consent, threaten, coerce, or intimidate any handler in any manner whatsoever or for any purpose connected with the formulation, promulgation, administration, or enforcement of the marketing agreement, or Order No. 27 or otherwise.

(Refused.) 56. None of the defendants were in any way threatened, coerced, or intimidated by any person with the purpose or intent of compelling any of the defendants to sign a marketing agreement or to comply with Order No. 27.

Respectfully submitted.

JOHN S. L. YOST,
CHARLES J. MCCARTHY,
Special Assistants to the Attorney General.

RALPH L. EMMONS,
United States Attorney.
HAROLD L. SCHILZ,
Special Assistant to the Attorney General.
E. O. MATHER,
Senior Attorney, Department of Agriculture.

270 In United States District Court

Civil Action No. 32. Consolidated Cause

[Title omitted.]

Memorandum of record references to plaintiff's proposed findings of fact.

Paragraph 1—Exhibit A, par. 1.
Paragraph 2—Exhibit A, par. 2.
Paragraph 3—Exhibit A, par. 3.
Paragraph 4—Exhibit A, par. 4.
Paragraph 5—Exhibit A, par. 5.
Paragraph 6—Exhibit A, par. 6.
Paragraph 7—Exhibit A, par. 7.
Paragraph 8—Exhibit A, par. 8.
Paragraph 9—Exhibit A, par. 9.
Paragraph 10—Exhibits A–3, A–4 (Exhibits 3 and 4 to the stipulation).
Paragraph 11—Exhibits A–1, A–2, A–3.
Paragraph 12 (A)—Exhibit A–3–8 (Exhibit 8 to the record of the hearing before the Secretary of Agriculture, p. 14 et post, Exhibit A–3–36, Exhibit A–3–15, p. 5.

271 Paragraph 12 (B)—Exhibit A–3–15, pp. 5–6, 127–129; Exhibit A–3–25, tables 43, 44; Exhibit A–3–26, p. 32, tables 45; Exhibit A–3–8, p. 14, et post, p. 55, et post, cf. R. 593, R. 659.
Paragraph 12 (C)—Exhibit A–3–15, p. 22; Exhibit A–3–8, p. et post, p. 37; Exhibit A–3–25, tables, 43, 44; Exhibit A–3–26, tab 42, 45.
Paragraph 12 (D)—Exhibit A–3–25, tables 43, 44; Exhibit A–3– tables 42, 45; Exhibit A–3, pp. 1463–1465; Exhibit A–3–8, p. et post; Exhibit A–3–15, pp. 127–129.
Paragraph 12 (E)—Exhibit A–3, with particular reference to p 97–104, 431, 432; Exhibit A–3–8, p. 17, et post; Exhibits A–3– A–3–26, A–3–27.
Paragraph 12 (F)—Exhibits A–3, pp. 95, 96; Exhibit A–3–26, p.
Paragraph 12 (G)—Exhibit A–3, p. 45, et post; Exhibit A–3– pp. 158–165.
Paragraph 13 (A)—Exhibit A–3, pp. 244, 245, 1143, 1146, 170 Exhibit A–3–8, p. 91; Exhibit A–3–26, p. 213, 220; Exhibit A, p 59, cf. R. 568, R. 636, R. 820, R. 992, R. 1579.
Paragraph 13 (B)—Exhibit A–3, pp. 235, 237, 241; Exhibit A–3– p. 43; Exhibit A–3–17, pp. 21, 22, 44; Exhibit A–3–26, p. 214, 2315, Defendant's Exhibits 78, 79.
Paragraph 13 (C)—Exhibit A–3–8, pp. 96, 243; Exhibit A–3– p. 99; Exhibit A–3–26, pp. 212–214.
Paragraph 13 (D)—Exhibit A–3, pp. 116, 117, 1569–1574; Exhibit A, pars. 31–38; Exhibit A–3–18, pp. 26, 27.

Paragraph 13 (E)—Exhibit A–3, pp. 221, 232, 1151; Exhibit A–3–16, pp. 12, 44, 45, 47, R. 2315, Defendant's Exhibit 78, cf. R. 1448, R. 1467, R. 1481, R. 2369.

Paragraph 13 (F)—Exhibit A–3–8, p. 110; Exhibit A–3–26, p. 212; Exhibit A–3, p. 1085.

Paragraph 14—Exhibit A–3–8, pp. 73, 118, 119; Exhibit A–3–15, pp. 5, 9, 42, cf. R. 848, R. 1209, R. 1225, R. 2349; Exhibit A–3, pp. 1008, 1009.

Paragraph 15—Exhibit A, par. 11.

Paragraph 16—Exhibit A, par. 12; Exhibit A–7.

Paragraph 17—Exhibit A, par. 13; Exhibits A–7, A–8, A–9, A–10.

Paragraph 18—R. 1876, R. 1891, R. 1960, R. 2380, R. 2411; Exhibits A–23, A–24, A–25, A–26, A–27, A–28; Exhibit A–3, pp. 58–60; R. 2409.

Paragraph 19—Exhibit A, par. 18.

Paragraph 20—Exhibit A, par. 19.

Paragraph 21—Exhibit A, par. 20.

272 Paragraph 22—Exhibit A, par. 14.

Paragraph 23—Exhibit A, par. 15; Exhibit A–3, particularly Exhibit A–3–8, p. 3, 115, 116; Exhibit A–11.

Paragraph 24—Exhibit A, par. 28.

Paragraph 25—Exhibit A, par. 29.

Paragraph 26—Exhibit A, par. 30.

Paragraph 27—Exhibit A, par. 35; R. 278–279; Exhibit A, par. 33, 34.

Paragraph 28—Exhibit A, par. 36; R. 286–290.

Paragraph 29—Exhibit A, par. 37, R. 293, 298.

Paragraph 30—Exhibit A, par. 38, R. 298, 299.

Paragraph 31—R. 165, R. 171, R. 181, R. 460, R. 496, R. 521, R. 528, R. 537, R. 628, R. 875, R. 891–901, R. 1003, R. 1423, R. 1451–1459, R. 1470, R. 1478, R. 2344–2350.

Paragraph 32—Exhibit A, par. 42, 43.

Paragraph 33—Exhibit A, par. 40, 43, 45, 46, 47, 64 to 76 inclusive; R. 314, R. 1256, R. 2207, R. 2309, R. 2377, R. 796–804, R. 962, R. 989, R. 1448, R. 1456, R. 1487; defendant's exhibits 83, 84; Exhibits A–29 to A–42 inclusive; Par. 8 amended answer of defendant Jetter Dairy Company.

Paragraph 34—Exhibit A, par. 60, 61, 62; Exhibits A–29 to A–40

Paragraph 40—R. 1888.

Paragraph 35—Exhibit A, par. 63, 74.

Paragraph 36—R. 1520.

Paragraph 37—R. 1521.

Paragraph 38—R. 1887.

Paragraph 39—Exhibit A, par. 55.

Paragraph 40—R. 1888.

Paragraph 41—Exhibit A–3, p. 42.

Paragraphs 42 to 46—The issues dealt with in these findings were raised in the affirmative defenses of the defendant Jetter Dairy Company, Inc. The burden of proof was on the defendant and the

defendant has failed to sustain such burden. These findings are based not on any particular portion of the record but on the record as a whole.

273 Paragraph 47—Defendants' exhibits 11 and 39.
Paragraph 48—Defendants' exhibits 12 and 40.
Paragraph 49—Defendants' exhibits 41 and 54.
Paragraph 50—R. 172, 970; Exhibit A–43.
Paragraphs 51 and 52—See comment on paragraphs 42 to 46.
Paragraph 53—Exhibit A–3, pp. 1008, 1009; Exhibit A–3–15, pp. 5, 9, 42; Exhibit A–3–8, pp. 73, 118, 119.
Paragraph 54—Defendants' exhibits 13, 39, 40, 41.
Paragraph 55 and 56—See comment on paragraphs 42 to 46. Also R. 1489 et post.

Respectfully submitted.

JOHN S. L. YOST,
John S. L. Yost,
CHARLES J. McCARTHY,
Charles J. McCarthy.
Special Assistants to the Attorney General.

RALPH L. EMMONS,
United States Attorney.
HAROLD L. SCHILZ,
Special Assistant to the Attorney General.
E. O. MATHER,
Senior Attorney, Department of Agriculture.

274 In United States District Court

Civil Action No. 32. Consolidated Cause

[Title omitted.]

Plaintiff's proposed conclusions of law

Filed March 9, 1939

(Refused.) 1. The Agricultural Marketing Agreement Act of 1937 is a valid exercise by Congress of its power under the Constitution to regulate commerce among the several states.

(Granted.) 2. After notice of hearing on the proposed order, a public hearing was held thereon in accordance with said notice; findings of fact were made by the Secretary of Agriculture, as required by said Act; and Order No. 27, "Order * * * Regulating Such Handling of Milk in the New York Metropolitan Marketing Area as is in Interstate Commerce, and as Directly Burdens, Obstructs, or Affects Interstate Commerce," was duly issued by the Secretary of Agriculture in compliance with, and conformity to, the applicable provisions of the Agricultural Marketing Agreement Act of 1937.

(Granted.) 3. Said Order No. 27 is now, and has since Septem-

(Granted but this is not to be construed as finding that the order is reasonable.) 4. There was substantial evidence introduced at the said hearing and before the Secretary of Agriculture to support all of the said findings and to support the reasonableness of all
275 of the terms and conditions contained in said Order No. 27.

(Refused.) 5. The said Order No. 27 and the applicable provisions of the Agricultural Marketing Agreement Act of 1937 pursuant to which the order was issued constitute a valid regulation of such handling of milk produced for sale in the New York Metropolitan Area, as defined in said order, as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce.

(Granted.) 6. All handling of milk produced for sale in the New York Metropolitan Area is in the current of interstate commerce, or directly burdens, obstructs, or affects interstate commerce, and is subject to regulation as provided in the said Order No. 27.

(Refused.) 7. The powers vested in the Secretary of Agriculture by the provisions of the Agricultural Marketing Agreement Act of 1937, as invoked by the Secretary of Agriculture in this case, are accompanied by a prescription in the said Act of the subject matter, policy, standards and limitations upon, for, by, and in accordance with, which such powers are to be exercised, together with a requirement of requisite findings of fact by the Secretary precedent to the exercise of such powers, and all of such powers were validly conferred by Congress upon the Secretary of Agriculture and do not constitute an unlawful delegation of legislative authority.

(Refused.) 8. The said Order No. 27 and the applicable provisions of the Act pursuant to which the said order was issued do not operate to deprive the defendants, or any of them, of property without due process of law.

(Refused.) 9. The Agricultural Marketing Agreement Act of 1937 is a valid exercise of the constitutional powers of Congress.

(Refused.) 10. Order No. 27 is a valid and proper exercise of the powers conferred upon the Secretary of Agriculture by the Agricultural Marketing Agreement Act of 1937.

276 (Granted.) 11. Each of the defendants is a handler as defined in said Order No. 27, and is subject to the provisions of the said order and the said Act.

(Granted.) 12. Each of the defendants has handled milk in violation of the provisions of the said order and has failed and refused to comply with the provisions of said order.

(Granted.) 13. The Agricultural Marketing Agreement Act of 1937 vests in this Court jurisdiction specifically to enforce, and to prevent and restrain the defendants from violating, the provisions of said Order No. 27, and the plaintiff is entitled to the relief demanded in its complaint herein.

(Refused on the ground that the order is invalid.) 14. The defendants are indebted to the Market Administrator under Order No. 27 for payments due to milk producers through the Producer Settle-

ment Fund in the amounts set opposite their respective names in pa
agraph 34 of plaintiff's proposed findings of fact.

15. An injunction should issue

(Refused.) (a) Commanding each of the defendants to pay t
amounts now due and owing by such defendant under the provisio
of said Order No. 27;

(b) Commanding the defendants, their agents, officers, attorney
employees, successors, and assigns to comply with all the provisio
of Order No. 27; and

(c) Restraining and enjoining the defendants, their agents, of
cers, attorneys, employees, successors, and assigns from handling mil
in violation of the provisions of said Order No. 27.

(Not necessary to decide.) 16. The Rogers-Allen Act (New York
Laws of 1937, Chap. 383) is a valid exercise of the constitutional
powers of the Legislature of the State of New York.

277 (Not necessary to decide.) 17. Official Order No. 126 w
a valid and proper exercise of the powers conferred upon the
Commissioner of Agriculture and Markets of the State of New York
by the Rogers-Allen Act.

(Granted.) 18. Official Order No. 126 is now, and has since Sep
tember 1, 1938, been continuously, in full force and effect.

(Not necessary to decide.) 19. There was evidence before the
Commissioner to support all the necessary findings and all the terms
and conditions contained in Official Order No. 126.

Respectfully submitted.

(Signed) JOHN S. L. YOST,
John S. L. Yost.
CHARLES J. McCARTHY,
Charles J. McCarthy,
Special Assistants to the Attorney General.

RALPH L. EMMONS,
United States Attorney.
HAROLD L. SCHILZ,
Special Assistant to the Attorney General.
E. C. MATHER,
Senior Attorney, Department of Agriculture.

278 In United States District Court

Civil Action No. 32. Consolidated Cause

[Title omitted.]

Findings of fact and conclusions of law proposed on behalf of defendants Jetter Dairy Company, Inc., Rock Royal Co-operative, Inc., and Schuyler Junction New York Milk Shed Co-operative, Inc.

Filed March 21, 1939

(Granted, changing 65 to 82.) 1. The defendant Rock Royal Cooperative Inc., is a cooperative corporation organized and existing under

and by virtue of the Laws of the State of New York, and having its principal office and place of business at Rock Royal, in the County of Delaware, State of New York, at which place it operates a milk-receiving station, receiving milk from 65 producers in August 1938.

(Granted.) 2. The defendant Central New York Co-operative Association, Inc., is a cooperative corporation organized and existing under and by virtue of the Laws of the State of New York and having its principal office and place of business in the City of Cortland, County of Cortland, and State of New York, operating milk-receiving stations at Maybury Mills, Youngs Crossing, Kortright, and Sheds, N. Y., receiving milk from 484 producers' in the month of August 1938.

(Granted.) 3. The defendant Schuyler Junction New York Milk Shed Co-operative, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Schuyler Junction, County of Herkimer, and State of New York, operating a milk-receiving station at Schuyler Junction, N. Y., and in August 1938 received milk from 60 producers.

(Granted.) 4. Defendant Jetter Dairy Company, Inc., is a business (proprietary) corporation, organized and existing under and by virtue of the stock corporation law of the State of New York, and having its principal place of business at Oriskany Falls, Oneida County, N. Y. Said corporation operates milk receiving stations at Solsville, Madison County, N. Y.; Oriskany Falls, Oneida
279 County, N. Y., and Bridgewater, Oneida County, N. Y., receiving a minimum of more than 40,000 quarts of milk daily from milk producers. Said milk is all resold in the City of New York.

(Granted because stipulated.) 5. On June 7th, 1937, a Certificate of Incorporation of "Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.," hereinafter referred to as "Bargaining Agency," was filed in the Office of the Secretary of State, of the State of New York, whereby there was created a membership corporation. Said Certificate provided in part:

"10. The membership of the corporation, shall be limited to cooperative associations organized under or subject to the provisions of the Cooperative Corporations Law of the New York State, or of similar laws of any other State, and organized and controlled by milk producers."

Shortly thereafter, the Dairymen's League and Sheffield Cooperative became members of said new corporation or Bargaining Agency. Other cooperatives, operating country receiving plants, were solicited to become members of the Bargaining Agency, and some did so. The officers, members, agents, and servants of the Bargaining Agency assisted in the formation of cooperative corporations among the milk producers delivering milk to plants owned by independent dealers, including defendant Jetter.

Said Bargaining Agency is the intervening plaintiff.

(Granted same as pltffs 41.) 6. The Bargaining Agency presented to the Secretary of Agriculture of the United States, and to the Commissioner of Agriculture of the State of New York a proposed marketing agreement and Order, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and requested a hearing thereon under the authority of the Act, and under the provisions of Chapter 383 of the Laws of 1937 of the State of New York. A true, correct, and complete copy of such proposed marketing agreement and order, together with the notice of hearing thereon, is attached as Exhibit 21 to the stipulation of agreed facts, hereinafter referred to as "stipulation."

(Refused because better stated in plaintiffs 36.) 7. The intervening plaintiff, Dairymen's League Cooperative Association, Inc., hereinafter referred to as "Dairymen's League," is a cooperative corporation, organized under the cooperative corporations law of the State of New York, and having its principal place of business at Utica, N. Y.

280 (Granted Public, No. 127 changed to 137 same as pltff's no. 5.) 8. Pursuant to the provisions of Section 8b and 8c of the Agricultural Marketing Agreement Act of 1937 (Public, No. 127, 75th Congress; 50 Stat. 246; 7 U. S. C. 601 et seq.) (hereinafter referred to as the "Act"), the Secretary of Agriculture of the United States (hereinafter referred to as the "Secretary"), on April 29, 1938, gave notice of public hearings on a proposed marketing agreement and a proposed Order regulating the handling of milk in the area which includes the territory within the boundary lines of the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York, the said area being hereinafter referred to as the "Marketing Area." On April 29, 1938, the Commissioner of Agriculture and Markets of the State of New York, pursuant to the provisions of Chapter 383 of the Laws of 1937 of New York, gave notice of public hearings to be held at the same times and places on an Order substantially identical with the aforesaid Order.

(Granted same as plaintiff's no. 6.) 9. Pursuant to the terms of the said notices, and upon the request of the Commissioner of Agriculture and Markets of the State of New York, pursuant to Section 10 (i) of the Act, and Chapter 383 of the Laws of 1937 of New York, joint public hearings were conducted by Glen J. Gifford, an employee of the Department of Agriculture, who was designated by the Secretary to conduct such hearings, and also designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on behalf of the State. In accordance with the terms of said notice, the aforesaid public hearings were conducted at Albany, N. Y., on May 16, 1938; at Malone, N. Y., on May 17, 1938; at Syracuse, N. Y., on May 18, 1938; at Elmira, N. Y., on May 19, 1938; and at New York, N. Y., on May 20, 1938. The hearings were then recessed until May 24, 1938, and were continued at New York, N. Y., on May 24, 25, and 26, 1938, and at Albany, N. Y., on June 3, 4, 5, and 7, 1938. At the times and places aforesaid, all

interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed Order. The said hearings were attended by producers, representatives of producers, handlers, and consumers of milk sold in the marketing area. All of the defendants knew of said hearings, but none of the defendants appeared or were represented at any hearing.

(Granted same as pltff's. no. 7.) 10. On the 5th day of
281 August 1938, the Secretary, pursuant to the provisions of Section 8e of the Act, made a finding and proclaimed that, as to milk produced for sale in the marketing area, the purchasing power of such milk during the base period, August 1909 to July 1914, could not be satisfactorily determined from available statistics of the Department of Agriculture, but that the purchasing power of such milk could be satisfactorily determined from available statistics of the Department of Agriculture for that portion of the post-war period between August 1921 and July 1929, inclusive.

(Granted substantially same as pltff's. no. 8.) 11. Upon the evidence introduced at the said hearings, and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of the proposed Order (which notice was published in the Federal Register on July 23, 1938), the Secretary, on August 5, 1938, issued Order No. 27, regulating the handling of milk in the marketing area in the manner provided in the Act, said Order containing the terms and conditions held by the Secretary to be authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner as, and made applicable only to persons in the respective classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as aforesaid. Said order also contains the findings by the Secretary, required by the applicable provisions of the Act, to be made by him.

(Granted same as pltff's. no. 3.) 12. Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of, or in opposition to the findings and provisions, of any of them, of the proposed Order, the Commissioner of Agriculture and Markets, on August 5, 1938, made the findings as required by Chapter 383 of the Laws of 1937 of New York, and issued proposed Official Order No. 126 which Order is substantially identical with Order No. 27 and contains the terms and conditions held by the Commissioner to be authorized by the applicable provisions of Chapter 383 of the Laws of 1937 of New York and no others.

(Granted same as pltff's. no. 15.) 13. On the 5th day of A'gust 1938, the Secretary tentatively approved a marketing agreement regulating the handling of milk in the marketing area, and on or
282 about August 6, 1938, delivered copies thereof to all handlers who would be subject to the provisions of the Order, but prior to the issuance of said Order, handlers of more than 50 per cent of the volume of milk covered by said Order, which was marketed

within the marketing area, failed or refused to sign said marketing agreement.

(Granted substantially same as pltffs. 16.) 14. Under authority of the provisions of Section 8c (19) of the Act, Secretary conducted a referendum of producers in order to assist him in determining whether the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938 (said month having, on the 25th day of July 1938, been determined by the Secretary to be a representative period), were engaged in the production of milk for sale in the marketing area. The referendum was held at the times and places set forth in a schedule of polling places issued by the Department of Agriculture prior to said referendum.

(Granted over pltffs. 23.) 15. After conducting said referendum and after the refusal or failure of handlers of more than 50 per cent of the volume of milk covered by said Order, which was marketed within the marketing area to sign the tentatively approved marketing agreement relating to milk, the Secretary on the 24th day of August 1938, made a determination, which determination was approved by the President:

(a) That the refusal or failure of said handlers to sign such marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(b) That the issuance of the Order is the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and

(c) That the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938, were engaged in the production of milk for sale in the marketing area, and who voted in the above mentioned referendum.

Said findings and determination were published by the Secretary in the Federal Register on August 27, 1938, a copy of which is attached as Exhibit II to stipulation.

(Granted same as pltff's. no 23.) 16. On August 25, 1938, the Commissioner of Agriculture and Markets, pursuant to the provisions of Chapter 383 of the Laws of 1937 of New York, found, after conducting a poll, that the issuance of Official Order No. 126 was favored by at least 75 per cent of the producers for milk produced in the production area for the marketing area, and
283 declared Official Order No. 126 to be effective on September 1, 1938. Said Order has not been terminated.

(Granted substantially same as plaintiff's no. 26.) 17. On August 26, 1938, the Secretary issued an Order which was published in the Federal Register on August 27, 1938, said Order providing that Order No. 27 should become effective on September 1, 1938. Order No. 27 has not been terminated.

Order No. 27 and Official Order No. 126, are herein after referred to as the "Order."

(Granted.) 18. The Order established prices to be paid for milk

Class I, is fixed arbitrarily, depending upon the market price for butter. Class 2A milk, utilized in the manufacture of cream for fluid consumption, is likewise arbitrarily fixed. Under such provisions, the price for fluid milk, has been since September 1, 1938, $2.45 per cwt.

Prices for milk manufactured into various milk products, are the assumed market values thereof, based on market prices of the products into which said milk is manufactured, and which products are sold in country-wide competition. These prices are determined monthly by the Administrator in accordance with the formulas therefor contained in the Order.

(Granted.) 19. The Metropolitan Marketing Area, as defined by the Order, includes the City of New York, and territory adjacent thereto, wholly within the territorial botindaries of the State of New York.

(Granted.) 20. Milk dealers, licensed as such, under the provisions of Sections 253 and 257 of the Agriculture and Markets Law of the State of New York, alone, have the right to engage in the purchase and sale of milk in said Marketing Area, and the term "milk dealer" includes

"Any person who purchases or handles or sells milk, including * * * cooperative corporations and unincorporated cooperative associations."

A "dealer" who handles milk received at an approved plant is a handler within the meaning of the Order. All of the defendants are handlers as defined in the Order.

(Granted except that the figures should read Art. V, Sec. 3.) 21. All handlers purchasing milk in the production area, are required to report to the Market Administrator monthly, a statement of the amounts of milk purchased by such handler, and the utilization 84 thereof, Article V, Section 2. (Granted, should read Art. VI sec. 1.) Based on the total reports, the Administrator computes the total value of the milk of such handler, based on the prices provided for in the Order, Article VI, Sec. 7. The result of such computation, is the handler's "net pool obligation."

(Granted.) 22. By the provisions of Article VI, Section 2, the Administrator computes from all reports of all handlers, a so-called "uniform price," which is deemed to be the average price payable to producers for milk for such month, subject to certain differentials which are hereinafter referred to. Such computation is made after subtracting certain special payments to cooperatives, and to proprietary handlers, under the provisions of Article VII, Sections 5 and 6.

(Granted.) 23. By the provisions of Article VII, Section 1, on or before the 25th day of each month, "each handler which is not a cooperative association of producers," is required to pay to each producer the uniform price for all milk delivered by producers during the preceding month and which was sold in the marketing area.

(Granted.) 24. Cooperative associations which are handlers a not required to make payment for similar milk at the uniform pr or at any stated price.

(Granted.) 25. All handlers are required by the provisions Article VII, Section 8, on or before the 18th day of each month, pay to the Market Administrator, for the Producer Settlement Fu "the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the pool milk of such handler by the uniform price." Applied to flu milk, under this provision, each handler is required to pay to th Producer Settlement Fund, for all milk so utilized, the differen between $2.45 per cwt. and the uniform price for all Class I milk.

(Granted.) 26. Handlers selling milk received from producers i the production area, but marketed outside of the marketing area, a under no requirement to pay the uniform price for such milk, n do they pay into the Producer Settlement Fund for the differen between the uniform price and the actual market value of suc milk, or otherwise. Such handlers are permitted to blend prices pai or purported to have been paid for such milk sold in other market with the uniform price announced by the Administrator for mil sold in the area, thereby reducing the actual price paid by suc handlers for milk sold in the Metropolitan Area in competition wit milk sold by the defendants.

The construction placed upon said provisions of Order No
285 27 by the Secretary, is set forth in a pamphlet issued by th United States Department of Agriculture, Dairy Section, i October 1938, on the cover of which is printed "Market Adminis trator, New York Metropolitan Milk Marketing Area, 95 Madiso Avenue, New York, N. Y." Page 14 of said pamphlet states:

"Uniform Pool Prices for Producers

"Handlers are required to pay the uniform pool, or blended price calculated by the Market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class 1 milk outside of the Marketing Area. In such instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. For the remainder of each producer's milk, the handler may pay such prices as he sees fit, but is required to furnish the producer with a statement of the percentage of the producer's milk paid for the uniform price."

Thus, the handler may multiply the total pounds of milk sold by it in the area by the uniform price; multiply the total pounds of milk sold in other markets and which is called "unpriced milk," by "such prices as it sees fit"; add the totals, and divide by the total pounds of milk, to obtain the average or "blended" price paid producers for all milk. If the price figured by the handler for unpriced milk is lower than its actual market value, the handler, by blending, is

thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof.

(Granted.) 27. While cooperative corporations are exempted from any requirement to pay either the uniform price to its producers, or any stated proportion thereof, and are permitted to blend prices of milk received in the production area in accordance with their sales or portions thereof in the marketing area, and portions in other markets, in addition, said cooperatives are, by the provisions of Title 7, Section 608c (5) (F), U. S. Code, permitted to "blend" any prices actually paid, with prices obtained or charged for unpriced milk produced outside of the production area.

(Granted.) 28. The principal health authority in the Metropolitan Milk Marketing Area, as described by the Order, is the Department of Health of the City of New York, which inspects country receiving plants, farms, dairies, and other facilities of milk producers, as well as bottling and distributing facilities covering all milk sold within the City of New York.

286 Some of the milk receiving stations in the production area which are approved by the Department of Health of the City of New York, are also approved by the Health authorities of the City of Newark, State of New Jersey, and by the State of New Jersey for delivery to Newark and other cities and communities in said State.

(Granted.) 29. The Official records of the Department of Health of the City of New York, as of August, 1938, disclosed that there were 54,111 milk producers whose dairies had been inspected and approved for the production of Grade B milk for shipment to and sale in the City of New York; 6,109 milk producers, whose dairies had been approved for the production of Grade A milk for shipment to, and sale in the City of New York, making in all 60,220 milk producers. Said producers were located in the States of New York, Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania, and Vermont, herein referred to as the "production area." Included therein, are the producers delivering to defendant's plants.

(Granted.) 30. Approximately 420 country receiving plants have been approved for the receiving and shipping of Grade B milk, and approximately 86 milk receiving plants have been approved for receiving and shipping Grade A milk, making a total of approximately 506 milk receiving stations in all, in said production area. Included therein, are defendants' receiving stations.

(Granted.) 31. At all the times hereinafter mentioned, defendant Jetter Dairy Company, hereinafter referred to as "Jetter," was a competitor of, and has sold milk in its business, in competition with dealers operating the country milk receiving stations in the New York Milk Shed above referred to, and who shipped milk received at said stations to the Metropolitan Area and sold the same in competition with milk sold by said defendant. The defendants Rock Royal Co-operative, and Schuyler Junction Cooperative, at all the times herein mentioned, have been and now are, selling milk to independent deal-

ers for resale in competition with milk received at the country pl
described in the next preceding paragraph.

(Granted.) 32. Defendants' principal competitors are as follo

a. The Borden Company and various corporations subsidi
thereto, hereinafter referred to as "Bordens."

b. Various subsidiaries of National Dairy Products corporati
hereinafter referred to as "National Dairy."

287 c. Dairymen's League Cooperative Association, Inc., here
after referred to as "Dairymen's League."

d. Other dealers, known in the industry as "independent deale
Defendant Jetter is an independent dealer.

The defendant Jetter, the dealers purchasing the milk supply of
defendants Rock Royal and Schuyler Junction, and said competit
above enumerated, insofar as they are engaged in the sale of milk
fluid consumption in the City of New York are all "milk dealers"
defined by Section 253 of the New York Agriculture and Mark
Law, and are all "handlers" as defined by Article I, Subdivision
of Order No. 27 and Official Order No. 126.

(Granted.) 33. Defendant Jetter, customers of defendants Ro
Royal and Schuyler Junction, and their competitors, are also know
in the industry as distributors. The Dairymen's League occupies
dual capacity as a cooperative agent of producers and as a distributo
The Dairymen's League, as a distributor sells milk in competiti
with the defendant Jetter and other distributors including distrib
tors purchasing their supplies from it, and is a factor in the pri
which defendant Jetter and their competing dealers can demand a
procure for fluid milk.

(Granted.) 34. Dairymen's League was in August, 1938, operatin
109 approved milk receiving plants in the New York Milk She
receiving milk from 11,391 producers.

(Granted.) 35. The records of the Department of Health of th
City of New York, show that as of August 1938, Bordens operate
65 approved milk receiving stations, receiving milk from 8,404 pr
ducers. All of said producers were and are members of Dairymen
League; milk of said producers is delivered to Bordens and paymen
therefor, is made by Bordens to said Dairymen's League, which i
turn pays said producers, and also pays producers delivering mil
to its own plants.

(Granted as modified by insertion of the words "by all handlers."
36. The number of approved producers included in Dairymen
League membership was in August 1938, upwards of 19,500.

Reports to the Market Administrator, show that total utilization o
milk in the marketing area, by all handlers was as follows:

	For month	Per day
	Pounds	*Pounds*
September	203,478,06	6,782,60
October	211,946,396	6,838,9
November	204,742,307	6,824,74

(Granted if 2,288,312 is changed to 2,294,763 and 236,514 changed to 242,965 and 46,130 changed to 39,664.) 37. The Dairymen's
288 League, which has receiving stations approved for the Metropolitan Area, and also for the State of New Jersey, and various localities therein, reported a total utilization of milk in class I in the marketing area, as follows: (Exhibits 11–12–54)

	Total for month	Total per day
	Pounds	*Pounds*
September	61, 553, 968	2, 051, 798
October	71, 137, 678	2, 294, 763
November	70, 033, 283	2, 334, 427

Gain per day October over September 242,965 pounds; November over October 39,664 pounds.

	Total unpriced class 1 milk reported to producers, exhibits 11, 12, 54	Total unpriced milk sold in New Jersey, exhibit 81	Total unpriced milk reported sold in markets other than New Jersey
Sept	35, 586, 543	10,808, 500	4, 624, 717
Oct	38, 619, 930	10, 457, 153	3, 737, 378
Nov	35, 374, 845	10, 143, 275	

(Granted.) 38. The Milk Control Board of the State of New Jersey, fixed a base price of $2.76 per cwt. to producers for 3.5 milk F.O.B. country milk plants, which price was in effect in New Jersey from September 1st and still continues.

Said Milk Control Board of the State of New Jersey fixed the wholesale price from dealers to stores, at 11¢ per quart of milk bottled in glass in two rural districts, and at 12¢ per quart of milk in glass from dealers to stores in the three more heavily populated districts in the State, and fixed a minimum price to consumers out of stores in the two rural districts, of 12¢ per quart, and in the three heavily populated districts, of 13¢ per quart.

No resale prices are fixed in the State of New York, either from dealers to stores, or stores to consumers.

The fair market value of "unpriced" Class 1 milk produced in the production area and sold by handlers in New Jersey (based on producers and resale prices fixed by Control Board), in September, October, and November 1938, was $2.76 per cwt.

(Granted.) 39. The uniform price for 3.5 milk in the 200-mile zone fixed by the Administrator was as follows: September, $1.87; October, $1.91; November, $2.10.

The Dairymen's League paid its producers a base price for 3.5 milk in the 200-mile zone, in cash and certificates of indebtedness (considered as cash), as follows: September, $1.75 per cwt.; October, $1.81 per cwt.; November $2.01 per cwt.

289 The difference between the value of Class 1 milk sold by the Dairymen's League in New Jersey (as fixed by the New

Jersey Control Board), and the prices paid for the same to produce[illegible] per cwt., was as follows: September, $1.01 per cwt.; October, 95¢ p[illegible] cwt.; and November 75¢ per cwt.

$1.01 per cwt. on 10,208,500 pounds of milk sold in New Jersey equals $103,105.85.

(Granted.) 40. The amount by which the price actually paid for Class 1 milk sold in the marketing area was reduced by "blending" proceeds of New Jersey milk with proceeds of New York milk, as applied generally to the Dairymen's League, was as follows:

	Total volume sold in New Jersey	Difference between New Jersey price and price paid producers
	Pounds	
Sept	10,208,500	[illegible]
Oct	10,457,153	[illegible]
Nov	10,143,275	[illegible]

The Dairymen's League, as a distributor, was engaged only in the wholesale or dealer-to-store and dealer-to-institutions trade. Total sales reported by the Dairymen's League of Class 1 milk sold in the marketing area, included its own wholesale business and amounts of Class 1 milk furnished to the Borden Company, delivered to its own stations and milk sold to other distributors. The following is a statement of the total amounts of milk utilized by the League in its own wholesale trade; the total amount of milk sold by it in Class 1, including amounts handled by Bordens, other dealers, and the League in its own distributing business, and a statement by which the Class 1 price would be reduced by applying the difference between the actual value of milk sold in New Jersey and the total actual price paid therefor to producers by the league:

	Total amount of milk sold by Dairymen's League in class 1, including other dealers	Gain on New Jersey milk applied to all sales class 1 milk sold to dealers and its own business, in area
	Pounds	*Per hundredweight*
September	61,563,968	$0.16[illegible]
October	71,137,678	.13[illegible]
November	70,033,283	.10[illegible]

290

	Total sales by League in Marketing Area in its own wholesale business	Gain on New Jersey milk applied to all Class 1 milk sold by League in its own wholesale business.
	Pounds	*Per hundredweight*
September	11,292,149	$0.91[illegible]
October	12,236,083	.81[illegible]
November	10,692,420	.71[illegible]

anted except last paragraph.) 41. The Administrator paid to atives under the provisions of Article VII, Section 5, the sums after stated, which are divided into total payments, payments rymen's League, and payments to other cooperatives:

	Total payments to co-operatives	Paid Dairymen's League	Sheffield producers	Paid to co-operatives
	$66,374.80	$59,455.59	$5,949.88	$969.33
	70,062.29	60,794.07	5,894.88	3,372.34
	71,805.61	57,280.32	4,824.50	9,700.69

fused because not proved on trial though contained in affidavits tion.) Defendant, Rock Royal Cooperative, Inc., made appli- for allowance under this Article, but up to January 1939 had en approved by the Secretary for payments under Article VII, n 5.

anted.) 42. The amounts received by the Dairymen's League Article VII, Section 5, when applied to all milk sold by it in l, including sales to Bordens and other dealers, and when ap- nly to milk sold by it in its own business as distributor, were ows:

	Applied to all milk	Applied to own distributing business
	Per hundredweight	*Per hundredweight*
	$0.0965	$0.5285
	.0868	.4969
	.0817	.5357

anted.) 43. The Dairymen's League was paid by the Adminis- under Article VII, Section 6 (1) for receiving milk which was to other plants for manufacture, 23¢ per cwt. plus certain e charges for transportation. These figures, broken down, are ows:

	Total pounds of milk	Total amount paid	Total allowances for receiving milk
	28,374,541	$91,530.17	$65,261.44
	22,920,087	73,994.62	52,716.20
	(1)	6,228.27	(1)

—No records are available as to the pounds of milk on which market service were claimed, nor is there any information in the record as to whether manu- plants shipped fluid milk and received the 30¢ differential provided for by I, Section 6 (2).

The market service payments made for receiving milk, when ap
plied to Class 1 milk reported by the League, both in its own bus
ness and as to total sales, including other dealers:

	Applied to all Class 1 sales	Class 1 sales on own business
	Per hundredweight	*Per hundredweight*
September	$0.1060	
October	.0741	
November	(1)	(1)

[1] No adequate data available.

(Granted.) 44. Applying the base price paid by the Dairymen's League to the uniform price fixed by the Administrator (see finding No. 39), shows payments by the League, less than the uniform price as follows:

	All milk utilized in area	League price less	Total payment less than uniform price
	Pounds	*Per hundredweight*	
September	118,911,179	$0.12	
October	121,568,142	.10	
November	114,560,632	.09	

Payments less than the uniform price (paid on milk in the area only), when applied to all Class 1 milk sold by the League, including Bordens and other dealers, and when applied to sales in League's own distributing business, were as follows:

	Total amount	Applied to all milk	Applied to own business
		Per hundredweight	
September	$142,693	$0.2318	
October	121,588	.1709	
November	103,264	.1473	

(Granted.) 45. Summarizing the total competitive advantage to the Dairymen's League from sales in New Jersey, payments under Article VII, Sections 5 and 6, Producer Settlement Fund, and by payment to producers for milk at less than the uniform price, the Dairymen's League had the following competitive advantages, as shown by the preceding tables:

Competitive Advantage applied to all Sales

	September	October	November
	Per hundredweight	*Per hundredweight*	*Per hundredweight*
J. Sales	$0.1674	$0.1396	$0.1086
t. VII, Sec. 5	.0955	.0868	.0817
t. VII, Sec. 6	.1060	.0741	(1)
payment less than uniform price	.2318	.1709	.1473
	.6017	.4714	[1].3376

NOTE.—No adequate data as to the amounts involved or on which payment was made for market vice is November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, ction 6 (2) was claimed or paid.
NOTE.—November missing.

Competitive advantage if applied only to League Distributing Business

	September	October	November
	Per hundredweight	*Per hundredweight*	*Per hundredweight*
J. sales	$0.9130	$0.8118	$0.7114
t. VII, Sec. 5	.5265	.4969	.5357
t. VII, Sec. 6	.5779	.4390	(1)
payment less than uniform price	1.2636	.9936	.9652
	3.3010	2.7403	[1] 2.2123

NOTE.—No adequate data as to the amounts involved or on which payment was made for market vice in November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, sec- n 6 (2) was claimed or paid.
NOTE.—November missing.

(Granted.). 46. Sheffield Farms Company, a subsidiary of National airy, in September utilized 40,083,075 pounds of Class 1 milk in ew York State, and 6,426,443 pounds of milk in New Jersey, as well milk in other markets. For out-of-market milk, on September 24, 38, the Company negotiated with its producers, to pay the uniform ice in full payment for such out-of-market milk. The base price id by Sheffield Farms, was accordingly $1.87, or 89¢ per cwt. less e price fixed by the New Jersey Control Board. This amounted to 7,194.96. Applied to Class 1 milk used in the area (40,083,075 unds), this amounted to $.1427 per cwt. on said milk, and the Class 1 ice paid by the Sheffield Farms Company, was thereby reduced in t amount. The Sheffield Company received payments under Ar- le VII, Section 6, from the Producer Settlement Fund for market vice payments, $38,224.57, which, when applied to Class 1 milk, ounted to $.0936 per cwt., and was equivalent to a discount thereon.

Combining the two figures, the Sheffield Company, has a competitive advantage of $.2363 arising out of said two items for September milk.

n October, the Sheffield Company sold 6,737,848 pounds of milk in r Jersey, for which it paid $1.88 per cwt. The difference between New Jersey Control price *fo* $2.76 and said price, was 88¢, and illed $59,292.64. The Sheffield Company paid its producers for all k used in the area, at a base price of $1.87 per cwt., or 4¢ under

the uniform price, on 67,306,590 pounds of milk, amounting to $25,322.63. The Company also received a market service payment of $26,430.96. The three concessions aggregate $91,656.23, which, when applied to 43,662,117 pounds of Class 1 milk, amounted to a concession or reduction of $.2099 per cwt.

(Granted.) 47. No evidence was received, showing the actual operations of the Borden Company, either quantity or utilization of milk purchased through the Dairymen's League, nor was any evidence received as to quantity of milk purchased by Sheffield Farms Company from cooperatives, or the prices paid by either Bordens or Sheffields for milk purchased from cooperative sources.

(Granted.) 48. By the provisions of the Order, proprietary handlers are required to pay producers the minimum prices stated therein, and are obliged to pay their own plant receiving costs. Dealers buying from cooperatives, are required by the Order, to pay cooperatives only the minimum prices without any necessity upon such handlers to pay, or upon such cooperatives, to charge, any sum as a handling charge to be applied on the cost of operating the milk-receiving station.

(Granted.) 49. The average daily fluid shipments of milk to New York City for the months of August and September 1938 were approximately as follows:

	Quarts
By rail, in tank cars	1,380,000
By rail, in 40-quart cans	140,000
By automobile tank trucks	1,568,000

Fluid milk shipments to New York, are approximately 50% by rail, and 50% by tank truck.

The allowances for trucking milk which are provided in Article VII, Section 6, Subsection 1, of Order No. 27, and Official Order No. 126, represent the approximate cost of shipping milk by tank trucks.

The standard rate, approved by the Interstate Commerce Commission, for shipments of milk by rail in tank cars from points 201–210 miles from New York City, is 2.7 cents per gallon equivalent to
294 31.2 cents per hundredweight. The freight differentials in Order No. 27 and Official Order No. 126, are approximate to the nearest half-cent of the differences per hundredweight between this standard tank car rate for the 201–210 mile zone and such rate for each other ten-mile zone. These standard tank car rates are 70% of the standard rate for the shipment of milk in 40-quart cans in less than carload lots. Truck competitive rates have been established at certain points which are somewhat lower than the approved standard tank car rates for those points.

Where shipment is made by rail in tank cars or in cans to a city plant not on railroad tracks, there is an additional cost for transportation between the rail terminal and the city plant. Where shipment by tank truck is from country receiving plants to city plants the tank truck delivers the milk to the city plant and the trucker's charge or truck operating cost covers such delivery to the city plant.

The truck rates for the first 25 miles are 9¢ per cwt., and beyond that zone, 1/10 of 1¢ per cwt. for each additional mile, amounting to 1¢ for each 10 miles.

50. Establishment of freight differentials was designed to make the base delivered cost of all milk to New York City the same.

(Granted.) Milk delivered to New York by truck, in the various zones, costs the handler, according to zones, the actual freight, plus or minus freight differentials, according to whether the point of origin is less or more than 200 miles. Without reducing the schedules to each 10-mile unit, the net freight cost, after applying the differentials, in various typical zones, is as follows:

Zone	Actual freight	Differential	Total cost
25 mile	0.09	+0.13	0.22
50 "	.115	+.105	.225
100 "	.165	+.07	.235
150 "	.215	+.035	.25
200 "	.265	.00	.265
240 "	.305	−.02	.285
250 "	.315	−.02	.295
300 "	.365	−.045	.32
350 "	.415	−.08	.335
400 "	.465	−.09	.375
450 "	.515	−.115	.40
500 "	.565	−.14	.425

The Jetter Dairy Company, being in the 231–240 mile zone (actually 250 miles by highway), its total freight cost is 6½¢ more per cwt. than milk in the 25-mile zone. It is also higher than in any intermediate zone. Defendant, Schuyler Junction Cooperative's plant is at Schuyler Junction, N. Y., in the same zone; the plant of defendant, Rock Royal Cooperative is in the 176–180 mile zone, and the plants of the defendant Central Cooperative are principally beyond the 200-mile zone, so that the total delivered cost of said milk is greater than the delivered cost of upwards of % of all milk sold in the area.

Milk by volume within various zones is as follows:

Miles from New York:	Percent
Within 50	
" 100	
" 150	
" 200	

(Granted.) 51. By the provisions of Article VI, Section 8, handlers receiving milk in 18 counties therein enumerated, in making return to the Administrator, are permitted to deduct 20¢ per cwt. for all net pool milk received from producers at plants in said counties. Producers in said counties are paid 20¢ per cwt. more for all milk than producers in other localities, including all producers delivering to the several defendants herein.

Accordingly, the price received by producers delivering to the three Cooperative defendants, is reduced by the increased amount of payments to producers in said 18 preferred counties, and in effect, moneys paid by handlers for milk of said defendent cooperatives,

are in part expropriated to make such preferential payment to producers in the counties receiving such preferential payments.

(Granted.) 52. In effect, the uniform price return directed to be paid to producers delivering to the Jetter Dairy Company, is 296 reduced by payment to producers in the 18 preferential counties, and moneys of said producers delivering to defendant Jetter and other proprietary handlers, outside of said preferred counties are expropriated to make payment to producers therein of payment of 20¢ per cwt. in excess of the uniform price.

(Granted.) 53. All producers do not receive the same base price for milk. By the terms of the Order, and by its application in practice, there is a differentiation between producers, in payments made as follows:

a. Cooperative corporations are not required to pay the uniform price.

b. Cooperative handlers, which are also distributors, may sell milk direct to storekeepers and consumers at less than prices fixed by the Order, plus processing and delivery charges, and reduce payments to producers, to the extent of such underselling.

c. Cooperative corporations may charge back to their producers losses in operations as milk distributors whereas proprietary handlers cannot do so.

d. Producers in the 18 counties enumerated in Article VII, Section 8, receive 20¢ per cwt., preferential payment, on all their milk.

e. Payment to producers outside of the 18 counties above referred to, is reduced below the true uniform or average price for all milk, by the amounts deducted from them to make up the 20¢ plus paid to producers in said 18 counties.

f. Prices paid to producers delivering to handlers, whether cooperative or proprietary, which sell fluid milk in the Metropolitan Area, and also in the State of New Jersey and other markets, are paid less than the actual value of milk delivered by them, by the process of "blending" arbitrary prices for milk sold outside of the market, which bear no true relations to the actual value thereof, with prices charged for milk sold in the area.

g. Prices received by all producers delivering to either proprietary or cooperative handlers which do not receive the cooperative payments provided for by Article VII, Section 5 of the Order (the greater part of which is paid to the Dairymen's League Cooperative Association), are reduced by the amounts deducted from the uniform price, and paid from the Producer Settlement Fund to the Dairymen's League Cooperative Association, and such other cooperatives as receive such payments.

(Granted.) 54. Grade B milk sold for fluid consumption in the Metropolitan Area brings the same price, regardless of butterfat content.

(Granted.) 55. Handlers receiving milk containing more than 3.5 butterfat content, are at a disadvantage in finding markets, by reason

to be paid to producers by the provisions of Article VII, Sec-
97 tion 3 of the Order. Said handlers are, in effect, required to pay a greater base price for said milk by utilization, than is aid by handlers purchasing lower testing milk, and must either sell a loss or lose their customers.

(Granted.) 56. Handlers whose milk-receiving stations are beyond e nearby freight zones are at a disadvantage in selling milk, in that e base price of said milk delivered in New York, is increasingly gh, as the handlers' receiving stations are at increasing distances om New York.

(Granted.) 57. By the terms and application of the Order, there a differentiation between handlers who sell milk at wholesale and tail in the marketing area, and the prices required to be paid by id handlers for fluid milk, in the following particulars:

a. Cooperative handlers, who are also distributors, are under no quirement to pay any stated price for milk sold to stores and con-mers.

b. The price accounted by cooperative handlers to the Producer ttlement Fund is reduced by payments to them out of said Fund, rsuant to Article VII, Section 5.

c. The large handlers, both cooperative and proprietary, being ncipally National Dairy subsidiaries, Bordens and subsidiaries, irymen's League and several smaller companies, including Queens-o Farms Products, Inc., and the several companies operated by ron J. Rubenfeld, which are engaged in manufacturing milk into k products, receive so-called "market service payments" under icle VII, Section 6, which are not and cannot be received by small dlers, who combine fluid milk operations with manufacturing on nall scale in their own plants, thereby in effect, substantially re-ing the prices paid by such large handlers for milk utilized in d form.

. Proprietary handlers purchasing direct from producers are ged to pay for the cost of maintenance and operation of milk-re-ing stations, and the cost of receiving milk, whereas handlers chasing from cooperative associations are required to pay only the e price for such milk. Such receiving station or plant handling s are from 15¢ to 30¢ per cwt.

By the terms and application of the Order, the same large han-s referred to in the next preceding paragraph, both proprietary cooperative, in making payment for all milk purchased in the duction area, are permitted to pay a blended price, which price is puted upon the prices fixed in the Order for milk sold in the keting area, and with arbitrary prices fixed by such handlers as see fit, for milk sold outside of the area, which milk is known unpriced milk," thereby, in effect, reducing the price paid by such dlers for fluid milk sold in the marketing area.

one of the defendants are engaged in the manufacture of milk ducts. None of said defendants are engaged in marketing milk

298 f. National Dairy subsidiaries, including Sheffield Farms and the Borden Company, purchase milk from cooperatives. The Dairymen's League, which is also a distributor, is a cooperative. Said companies, by the reports filed with the Administrator, handle more than 50% of the fluid milk sold in the area, and the greater part of milk sold out of the area.

g. Handlers purchasing milk in areas producing milk of high butterfat content pay a higher price for milk utilized in fluid form than handlers purchasing milk of less butterfat content, although the re-sale price of such milk in New York City is neither greater nor lessor by reason of butterfat content.

h. Handlers purchasing milk beyond the 25-mile zone, in each succeeding zone, pay a greater delivered cost for milk delivered to the marketing area, for the reason that the freight differentials established by the provisions of Article IV, Section 3, are not comparable to the actual difference in freight costs, said unfavorable difference increasing from ½¢ per cwt. in the 50-mile zone to 22½¢ per cwt. in the 500 mile zone.

i. Defendant Rock Royal's plant is in the 176–180-mile zone; the plants of the defendant Jetter and Schuyler Junction Cooperative are in the 231–240-mile zone, and the several plants of the defendant Central Cooperative are beyond the 200-mile zone.

(Refused.) 58. Handlers operating manufacturing plants may and do utilize milk for manufacture of storage fluid cream at prices substantially less than those charged under the Order for milk utilized as fresh fluid cream, such handlers on the same day place in the same warehouse fresh cream for storage and remove cream already stored; such handlers also have permits to ship fresh skim milk to the City of New York. Fresh skim milk and fresh cream may be placed together, be agitated and the same becomes "whole milk."

(Granted.) The Market Administrator has no facilities for checking the actual disposition of milk reported by various handlers nor for checking whether cream withdrawn from storage is cream which was already in storage or is cream delivered to the storage plant and immediately withdrawn. The size and complicated nature of utilization of milk by the large companies, their plant-to-plant transactions within their own business, and their in-market and out-of-market sales make it impractical for the Administrator to check the accuracy of reported utilization and disposition except from the books of such large handlers.

(Granted.) 59. In the fierce competition for fluid milk business in the Metropolitan Area, hereinafter referred to, there is a strong incentive to manipulate milk between plants and in and out of the market by the large companies, having facilities so to do, for the purpose of obtaining a competitive advantage. Such large companies have made full use of such competitive advantage in application of the Order of their business.

99 (Granted.) 60. Prices fixed by the Administrator pursuant to the formulas contained in the Order for approved milk tilized in the manufacture of cheese for the months of September nd October 1938 were less than the prices paid by cheese factories urchasing unapproved milk which was not subject to regulation of ny health authority to the extent of 20¢ per cwt. The cost of pro-ucing unapproved milk is less than the cost of producing approved ilk. Bordens, National Dairy, and the League were able to and id purchase approved milk for such cheese purposes, since they are so engaged in such business, and thereby enjoy discriminatory dvantage.

(Refused in this form.) 61. Prices paid by butter factories for eam from unapproved sources on the basis of 3.5 milk was less an the value of such cream plus the value of skim milk after the me was separated to the extent of upwards of 20¢ per cwt. in the onths of September and October 1938. Approved production of ilk is not required for butter. Borden, National Dairy, and ueensboro were able to and did purchase approved milk for such itter purposes, since they are also engaged in said business, and ereby enjoy discriminatory advantage.

(Granted.) 62. The Dairymen's League News for May 17, 1938, xhibit 24 in evidence, states "Today, more than half of all milk sold the Metropolitan district is handled through stores."

The average minimum delivered cost per quart of fluid milk deliv-ed to stores in New York City by handlers, based on the prices ed in the Order, has been since September 1st, 1938, and now is ¼¢ per quart.

(Granted.) 63. On September 1, 1938, a majority of the handlers lling Grade B milk in the dealer-to-store trade raised the price of ch milk to 9¾¢ per quart.

(Granted.) 64. On September 1, 1938, the Jetter Dairy Company d been selling to one Weintraub 30 cases of milk daily at 9¾¢ per art. On September 4, 1938, intervening plaintiff, Dairymen's ague solicited said account, and by selling at 9¢ per quart, acquired cases of said trade. Gold Medal Farms, Inc., by same price cut-g as the League on same day also acquired 10 cases of said trade. order to retain the balance of 10 cases of such trade, Jetter Dairy mpany was compelled to and did reduce its price to 9¢ per quart on ptember 5, 1938.

(Granted.) 65. Within two weeks after September 1st) milk was being sold generally in the dealer to store trade in the City of New York at from 8¢ to 9¢ per quart. The Shef-d Farms Company, in order to capture the trade of Herman vender, furnished said Lavender milk at 9¾¢ per quart; rebated said Lavender ¾¢ per quart on all purchases, and in addition reto delivered 13 quarts per case, the extra quart of milk further ucing the price ¾¢ per quart, making the net cost to said Laven-8¼¢ per quart.

The Sheffield Company sold milk to one Rose Paley; gave her 35 cases of milk free, in order to induce her to buy "Breakstone" milk." Prior to that time the Dairymen's League had given the same witness 35 cases of free milk to procure her to buy Dairymen's League milk. The Grandview Dairy Company refused to give Mrs. Paley any free milk, and she discontinued buying from them, obtaining her requirements from Sheffields and Dairymen's League, which made the concessions above referred to. Sheffields billed milk to Mrs. Paley at 9¾¢ per quart, collected that amount, and rebated to her in cash at the rate of ¾¢ per quart. The Dairymen's League charged her 9¢ per quart.

(Granted.) 66. The practices above referred to were general throughout the milk industry and the capture of trade by price cutting is known as "chiseling."

(Granted.) 67. Certain producer dealers, with large numbers of cows, are not subject to the Order. The Balsam Dairy Company selling milk in Brooklyn, sold milk to Israel Hock, storekeeper at 8½¢ per quart in September 1938.

(Granted.) 68. It is common practice in the marketing area for storekeepers to buy milk from several dealers, varying the quantities purchased from each in accordance with the price concessions, free milk, or other concessions, which such storekeepers can obtain from one dealer as against another.

(Granted.) 69. From September 1st, 1938, to January 1st, 1939, the Jetter Dairy Company lost 240 cases of daily trade to competitors by reason of concessions. It recaptured upwards of 200 cases of this trade, but in doing so, was obliged to give in free milk, cream and cash, several hundreds of dollars. In addition, said defendant sustained a loss on each quart of milk sold by it through the Jetter Dairy Company or the Triboro Milk & Cream Co., which sold milk received from producers delivering to the Jetter Dairy Company. In order to stop further losses of trade captured by competitors who undersold the Jetter Dairy Company and Triboro Milk & Cream Company, the said defendant was obliged to reduce
301 the price of milk charged to al customers to prices ranging from 8¢ to 9¢ per quart, in order to meet such competition. The principal stockholders of Jetter Dairy Company and Triboro Milk & Cream Co., are identical.

(Granted.) 70. The Order contains no provision prohibiting unfair methods of competition and unfair trade practices, as permitted by Title 7, Section 608c (7) (A).

(Granted.) 71. Intervening plaintiff, Dairymen's League is a member of a so-called "Farm Conference Board," being the only member of the Board engaged in the purchase and sale of milk. Said Farm Conference Board proposed, and the Dairymen's League actively sponsored and supported in the New York State Legislature a proposed Act known as the "Rogers-Allen Bill," which was enacted as Chapter 383 of the 1937 Laws of the State of New York. Pursuant to the provisions or purported provisions of said Act, here-

after referred to as the "Rogers-Allen Law," the intervening plaintiff, Bargaining Agency, was formed. Several directors of the Dairymen's League acted as incorporators of said corporation, and were active in the creation and organization thereof.

(Refused.) The general counsel for the Dairymen's League was the counsel for the Bargaining Agency in the preparation and filing of the Certificate of Incorporation of said Bargaining Agency.

(Granted.) 72. Following incorporation of the Bargaining Agency, its officers, directors and employees procured producers selling milk to proprietary handlers, to form many cooperative corporations for the purpose of joining the Bargaining Agency. Cooperatives were formed around the three plants operated by the defendant Jetter, which were known at the Solsville Milk Producers Cooperative Inc.; the Oriskany Falls Milk Producers Cooperative, Inc., and the Bridgewater Milk Producers Cooperative, Inc. Only the Bridgewater Cooperative joined the Bargaining Agency. The Bargaining Agency, in some instances, advanced the fees for filing certificates of incorporation.

(Granted, except as to words in parenthesis.) 73. In July 1937, E. M. Harmon addressed a meeting of the Bargaining Agency with regard to "government aid" in a marketing program. On October 5, 1937, a committee of attorneys was appointed by the Bargaining Agency to prepare a surplus program or plan. In November 1937, Allan Miller, attorney for the Dairymen's League, presented to said committee, a proposed milk marketing agreement. E. M. Harmon, employee of the Dairy Section of the Department of Agriculture of the United States, spent three days monthly commencing with November, 1937, with representatives of the Bargaining Agency (in consultation about such program).

Conferences continued through January and February 1938 and on February 20, 1938, a directors' meeting of the Bargaining Agency was held in Syracuse, N. Y., in which the program, which ended in the adoption of the Federal and State marketing orders, was formally launched. An account thereof is contained in Exhibit 23–C to the stipulation in evidence, which quotes Edmund F. Cooke, counsel for the intervening plaintiff, Bargaining Agency in this action, as saying "in the long run, the Producers' Bargaining Agency will prove to the milk industry of the State that their program is the right one."

In the Market News issued by the Bargaining Agency for April 1938 reference was made to said Marketing Order program. Said news stated "just as soon as this plan has met the approval of the Federal Officials, he will present it to our readers complete, and Chairman Rolfe, with the assistance of Executive Secretary Baldwin and fieldmen, have arranged many meetings among the members, at which the plan will be discussed in detail."

(Granted.) 74. Thereafter, the Bargaining Agency presented to the Secretary of Agriculture of the United States and to the Commissioner of Agriculture of the State of New York, the proposed marketing order, referred to in the 6th Finding of Fact herein. The

(Granted.) 75. Prior to the referendum there were sent to each producer as to whom available information indicated that he might be eligible to vote in said referendum (a) a copy of the Order as issued August 5, 1938, by the Secretary; (b) a schedule of polling places (Exhibit 7 to stipulation); (c) a pamphlet prepared by the United States Department of Agriculture entitled "Questions and Answers on the Federal-State Milk Program for New York" (a copy of which pamphlet is Exhibit 8 to stipulation); and (d) a pamphlet prepared by the United States Department of Agriculture, entitled "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27" (a copy of which pamphlet is Exhibit 9 to stipulation). Approximately 70,000 copies of the said Order, the said schedule of polling places, and the said pamphlets were sent through Federal-State Agencies to such producers. A copy of letter accompanying such material sent to producers in New York State is Exhibit 10 to stipulation.

(Granted.) 76. Prior to said referendum and poll the Bargaining Agency and Dairymen's League, in furtherance of the
303 scheme, carried on an elaborate campaign of false and misleading propaganda through the medium of newspapers, radio speeches, letters, pamphlets and otherwise, calculated to influence milk producers entitled to vote therein, or whose votes were entitled to be cast on their behalf by cooperatives.

On April 29, 1938, the Secretary signed a notice of hearing on the proposed Marketing Order and published said notice to the producers in the New York Milk Shed, accompanied by a proposed Order, stating, however:

"The provisions proposed by the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., are set forth below as possible provisions of a marketing agreement and of an order. Their publication in this form is for the convenience of interested parties and is not to be considered as in any way signifying their approval by the Secretary of Agriculture."

Hearings on the proposed Federal and State Orders were held jointly thereafter. Coincident therewith, and on or about April 29, 1938, the Bargaining Agency, issued a 24-page booklet, on the cover of which was contained the following statement: "Mr. Dairyman * * * Save this Booklet. The Plan It Explains May Save your Farm." Said booklet contained statements which were grossly untrue, and in particular, stated on page 1:

"Principles Upon Which the Order Is Based

"The fundamental requirements of the industry which this Order seeks to establish are five in number, viz:

"1. An equal purchase price to be paid by all dealers for milk for the same use.

"2. An equal share to each producer of the benefits of the fluid market.

* * * * * * *

"Complete simplicity in the terms of the Order is impossible partly because of the complexity of the subject dealt with and partly because of the impossibility of giving the desired legal effect to certain provisions without employing the language of the Courts. It is confidently believed that the present Order can successfully withstand any assaults upon its legality."

Prior to the vote on said proposed Orders, widespread, innumerable statements and representations were made to all producers in the area, by both the Bargaining Agency and Dairymen's League, their members, agents, servants, and affiliates, to the effect that all handlers would be required to pay the uniform price to all producers, and that no handler had a competitive advantage over the other. Specifically, as an example, the Dairymen's League News, the official newspaper of the Dairymen's League, on August 16, 1938, contained the following statements on page 5:

"Uniform Pool Prices for Producers

"The order requires handlers to pay the uniform pool, or blended price, calculated by the market administrator, to all producers delivering milk during month unless the handler has received milk and sold it as Class 1 milk outside of the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable.

* * * * * * *

"Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and assures for that milk payments to all producers at a uniform rate except for the transportation and zone differentials provided."

Thereafter, the Department of Agriculture in August, 1938, issued a printed pamphlet under the seal of the Department, stating on pages 12 and 13:

"The order requires handlers to pay the uniform pool, or blended price, calculated by the market administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as class 1 milk outside of the marketing area.

* * * * * * *

"Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to all producers at a uniform rate except for the transportation and zone differentials provided."

The foregoing statements were and are untrue. Identical provisions of Article 1 of said Orders, provide:

"5. 'Producer' means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

"6. 'Handler' means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area.

* * * * * * *

"This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment."

The only provision in said Orders directing payment to producers is as follows:

Article VII—Payments to Producers

"SECTION 1. Time of Payment.—On or before the 25th day of each month, each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article."

305 (Granted except as to last sentence.) 77. Said representations as to the text and effect of said proposed marketing Order, were untrue. There was no provision requiring payment of a uniform price to all producers, or any requirement that any stated price or any price bearing relation to the prices by the Order, be paid to producers of cooperatives including the Dairymen's League. By reason of the differentiation between various producers as to locality, and otherwise, stated in Finding No. 53 herein, there was no general equality of payments to producers. Moneys were expropriated from various groups of producers according to location, the particular type of handler to which producers delivered and otherwise, as therein stated.

(Granted.) 78. The statement to the effect that all handlers pay the same cost for milk in the marketing area was also untrue for the reasons stated in paragraphs 55 through 59, inclusive.

(Granted if changed to many of the producers instead of the producers.) 79. The producers who votes in the referendum and poll, expressed only their favor or disfavor with regard to a marketing order which assured equal treatment and equal payments to all producers, and an equal price to be paid for milk by all handlers.

(Granted same as plaintiffs no. 22.) 80. The results of the aforesaid referendum were as follows: 45,644 votes cast, of which 7,017 were rejected as invalid. Of the 38,627 votes counted as valid, 33,663 votes, or 87.1 percent were in favor of the issuance of the Order, and 4,964 votes, or 12.9 percent were opposed thereto. Of the 7,017 votes which were rejected, 6,547 votes were rejected either because the voters were members of cooperative associations which had cast ballots for all of their members, or because the voters were not qualified to vote, not having delivered milk to an approved plant during the month of May 1938. Of the votes rejected for this season, 5,110 votes were in favor of the issuance of the Order, and 1,437 votes were opposed thereto, 470 votes were rejected because the voter had failed to mark his ballot either for or against the Order, or because it was not possible to determine whether the ballot was marked for or against the Order.

(Granted if the word "substantial" is inserted before "evidence" in the 3rd line, and if the words "many of the producers" be substituted for "the producers" in the 3 and 4 lines). 81. The finding that the order "was approved or favored by at least two-thirds of the producers who * * * voted in the above mentioned referendum," was unsupported by any evidence, and said referendum determined only that the producers voting therein "favored an order which required equal payments to all producers, and payment of the same price for milk by all handlers." The inference to be drawn from such vote, was that such producers did not favor or approve
306 an order which exempted large handlers from payment of the uniform price to their producers, and which did not require equal prices to be paid by all handlers, but on the contrary, permitted certain large handlers to pay reduced prices for their milk supply.

(Granted.) 82. The Dairymen's League actively sponsored the proposed Federal and State Marketing Orders, and, as disclosed by the hearing, Exhibit A-3 to the stipulation, by its attorneys, attended all hearings, examined various witnesses and introduced elaborately prepared evidence in book form. The Dairymen's League News, its official organ, actively advocated adoption of the Order and attacked persons, newspapers, and others, who were either actually against adoption of the Order or who were claimed to be against the same.

(Granted.) 83. The Bargaining Agency, of which the Dairymen's League was the largest member, expended between December 1st, 1937, and June 1st, 1938, $63,338.76 for salaries of employees and directors, publicity, printing, radio ($4,405.51), and other expenses while carrying on the Federal-State Order program; from June 1st to September 1st, a three-month period, the Agency spent $45,299.15; radio expenditures increased to $7,029.05, and advertising and publications (exclusive of "Market News"), $7,979.79. From September 1st, 1938, to December 1st, 1938, the Agency expended $31,348.98; there were no expenditures for radio and advertising and publications dropped to $2,871.91.

(Granted.) 84. The activities of the Bargaining Agency are partly reviewed in Exhibit 59. E. C. Bardin, in his report printed therein stated (Dec. 5, 1938):

"With field men and other directors, I have travelled approximately 20,000 miles spreading the gospel of cooperation. I have not tried to discuss the details of the Order, but have dealt with the broad general program."

Homer S. Rolfe, in the President's address at the same time, said (see Defendants' Exhibit 59):

"Last year at the first annual meeting of the Metropolitan Cooperative Milk Producers Bargaining Agency, I said that the occasion marked a new forward step in cooperative effort. I was referring to the fact that producers had been given the right to work together cooperatively by the enactment of the Rogers-Allen Law and now had an opportunity to solve their marketing problems.

* * * * * * *

"The Bargaining Agency is generally credited as being the form by which and the medium through which this plan was prepared and accepted by producers and with their support made effective. History will record that the long sought permanent marketing program to control surplus was established in 1938 on a solid foundation, backed by Federal-State assistance, and put into operation with a united producer support.

* * * * * * *

307 "On February 7, several representatives of the Federal and State Departments of Agriculture met with the Board of Directors. Work was started on drafting a marketing agreement to incorporate the principles that had been agreed upon.

* * * * * * *

"The first hearing was held at Albany on May 16th and the final one was held on June 4th. At hearings, members of Bargaining Agency appeared as proponents of order.

* * * * * * *

"It was not until August 18, 19, and 20 that voting took place. This gave the Bargaining Agency sufficient time to comply with requests for information and with the assistance of State and Federal officials, extension departments, and many volunteers, it was possible to acquaint producers generally with the provisions of the Order.

"In doing this, many meetings were held, the mail brought every producer copy of Order and official explanation, the American Agriculturist, dairy papers and newspapers brought out the facts and objectives, advertisements by newspapers and by radio, all combining brought forth a well informed and united producer sentiment for adoption of a surplus control plan as provided for in the Federal State Marketing Order.

"On August 25th, the result of the vote was announced and producers were delighted to find that the Order had been approved by approximately 87% of the qualified producers voting.

* * * * * * *

"The magnitude of the vote and the speed and determination with which it was put into effect were impressive."

(Granted.) 85. The Dairymen's League cast 22,287 votes in favor of Order No. 27, and 17,361 votes in favor of Official Order No. 126. Defendant Jetter, as a distributor, was permitted no vote. The producers under contract with the Dairymen's League, or who were members thereof, were permitted no vote.

(Granted.) 86. The Dairymen's League, having been accredited the privilege of casting 22,287 votes out of a total of 60,220 milk producers, the remaining milk producers in the production area together, if all voted, could not cast the two-thirds vote necessary to promulgate a marketing order agreeable to them. The Dairymen's League cast approximately two-thirds of the total number of 33,663 votes counted in favor of the issuance of the Order.

(Granted.) 87. The Orders were issued as a result of the program of the intervening plaintiff, Dairymen's League, begun with sponsoring of the Rogers-Allen Law and continued through the formation of the Bargaining Agency formulation and proposal by the Bargaining Agency, of the proposed Federal Order, and finally adoption of the same by the casting of 33,663 votes in favor of the Order, or which 22,287 were cast by the Dairymen's League.

308 (Granted.) 88. The purpose and effect of said program and Order was to give to the Dairymen's League a competitive advantage over its competitors, including the defendants, and to create in said Dairymen's League and the Bargaining Agency, and in handlers buying milk from them, to the exclusion of the defendants and all others, the control of fluid milk business in the marketing area. To that end, the Dairymen's League, Bargaining Agency, and E. Manning Gaynor (herein referred to as Gaynor), who was personal representative of intervening plaintiff Noyes, entered into a conspiracy to establish in said Dairymen's League, Bargaining Agency, and dealers purchasing milk from Bargaining Agency members, including Dairymen's League, an illegal monopoly in the purchase and sale of milk in said marketing area.

(Granted.) 89. One Charles H. Baldwin, acting individually and as Executive Secretary of the Bargaining Agency (herein called "Baldwin"); one Homer Rolfe and one Jay C. Treat, acting individually and as President and Secretary, respectively, of the intervening plaintiff Bargaining Agency, and intervening plaintiff, Dairymen's League, uttered and published certain letters, pamphlets, official newspapers, to wit: The Bargaining Agency News and the Dairymen's League News, which said letters and other printed statements contained threats against any dealer who might appeal to the Courts for any adjudication of its rights, and entered upon a campaign to compel distributors and dealers of milk in the same position as defendants to sign contracts which surrendered their rights to due process. Said printed utterances were circulated among producers.

(Granted.) 90. Gaynor procured one Faulkner, a producer delivering milk to defendant Jetter, to visit said Gaynor at Leonardsville,

N. Y., and there requested Faulkner to arrange for withholding m
of the defendant Jetter unless it signed a marketing agreement; a
Gaynor requested one Dake to withhold delivery of substantial qua
tities of milk from Eisenberg Farms, Inc. Said Dake withheld s
milk until said Eisenberg signed, and then released the milk. Ga
nor told Eisenberg that his milk would be released when he sign
a marketing agreement in the Administrator's office. Eisenber
signed at the Administrator's office, and his milk was released.

Baldwin, executive secretary of the Bargaining Agency, solicit
one Dumont, who had been active in a milk strike during 1937,
apply to the Market Administrator for a "job," which was
309 include visiting localities where dealers "refused to go alon
with the Order" and "drying up" the milk stations of suc
dealers by withholding milk until they complied.

(Granted.) 91. Said Gaynor, in public speeches and privately ove
the telephone, threatened and caused to be threatened all dealers wit
summary withholding of their milk supplies unless they signed mar
keting agreements.

(Granted.) 92. On August 29th, 1938, C. H. Baldwin, acting ind
vidually and as executive secretary of defendant Bargaining Agency,
caused to be issued and distributed to producers delivering milk to
defendant Jetter and to other producers in the marketing area
letter, which letter contained the following:

"DEAR PRODUCER:

"Before you receive this letter a Federal-State Milk Marketing
Order covering the Metropolitan New York Milk Market will hav
been signed by the President. This Order will, no doubt, become
effective September 1st.

"To the casual observer a wonderful battle has been won, but we
who have known the opposition, realize that the real battle is ahead.

* * * * * * * *

"As you know, the dealers in Boston Took the Boston Order into
Court and have held up its full operation for over a year. Over
two million of the farmers' money has been held up by the dealers.

* * * * * * * *

"This, producers can stop by inducing dealers to consent, to the
operation of the Order as an agreement. Your dealer, by such con-
sent, voluntarily refrains from using the Courts to block the Or-
der. * * * We want results through compliance with the Order,
not law suits.

* * * * * * * *

"You will be contributing greatly towards that end if you singly
or collectively with other producers insist that your dealer cooperate
with others in signing this Order at once. If you have not already
done this, won't you please take care of it immediately?

"Won't you also cooperate with me by giving your advice on ques-
tions that you will find on the enclosed page?"

Attached to said letter was purported questionnaire, which in part contained the following:

Questionnaire to be Returned to C. H Baldwin, Ex. Sec., Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., Room 118, Onondaga Hotel, Syracuse, N. Y.

"1. Can you stand continued low prices while dealers argue this matter out in the courts?

"3. In your opinion, are farmers in your community ready for a movement to compel the buyers to sign the Order, pay the price, and live up to its terms?

"6. Will you support the Bargaining Agency in that move if others will?

"7. In Boston the dealers tied up over two million dollars of the farmers' money in the courts. Do you think farmers will work together to prevent dealers here from doing this?"

"Note.—The information on this questionnaire will be held in the strictest confidence by me, and your name will not be used in any way."

(Granted.) 93. On September 21st, 1938, Jay C. Treat, individually and as an Officer of the intervening plaintiff, Bargaining Agency, issued a letter which was circulated throughout the New York Milk Shed, and among producers delivering milk to defendant Jetter. This letter stated in part:

"almost every dealer in the Metropolitan Market has signed the agreement. In some instances, it has been necessary to exert producer pressure and the willingness of producers to cooperate in withholding or offering to withhold their milk until their dealer signed, has been encouraging and gratifying."

(Granted.) 94. During the early part of September 1938, Gaynor was principally engaged in directing producers and cooperative associations in a program of withholding milk from dealers who refused to sign the proposed agreement, or who did not make reports and comply with the order. Milk which was so withheld, was chiefly diverted to the intervening plaintiff Dairymen's League, which acted in concert and in cooperative with said Gaynor.

In the weekly newspaper of the plaintiff Dairymen's League, known as the "Dairymen's League News," and particularly in the copy thereof dated September 6th, 1938, on the first page thereof, was contained the following statement:

"Dealers Sign Up

"Fred H. Sexauer, president of the Dairymen's League, estimated the new program would raise League members' September returns $1,000,000 over what they receive for August milk.

"More than 75 per cent of New York's milk supply was under voluntary agreement when the plan began operating. Included were dis-

tributors buying from the Dairymen's League. They handle 40 per cent—approximately 50,000 cans daily—of the market's supply."

On page 14 of said issue, was the following statement:

"'NO FOOLIN', Say Sub-District 17–A Members

"At the August meeting of sub-district 17–A, held in the Congregational Church at Kiantone, as guests of Kiantone and Fresburg locals, delegates and associate delegates informed Director Grout in no uncertain terms that the membership of the sub-district will not allow dealers to nullify the benefits of the new marketing Order, by passing unanimously the following resolution:

* * * * * * *

"Whereas, in Boston with a similar order dealers have tied
311 up the cream of the milk check in court litigation, and threats of similar actions are circulated in this area, therefore be it

"Resolved, that sub-district 17–A in regular meeting ask and demand that our Association and officers insist on our full rights from the start of the State and Federal Marketing Order, and be it further

"Resolved, that all dealers be required to give satisfactory proof of the acceptance of the terms of the order, or no milk be sold them, and in carrying out this plan, we pledge our officers our cooperation and support in agreeing to any diversion necessary to accomplish their purposes."

On page 15 of said issue, the Market Administrator Harmon was quoted as saying:

"It is my duty to administer the rules and regulations that have been formulated and approved by producers. It is my purpose to do just that, and to do it to the best of my ability. This may at times not be to the liking of some people, some may be made unhappy."

(Granted.) 95. In the issue of the Dairymen's League News of September 20, 1938, the following item appeared on the front page:

"Producers Ready to Divert Milk From Non-Complying Dealers

"League Gets Vote of Thanks from Bargaining Agency for Its Offer of Marketing Facilities.

"Volunteer enforcement agents—100 strong—were riding the roads last week explaining to farmers how they could convince recalcitrant metropolitan milk handlers of the advantages of complying with the law by obeying the rules and regulations of the new federal-state marketing program.

"This action followed a meeting of delegates of the Metropolitan Cooperative Milk Producers' Bargaining Agency in Syracuse, September 10. The delegates voted to have 100 farmers go out as volunteer enforcement agents to 'crack down' on dealers who have not signed the marketing agreement. They were to explain to producers delivering to such dealers that they could divert their milk and not

ose money. Such diversion it was believed would quickly bring the ew New York holdouts into line."

The same article on pages 1 and 2 quoted Gaynor as follows:

"In a spirited speech M. Gaynor told the dairymen that they need not think about dealers for two minutes.' He explained the provisions for diverting milk from dealers who fail to comply with the regulations. 'The Dairymen's League plants are open—and others, too," said Mr. Gaynor. "Call me up; I'll tell you where to put the milk. You won't have to divert very long before these dealers will be ready to sign up."

The Dairymen's League News of September 27th, 1938, on the front page thereof, contained the following statements:

"J. C. Treat, secretary of the New York Metropolitan Cooperative Milk Producers' Bargaining Agency, made the prediction in Syracuse that all the larger dealers would be signed up by the end of last week. Except for a few small handlers, Mr. Treat predicted the sign-up would be almost 100 per cent. None of these smaller dealers handle more than 50 or 75 cans a day and practically all of them are in the 'spot buyers' class, he said.

312 "Mr. Treat also reiterated a former statement made by the Bargaining Agency to the effect that the squad of 100 producer volunteers were still on duty in the milk shed and that shipments of milk would be diverted from those buyers who declined to pay full prices as called for by the order or who might attempt through court action to obstruct administration of the order."

The foregoing quotations constitute only a small part of the program of propaganda carried on by the intervening plaintiffs, Dairymen's League and Bargaining Agency.

(Granted.) 97. In the October 11th issue of the Dairymen's League News, on the first page thereof, was contained the following:

"Producers Stop Dealer's Milk—He Signs Up

"Buffalo Milk 70% Under New State Order—Bargaining Agency Puts Pressure on Procrastinators.

* * * * * * *

"Producers Prepared for Non-Compliers—N. Y. C. Marketing Order Calls for Dealers—Reports Oct. 10

"Preparations to apply 'farmer pressure' to any milk handlers who fail to comply with requirements of the federal-state milk marketing agreement were being formulated last week by the Metropolitan Cooperative Milk Producers' Bargaining Agency."

On page 2 of said issue was contained the following statement:

"The farmer's opportunity lies in mass action through business cooperative organization. Farmers today depend more and more on their own responsible leaders for information. Elected cooperative leaders must know reasons for low prices and be prepared with constructive plans."

(Granted.) 98. In the "Milk Producers' Market News," the o
ficial newspaper of the plaintiff Bargaining Agency, for the mo
of October 1938, published prior to October 15th of said month, a
copies of which were distributed generally to the producers delive
ing milk to defendant's (Jetter's) plants, were contained amo
others, the following statements:

"Please bear in mind that our able Secretary, J. C. Treat, who is i
charge of the 'Minute Men,' is doing a fine job and these men, wh
are distributed throughout the milk shed, are on the watch at a
times for disturbances, chiseling, and other items that are not f
the best interests of your producers."

Page 18:

"Remember that in the last issue of the Market News, on the fro
page, your writer advised you producers to watch out for the sma
minority of trouble makers and see to it that they are kept i
313 their place. We also suggested that whenever you find one o
them sticking their nose in the picture and trying to disru
what you have approved, then a good idea is to swat the nose an
talk afterwards."

Page 24:

"Pressure Is Put On Milk Dealers

"Syracuse, N. Y., October 13 (A. P.)—Milk producers supplyin
the New York City markets began withholding milk today fro
dealers failing to abide by provisions of the federal-state marketin
agreement.

"The producers diverted 1,300 cans from a New York dealer wh
E. M. Harmon, administrator of the agreement, said failed to fil
the first monthly report of milk sales.

"Homer S. Rolfe, president of the Metropolitan Co-operative Mil
Producers Bargaining Agency, said the agency ordered the mil
diverted from the dealer to cheese plants. The agency, he added
will pay the difference between the cheese plant price and the pric
they would have received from the dealer.

* * * * * * *

"Some mighty fine work has been carried on at Bridgewate
* * * by the leaders in the past few weeks.

"An orchid to Eddie Gaynor, of Leonardsville, who is doing som
mighty fine work in assisting the groups working for the success o
the Federal Order. We want to welcome the Young-Maybery Co
operative Association, one of the new members of the Bargaining
Agency. They start off with over 200 members."

Page 25:

"The Bargaining Agency, plus Treat, plus Baldwin, plus An
dover Cooperative, created a headache for what large New Yor
dealer?

"Secretaries of all Cooperatives.—We have added nearly 2,00
names to the individual mailing lists since the last issue was sent out
If you have not already sent in your list, do so at once and you will

o longer be bothered with the bundles of Market News and the roubles of distributing same."

Page 28:

"Hot Stuff

* * * * * * *

"We farmers are like the tramp who stopped at a lady's door and ked for something to eat. She gave him some bread and said: low, I don't give you this bread for your sake, but for the Lord's ke.' The farmer looked to the dry bread and turning to the oman, said: 'Then, for Christ's sake, put some butter on it.' Now, the dealers won't give us a living price for milk for our sake, rhaps they will for Christ's sake. NOT BAD!"

The reference to the "mighty fine work" alleged to have been carried on at Bridgewater refers to activity among patrons delivering milk to the defendant Jetter.

(Granted.) 99. Sub-district president of plaintiff Dairymens ague (Dist. No. 11), has canvassed producers delivering to defendt Jetter, since September 1st, 1938, and represented to such proers, that payments for their milk were in danger; that said proers should leave Jetter and deliver milk to the plaintiff Dairyen's League before such producers sustained loss of payment for ilk delivered.

Plaintiff Dairymen's League, with knowledge that the defendant tter and others similarly situated, could not survive continued forcement of the Federal Order when accompanied by the deructive competition of the League, the National Dairy and Borden bsidiaries and affiliates, in the October 11th issue of the Dairyen's League News, printed the following statement:

"How Can the 'Cheap Milk' Dealer Pay?

"Apprehension was felt in some quarters that some producers may eive something of a shock when they get paid for their milk. "This uneasiness was due to the fact that it is well known that ot of milk is being sold to stores in New York City at less than t. There is a considerable question as to whether some of the ns selling this milk cheap will have money with which to pay proers at the rates established by the market administrator."

(Granted.) 100. The Market News issued by the Bargaining ency for December 1938 (Exhibit 23 to stipulation), states on e 30:

Syracuse, Nov. 21.—There will be no let up in activities of the tropolitan Cooperative Milk Producers' Bargaining Agency to ob a full compliance with the Federal-State milk marketing program, lared Charles H. Baldwin, Executive Secretary, today.

Mr. Baldwin made this statement following a conference with attorney, Edmund F. Cooke, and other lawyers who argued inst an application by Jetter Dairy Company to restrain Mr. dwin, the Bargaining Agency, and the Dairymen's League Co-

operative Association before United States Judge Frank Cooper in Albany Saturday.

"The Jetter Dairy sought to restrain these defendants and Metropolitan Market administrator E. M. Harmon and officials of the State Department of Agriculture and Markets from enforcing the marketing program which was instituted September 1 under The Rogers-Allen law and the Agricultural Adjustment Act.

* * * * * * *

"The Jetter case marks a new milestone in the progress of New York Milk Shed dairy farmers. Never before have dealers sought to enjoin farmers, although there have been cases where dairymen have had to seek protection of the courts from the acts of dealers. Starting of this case seems to indicate the desperate desire of dealers to wreck this program and frighten producers into acceptance of less money for their milk.

316 (Granted if the word "procured" in the 8th line is changed to "aided in procuring.") 100-a. Intervening plaintiff, Dairymen's League, by its acts in procuring the passage of the Rogers-Allen Law, the formation of the intervening plaintiff, Bargaining Agency, and through its own activities and those of the intervening plaintiff, Bargaining Agency, has conspired to convert the provisions of Title 7, Section 608c U. S. Code, as amended, and of the Rogers-Allen Law. (Chapter 383 of the Laws of 1937 as amended), as instruments of coercion, restraint of trade and monopoly. In furtherance of such conspiracy, said intervening plaintiffs procured the promulgation or issuance of Order No. 27 and Official Order No. 126, and, by specific acts referred to in Findings Nos. 92 to 100, inclusive hereof, have practiced coercion and intimidation upon the defendants and others in a like situation, to compel defendants and others to comply with said Orders, regardless of their legality. At the time of the trial the intervening plaintiffs were continuing such coercive measures.

315 "The effect, however, will be the opposite. Indignation is running high among farmers all through the State, and I believe they will now be more insistent that before that every dealer comply in every respect with this marketing program, which has already added more than $2,500,000 to dairymen's income."

Statistics contained in plaintiff's Exhibit A-3 show that the Dairymen's League pool return, including plant volume differentials, location differentials, certificates of indebtedness, were as follows:

	1936	1937	1938
September	$1.95	$1.90	$1.8
October	1.90	2.00	1.8

NOTE.—The actual cash return, including certificates of indebtedness, considered as cash, was less than the prices stated. In 1938 the September net cash price, including certificates of indebtedness, was $1.75 per cwt. and for October, $1.81 per cwt. (Exhibits 11, 12).

Sheffield Farms Company, in corresponding years, paid its producers net as follows:

	1936	1937	1938
September	$1.96	$2.20	$1.87
October	1.90	2.20	1.87

The statement that "this marketing program * * * has already added more than $2,500,000 to dairymen's income" is contrary to the statistics in evidence as part of Exhibit A–3.

(Granted.) 101. In August 1938 the Dairymen's League caused to be transferred all of the fluid milk business theretofore carried on by its several wholly owned subsidiary stock corporations, to itself, and since September 1st, 1938, said distributing business has been conducted by said intervening plaintiff, wholly in its own name.

(Granted.) 102. Since September 1st, 1938, Bordens and the Dairymen's League have withdrawn from approval by the health authority in the marketing area a number of milk receiving stations, which are listed on defendants' exhibit 53.

(Granted.) 103. The Dairymen's League utilized the same facilities owned and operated by it, and owned and operated by the Borden Company prior to September 1, 1938, that it has utilized since said date, and the services performed by it prior to September 1, 1938, were substantially the same as those performed since said date, except for withdrawal of certain plants from approval within the marketing area.

(Granted.) 104. The intervening plaintiff, Plaintiff Dairymen's League, is engaged in business as a distributor of milk in the Newark, New Jersey, district.

Conclusions of fact (All these refused as including in the findings of fact).

Conclusions of law

(Granted.) 1. Order No. 27 is discriminatory against the defendant Jetter Dairy Company and so-called proprietary handlers, in that they are required to pay producers, the uniform price fixed in the Order, for all milk sold in the marketing area, whereas cooperative corporations which are milk dealers of the same class engaged in the sale of milk to stores and consumers in direct competition with defendant Jetter, and other proprietary handlers, are under no requirement to pay the uniform price or any stated price to producers for such milk.

(Granted.) 2. Order No. 27 is discriminatory as against the Jetter Dairy Company and other proprietary handlers, in that said handlers are required to account to the Producer Settlement Fund for the difference between the uniform price and the prices stated in the Order, whereas the price accounted into said Fund by cooperative

handlers, is reduced by payments to them out of said Fund, pursuant to Article VII, Section 5 of the Order.

(Granted.) 3. Order No. 27 is discriminatory against all of the defendants and against other cooperative and proprietary handlers which are not engaged in the manufacture and sale of milk products in that the large handlers, both cooperative and proprietary, being principally National Dairy subsidiaries, Bordens and subsidiaries, Dairymen's League and several smaller companies, including Queensboro Farms Products, Inc., and the several companies operated by Aaron J. Rubenfeld, which are engaged in manufacturing milk into milk products, receive so-called market service payments under Article VII, Section 6, which are not and cannot be received by small handlers, who combine fluid milk operations with manufacturing on a small scale in their own plants, thereby in effect, substantially reducing the prices paid by such large handlers for milk utilized in fluid form.

(Granted.) 4. Order No. 27 is discriminatory against certain handlers, including all the defendants, in that the same regulates all of the businesses of handlers dealing only in the marketing area, while regulating only part of the business of the larger handlers, whose businesses extended to adjacent markets outside of the area.

By the terms and application of the Order, the same large handlers referred to in the next preceding paragraph, both proprietary and cooperative, in making payment for all milk purchased in the production area, are permitted to pay a blended price, which price is computed upon the prices fixed in the Order for milk sold in the marketing area, and with arbitrary prices fixed by such handlers as they see fit, for milk sold outside of the area, which milk is known as "unpriced milk," thereby, in effect reducing the price paid by such handlers for fluid milk sold in the marketing area.

None of the defendants are engaged in the manufacture of milk products. None of said defendants are engaged in marketing milk outside of the marketing area.

(Granted.) 5. Order No. 27 is discriminatory as against proprietary handlers purchasing milk direct from producers, in that such handlers are obliged to absorb the cost of maintenance and operation of their milk-receiving station, and the cost of receiving milk therein, whereas handlers purchasing milk from cooperative corporations are required to pay only the base producer price for such milk, and are not obliged to pay such cooperative associations, any part of the so-called handling charge, or in any manner for services rendered by the cooperative association in that regard. Such receiving station or plant handling costs were from 15¢ per cwt. to 30¢ per cwt.

319 (Granted.) 6. Application of the provisions of Order No. 27 to handlers, coupled with competitive practices of handlers in the marketing area, has resulted in a loss to all dealers selling wholesale fluid milk in the area, and has confiscated capital of proprietary handlers engaged principally in sales of fluid milk at wholesale to stores. The order is discriminatory as to such handlers

ncluding the defendant Jetter Dairy Company, and in favor of ther handlers, both cooperative and proprietary, whose operations nclude other markets; who are engaged in the manufacture of milk nd milk products, and who receive payments from the Producer ettlement Fund, under the provision of Article VII, Sections 5 nd 6.

(Refused.) 7. Order No. 27 is discriminatory against handlers purhasing milk in areas producing milk of high butterfat content, in hat they are required to pay a premium for such milk, although he resale price of such milk (Grade B), in New York City, is either more nor less by reason of butterfat content. Thereby, the ase cost of such milk of high butterfat content, is greater than the rice paid for milk, containing less butterfat, and which is sold ompetitively for the same price.

(Refused.) 8. Order No. 27 is discriminatory against handlers urchasing milk at plants beyond the 25 mile zone, the discrimina-ion being greater in each succeeding zone, in that such handlers re required to pay a greater delivered cost for milk delivered to he marketing area, for the reason that the freight differentials estabished by Article IV, Section 3 of the Order, are not comparable or quivalent to the actual established differences in freight costs, such nfavorable differences increasing from ½¢ per cwt. in the 50 mile one, to 22½¢ per cwt. in the 500 mile zone.

(Granted.) 9. The provisions of Order No. 27 are discriminatory s to the defendants, Rock Royal Cooperative and Schuyler Junction Cooperative, and in favor of the Dairymen's League and other large andlers, which receive payments under the provisions of Article II, Sections 5 and 6, and which blend "unpriced" milk with milk old in the market, in that such larger handlers are able to undersell aid defendants.

(Granted.) 10. Order No. 27 is discriminatory as to the defendnts who are engaged principally in the fluid milk business and opating wholly within the marketing area, in that moneys of said efendants are expropriated to be paid to competitors of said deendants, and in effect to give to such competitors, consisting princially of the Dairymen's League, Bordens and Sheffields, a subsidy om the capital account of the defendants and others in a like situaon, whereby monoply may be created in said large competitors and e several defendants be forced out of business by exhaustion of apital and by inability to meet competitive prices of said preferred ompanies.

(Granted.) 11. Order No. 27 is discriminatory as between proucers, in that there is no requirement that cooperative associations e required to pay the uniform price or any price to producers deivering to such associations.

Cooperative handlers, which are also distributors, may sell milk irect to store keepers and consumers at less than the minimum elivered cost thereof, based on prices contained in the Order and

deduct the losses occasioned by such price cutting from the pri paid to producers.

Cooperative handlers may sell milk to other dealers without ma ing any charge for handling or receiving costs, thereby in
320 effect, reducing prices charged for milk, and deduct the am so rebated to such handlers, from payments made t producers.

(Granted.) 12. Order No. 27 is discriminatory as between pr ducers, in that producers in 18 counties, enumerated in Article VII Section 8, receive 20¢ per cwt., preferential payment on all of the milk.

(Refused.) The uniform price to producers delivering to pr prietary handlers, is reduced by such preferential payment to pr ducers in the preferred 18 counties.

(Granted.) Prices paid by cooperatives to producers outside sai preferred counties, are also reduced by such preferential payme to producers in the 18 preferred counties, in the adjustments mad with the Producer Settlement Fund.

(Granted.) 13. Order No. 27 is discriminatory as to produce delivering to handlers, whether cooperative or proprietary, whos businesses are only partly regulated by the Order, which sell fluid milk in the Metropolitan Area, and also in the State of New Jersey and other markets, in that the producers are paid less than the actual value of milk delivered by them, accomplished by "blending" arbitrary prices for milk sold outside of the area, which bear no true relation to the actual value thereof, with prices charged for milk sold in the area.

(Granted.) 14. Order No. 27 is discriminatory as to all produce delivering to handlers, whether cooperative or proprietary, which producers do not receive the cooperative payments provided for by Article VII, Section 5 of the Order (the greater part of which is paid to the Dairymen's League Cooperative Association, Inc.), and whose prices are reduced by the amounts deducted from the uniform price under Art. VII, Sec. 5, and which are paid from the Producer Settlement Fund to the Dairymen's League Cooperative, and such other cooperatives as receive such payments.

(Granted.) 15. Order No. 27 is discriminatory as to all producers delivering to either proprietary or cooperative handlers, which handlers do not have facilities to receive payments under the provisions of Article VII, Section 6, and payments made to such producers are reduced by the amounts deducted and paid from the Producer Settlement Fund under the provisions of said Article VII, Section 6.

(Granted as to Federal Order 27 only.) 16. The Act as applied in Order No. 27 and Official Order No. 126, denies to the several defendants, equal protection of the law and tend to confiscate the property of the defendants without due process of law, and are vio-

tive of the Fifth and Fourteenth Amendments to the Constitution of the United States and to Article I, Subdivision 6 of the New York State Constitution.

(Refused.) 17. The provisions of Title 7, Section 608c of the U. S. Code, and Order No. 27 are violative of the Constitution of the United States, in that they attempt an unlawful delegation of legislative powers to producers and cooperative associations.

(Granted.) 18. The provisions of Title 7, Section 608c (5) (A) (B) (ii), and Order No. 27 are violative of the Fifth Amendment to the Constitution of the United States on the ground that they are discriminatory as between proprietary handlers purchasing milk from producers and proprietary handlers of milk of the same class, purchasing milk from cooperative associations.

321 (Granted.) 19. The provisions of Title 7, 608c (E) and Order No. 27 are violative of the Fifth Amendment to the Constitution of the United States, in that the same provide for payments to cooperative handlers of milk which are denied to proprietary handlers, for identical services, said handlers all being milk dealers of the same class. Thereby proprietary handlers are denied the right to purchase milk on the same terms and conditions, no more and no less, as those applied to cooperative handlers.

(Granted.) 20. The provisions of Title 7, 608c (B) (ii) U. S. Code, are violative of the Fifth Amendent *ot* the Constitution of of the United States, in that they expropriate money from dealers and producers for the benefit of competing dealers and of producers selling to said dealers, without due process of law.

(Granted.) 21. The provisions of Title 7, 608c (B) (ii) U. S. Code, are invalid and are unauthorized by the Constitution, or the Commerce Clause thereof. The equalization payments authorized therein, constitute a subsidy to be paid by dealers and producers, having well established fluid milk markets, to competing dealers and producers.

(Refused.) 22. Title 7, 608c, U. S. Code, known as the "Agricultural Adjustment Act," as a whole, is invalid because it delegates legislative powers to an administrative officer (the Secretary of Agriculture).

(Refused.) 23. Title 7, 608c, U. S. Code, as a whole, is unconstitutional, in that it delegates legislative powers to a limited group of private citizens.

(Granted.) 24. The Finding by the Secretary that Order No. 27 is approved or favored by two-thirds of the producers producing milk in the production area, is invalid; is unsupported by any substantial probative evidence and amounts merely to an expression of opinion by the Secretary.

(Granted except as Noyes.) 25. The intervening plaintiff Dairy-League, the intervening plaintiff, Bargaining Agency, and E. Manning Gaynor, personal representative of the intervening plain-

tiff, Holton V. Noyes, have been and now are, engaged in a conspiracy in restraint of trade or commerce against the defendants Jetter, Rock Royal Cooperative, Schuyler Junction Cooperative; handlers buying from said cooperatives, and other handlers, for the purpose of controlling the purchase and sale of milk, and destroying competitors of the Dairymen's League and its customers, including said defendants, in violation of the provisions of Title 15, U. S. Code, Sections 1 to 7. Said intervening plaintiffs and others have been and now are engaged in a scheme or conspiracy to discriminate in price between purchasers of commodities of like grade and quality, which discrimination is against the defendants Jetter, Rock Royal Cooperative and Schuyler Junction Cooperative, and is violative of the provisions of Title 15, U. S. Code, Sections 12–14, inclusive.

(Granted.) 26. The provisions of Order No. 27 are violative of the provisions of Title 15, U. S. Code, Sections 1–7, 12–14, and the intervening plaintiffs, Dairymen's League and Bargaining Agency, in violation of the provisions of said Title 15, U. S. Code, which are known as the Federal Anti Trust Laws, are now engaged in an unlawful combination and conspiracy and are now threatening, by coercion, intimidation and the other unlawful acts stated in the Findings and Conclusions of Fact therein, to impose upon the defendants Jetter, Schuyler Junction Cooperative and the Rock Royal Cooperative, compliance with the illegal and unlawful terms of Order No. 27; and to restrain them from exercising their legal right of engaging in the purchase and sale of milk, free from any constraint or discrimination, after the decision of this case and regardless of any decision rendered herein.

322 (Granted.) 27. The complaint of the plaintiff, United States of America should be dismissed as to each defendant.

(Granted.) 28. The complaint of the intervening plaintiff, Holton V. Noyes, should be dismissed as to each defendant, with costs.

(Granted with one bill of costs against both plaintiffs jointly.) 29. The complaint of the intervening plaintiff, Dairymen's League Cooperative Association, Inc., should be dismissed as to each defendant, with costs, and an allowance for attorneys' fees.

30. The complaint of the intervening plaintiff, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., should be dismissed as to each defendant, with costs and an allowance for attorneys' fees.

323 In United States District Court

Civil Action No. 32. Consolidated Cause

[Title omitted.]

Statement of plaintiff's objections to the proposed findings of fact and conclusions of law submitted on behalf of the defendants Jetter Dairy Company, Inc., Rock Royal Cooperative, Inc., and Schuyler Junction New York Milkshed Cooperative, Inc.

Filed March 9, 1939

STATEMENT

Plaintiff objects to proposed findings 7, 11 to 18, inclusive, 21 to 27, inclusive, 36 to 62, inclusive, 64 to 79, inclusive, and 81 to 104, inclusive, all of the so-called proposed conclusions of fact and all of the proposed conclusions of law, for the reasons hereinafter stated.

Detailed Statement of Objections and Reasons therefor

Findings Nos. 1–4: No objection is made to these findings except that the number of producers given in the first three findings are the numbers delivering milk as of August 1, 1938, and not the numbers delivering milk during August. The number of producers given in the first finding should be 82 instead of 65 (Defendants' 324 exhibit 18). These findings are substantially covered by plaintiff's proposed findings 1–4. Plaintiff would not object to the substitution of these findings in corrected form for its proposed findings Nos. 1–4.

Findings No. 5: This finding is partly covered by plaintiff's proposed finding No. 39.

Finding No. 6: The substance of this finding is included in plaintiff's proposed finding No. 41.

Finding No. 7: The facts included in this finding are more completely covered in plaintiff's proposed finding No. 36.

Findings Nos. 8, 9, and 10: These findings are identical with plaintiff's proposed findings 5, 6, and 7, except that the citation in the second line of Defendants' finding No. 8 should be "Public, No. 137."

Finding No. 11: This finding is identical with plaintiff's proposed finding No. 8 except for the phrase "said order containing the terms and conditions held by the Secretary to be authorized by the applicable provisions of the Act and no others." The plaintiff's proposed finding eliminates the underscored words. It is submitted that there is no evidence in the record that Order No. 27 contains any unauthorized terms and conditions. Plaintiff is therefore entitled to its proposed finding No. 8 in lieu of defendant's proposed finding No. 11.

Finding No. 12: This finding is identical with plaintiff's proposed finding No. 9 except for the inclusion of the phrase "held by the Commissioner." For the reasons set forth in the preceding paragraph it is submitted that plaintiff is entitled to its proposed finding No. 9 in lieu of defendants' proposed finding No. 12.

325

Finding No. 13: This finding is identical with the first sentence of plaintiff's proposed finding No. 15. It is submitted that plaintiff's proposed finding No. 15 is more complete and that plaintiff is entitled to such finding. If the Court adopts plaintiff's proposed finding No. 15, defendants' finding No. 13 will be unnecessary.

Finding No. 14: This finding is identical with the first part of plaintiff's proposed finding No. 16. It is submitted that plaintiff's proposed finding No. 16 is more complete and that plaintiff is entitled to such finding. If the Court adopts plaintiff's proposed finding No. 16, defendants' finding No. 14 will be unnecessary.

Finding No. 15: This finding is identical with the first part of plaintiff's proposed finding No. 23. It is submitted that plaintiff's proposed finding No. 23 is more complete and that plaintiff is entitled to such finding. If the Court adopts plaintiff's proposed finding No. 23, defendants' finding No. 15 will be unnecessary.

Finding No. 16: This finding is almost identical with plaintiff's proposed finding No. 25.

Finding No. 17: This finding is identical with plaintiff's proposed finding No. 26, except for the addition of the last sentence, "Order No. 27 and Official Order No. 126 hereinafter referred to as the Order." Plaintiff believes that confusion may result from failure to differentiate between Order No. 27 and Official Order No. 126.

326

Finding No. 18: This finding is inaccurate in that it says that the prices for Class I and Class II-A milk are arbitrarily fixed. The relation of these prices to the butter price is not arbitrary and is fully described in the Order so that no finding of fact is necessary. The second paragraph of this finding is likewise inaccurate. A complete and accurate description of the basis for the Class III-A, IV-A, and IV-B prices is contained in Paragraph 13 (A) of plaintiff's proposed findings of fact. There is no objection to a finding that the Class I price has been $2.45 per cwt. for the months of September, October, November, and December, 1938.

Findings Nos. 19 and 20: No objection.

Findings Nos. 21-25: These are not properly findings of fact but are an inaccurate description of certain provisions of Order No. 27.

Finding No. 26: The first paragraph of this finding is an inaccurate description of some of the provisions of Order No. 27 and is not properly a finding of fact. The conclusion in the last sentence of the first paragraph of this finding that the blending of the price paid for milk sold in other markets reduces the actual price paid for milk sold in the metropolitan area is not supported by any evidence in the record and is based on two erroneous assumptions: First, that the price paid for milk sold in other markets will be lower than the reasonable value of such milk, and secondly, that the profits made on the milk

ld outside of the metropolitan area will be used for the purpose of derselling in the metropolitan area. Neither of these assumptions is supported by the evidence.

27 The second paragraph of proposed finding No. 26 is evidentiary only and entirely irrelevant. The booklet to which eference is made should be considered by the Court in its entirety, f at all.

The third paragraph of finding No. 26 is not a finding of fact ut pure argument.

See plaintiff's proposed findings 13 (F) and 14, together with ecord references thereto. See also comment on defendants' proosed findings Nos. 40–45.

Finding No. 27: This is an inaccurate and confusing description of certain provisions of Order No. 27 and of the Act and is not properly a finding of fact.

Findings Nos. 28–35: No objection.

Finding No. 36: This finding should be clarified to show that the "total utilization of milk in the marketing area" means utilization of Class I milk by all handlers and not utilization only by the Dairymen's League.

Finding No. 37: This finding is accurate except that it paints an incomplete picture by reason of failure to state that the total utilization of Class I milk by the Dairymen's League includes sales to other handlers. See plaintiff's proposed finding No. 31. See also R. 2349 "From September 1st to November 25th, 1938, the sales of the Association [the Dairymen's League] through its branches in New York City of glass-bottled milk in quarts suffered a loss of approximately fourteen per cent in volume."

328 The headings of the columns with reference to unpriced milk are also incorrect. "Unpriced milk" means approved milk for which a handler does not account to the pool. The figures given in the first two columns include both approved and unapproved milk. The figures in the third column include only approved milk. (Defendants' Exhibit No. 49.)

Finding No. 38: The first paragraph of this finding is inaccurate because it fails to state that the $2.76 price applies only to milk purchased in the State of New Jersey from New Jersey producers and for the further reason that the New Jersey price is not fixed at country milk plants but is fixed at the plant to which the milk is delivered in the State of New Jersey, which may be either a country plant or a city plant.

The evidence does not support the statement in the fourth paragraph of this finding that $2.76 is the fair market value of milk delivered to an approved plant for sale in the State of New Jersey. The $2.76 price makes no allowance for transportation costs from approved plants located outside of the State of New Jersey to the New Jersey market and represents, in any event, the price paid for only a part of the milk which supplies the market. Unpriced Class I milk which is sold in the New Jersey market comes into direct

competition with milk which is not approved for the metropolitan marketing area and which is produced outside of the State of New Jersey for sale in the State of New Jersey. The market value of unpriced Class I milk which is sold in the New Jersey market is directly affected by the prices paid for such unapproved milk. There is no evidence in the record as to the prices paid for such unapproved milk.

329 Finding No. 39: The first paragraph is inaccurate in that it states that the uniform prices were "fixed" by the Administrator. They were simply computed and announced by the Administrator.

The second paragraph of this finding is inaccurate by reason of failure to explain the meaning of the phrase "base price." There is not sufficient evidence in the record to explain the meaning of "base price," but from Exhibits 11, 12, and 54, it does appear that in accounting to its own producers the Dairymen's League employs differentials over and above those required by Order No. 27. The total of such differentials must, of course, be deducted in computing its "base price." The base price is not the average price paid to producers in the 201–210 mile zone, which alone could be compared with the uniform price. The average price paid to producers by the Dairymen's League in the 201–210 mile zone was $1.83, $1.87 and $2.07 for the months of September, October, and November, 1938 respectively (Defendants' Exhibits 11, 12, and 54).

The third paragraph of this finding is based on two erroneous assumptions, namely, that the "base price" paid by the Dairymen's League is comparable to the uniform price and, secondly, that the price fixed by the New Jersey Control Board for milk produced and sold in the State of New Jersey is the reasonable value of milk delivered to a plant outside the State of New Jersey in the 201–210 mile zone for shipment to the New Jersey market. It should be noted that the value of Class I milk delivered at New York City is approximately $3.00. This includes the Class I price of $2.45 in the 201–210 mile zone, 32¢ freight (Defendants' Exhibits 78 and 79), and 23¢ representing the cost of handling at the country plant (R. 2369).

330 Findings Nos. 40 to 45: These findings are not properly findings of fact but are simply arguments based on erroneous premises. These premises are six in number.

A. That $2.76 is the reasonable value of Class I milk delivered to an approved plant in the 201–210 mile zone for sale in the State of New Jersey. See discussion of defendants' proposed findings Nos. 38 and 39.

B. That the payments to cooperatives pursuant to Section 5 of Article VII of Order No. 27 are not only not reasonable but that the cooperative performs no services involving either cost to itself or value to the market in return for these payments. Section 5 of Article VII is presumed to be valid and the defendants have intro-

duced no evidence whatsoever impeaching the reasonableness of these payments. The reasonableness of these payments is amply supported by the evidence. See plaintiff's proposed finding No. 13 (D) together with record references.

C. That the payments made to the Dairymen's League pursuant to Section 6 of Article VII are mere gratuities; that the Dairymen's League incurred no expense in earning these payments and that the services performed by the Dairymen's League in return for these payments are of no value to the market. Article VII, Section 6, is presumed to be valid and the defendants have introduced no evidence tending to show that such payments are not reasonable. The reasonableness of such payments is amply supported by the evidence. See plaintiff's proposed finding No. 13 (E) together with record references.

D. That the "base price" paid by the Dairymen's League in the 201-210 mile zone is a figure comparable to the uniform price. See discussion of defendants' proposed finding No. 39.

331 E. That all unpriced milk sold should be considered Class I milk. Article IV, Section 1 (second paragraph, p. 6), of Order No. 27 specifically provides that when a handler sells Class I milk outside of the marketing area a portion of his Class III-A, III-B, III-C, III-D, IV-A, and IV-B milk shall likewise be unpriced. The operation of this section of the Order is illustrated by the report of the Middletown Milk and Cream Company for the month of November 1938 covering its Slate Hill plant (Defendants' Exhibit 27-A). Columns 10, 12, 13, and 14 of this exhibit show 421,627 pounds of unpriced Class I milk (milk sold outside the marketing area) and 84,939 pounds of unpriced Class II-A milk. Columns 12, 13, and 14 further show that of 243,184 pounds of Class III-D milk handled the handler could claim credit in the pool for only 168,762 pounds, leaving 74,422 pounds unpriced. Defendants' Exhibit 36 shows that the Middletown Milk and Cream Company paid its producers at the rate of $2.38 per cwt. for 3.5 milk at the Slate Hill plant, which is five cents less than the uniform price plus freight and nearby differentials. In figuring the cost to this handler of his Class I unpriced milk it must be borne in mind that the price paid included 74,722 pounds of unpriced Class III-D milk on which the class price for the month of November was only $1.052 (Defendants' Exhibit 41), as well as 84,939 pounds of Class II-A milk for which the uniform price was $1.90 per cwt. If the value of unpriced Class II-A and III-D milk is figured at the class prices the net cost to this handler of his Class I unpriced milk in the 81-90 mile zone was approximately $2.60 per cwt.

F. That the Dairymen's League would make use of the aforesaid alleged advantages for the purpose of underselling proprietary handlers in the metropolitan marketing area instead of pass-
332 ing on the benefits to its producers in the form of increased returns. The evidence shows that the Dairymen's League did

where necessary to preserve its business. See plaintiff's proposed finding 31 and record references. The Dairymen's League has actually lost a part of its wholesale business in the metropolitan marketing area since September 1, 1938. The fact that it has lost business and still has not been able to return the uniform price to its producers would seem effectually to demonstrate that the alleged advantages upon which these findings are based do not exist.

In finding No. 40 the first column is misleading because the figures include unapproved as well as approved milk.

The statement in finding No. 41 that the defendant Rock Royal Co-operative, Inc., applied for qualification to receive payments pursuant to Article VII, Section 5, is not supported by any evidence in the record and no record citation is offered by defendants.

Finding No. 46: See comment as on Findings 40–45.

Finding No. 47: This is not a finding of fact.

Finding No. 49: The last paragraph of this finding is incorrect of certain provisions of Order No. 27 with an argument thereon.

Finding No. 49: The last paragraph of this finding is incorrect. There are no established truck rates (Defendants' Exhibits 78 and 79). The figures given would be correct if stated to be the approximate cost of transporting milk by tank truck.

The subject matter of the first four paragraphs of this finding is adequately covered by plaintiff's proposed finding 13 (B).

333 Finding No. 50: This finding is simply argument and is based on an erroneous premise. The freight differentials in Order No. 27 are based on actual tank car rates approved by the Interstate Commerce Commission. The I. C. C. rates are the only definite, ascertainable "actual freight" rates in existence in the production area. There are no uniform rates for transportation by tank truck (Defendants' Exhibits 78 and 79).

Finding 51: This finding contains an incorrect and inaccurate statement of certain provisions of Order No. 27 plus an argument based thereon. It is not a proper finding of fact. The defendants have introduced no evidence whatsoever tending to show that these differentials are not reasonable. The reasonableness of these differentials is amply supported by the evidence before the Secretary. (Exhibit A–3–8, pp. 102–104, Exhibit A–3, pp. 968, 969, 1013.)

Findings Nos. 52 and 53: These findings contain nothing but argument.

Finding No. 54: This finding is not supported by the evidence. The evidence is that there is only one grade of Grade B milk irrespective of butterfat content (R. 2376) but there is no evidence that Grade B milk having a consistently high butterfat content does not command a higher price or sell more readily than milk having a consistently lower butterfat content.

Finding No. 55: This finding is not supported by the weight of the evidence. Nelson All testified (R. 760) that the Worcester Cooperative Association was able to divert milk to a manufacturing plant

when a New York dealer had refused to accept it. Further-
334 more, there is no allegation in the answers of any of the de-
fendants that the butterfat differentials are not reasonable. The reasonableness of the butterfat differentials is amply supported by the evidence. See plaintiff's proposed finding No. 13 (C) together with record references.

Finding No. 56: See comment with reference to findings Nos. 49 and 50.

Finding No. 57: With the exception of paragraphs (f) and (i) this finding contains nothing but argument based upon erroneous assumptions and inaccurate descriptions of certain provisions of Order No. 27, all of which have been discussed in connection with earlier findings. The only objection to paragraph (f) is to the last phrase "and the greater part of milk sold outside of the area" which is entirely without support in the evidence.

Finding No. 58: Not a single statement in this finding is supported by the evidence. The storage of cream is an expensive operation (Exhibit A-3-8, p. 24). Storage cream is worth less than fresh cream (R. 817, 818, Exhibit A-3, pp. 1863, 1864). Cold storage cream when sold in New York City must be clearly labeled as such (Exhibit A-3-36, p. 68) and is used principally in the manufacture of ice cream (Exhibit A, p. 1863). It is sometimes reprocessed to make sour cream (R. 817). The unexplained statement of the witness Samuel Miller (R. 869) that he put cream into storage and also took cream out of storage during October 1938 certainly does not support this proposed finding. A mixture of skim milk and cream cannot legally be sold as whole milk in the marketing area (Exhibit A-3-36, p. 1, Exhibit A-3-41, p. 7).

The second paragraph of this finding is based on two assumptions—that large handlers will file false reports and that the Market Administrator will be derelict in his duty.

335 Finding No. 59: This finding is entirely unsupported by the evidence. There is no evidence that milk could be manipulated for the purpose of obtaining a competitive advantage and there is no evidence that any such manipulation has occurred.

Finding No. 60: The first sentence is based on one isolated instance (R. 636), which is not sufficient to support a general finding. Furthermore, the witness Mills testified that he manufactured other types of cheese as well as American (R. 660). The second sentence is true but entirely immaterial. There is no evidence that approved milk makes better cheese than unapproved milk. The Dairymen's League manufactured no milk into cheese during the months of September and October 1938 (Defendants' Exhibit 13). Bordens and National Dairy manufactured only a small amount of milk into cheese during these months (Defendants' Exhibits 45 and 43). The reasonableness of the Class IV-B prices is amply supported by the evidence. See plaintiffs' proposed finding 13 (A) and record references.

Finding No. 61: The first sentence of this finding is not supported by the evidence. The witness Barbour testified (R. 568) that he paid

less than the order prices for cream which he manufactured into butter. There is evidence of one isolated instance in which 20¢ per cwt. (of skim milk—not for the skim from a cwt. of whole milk) was paid for skim milk for a special limited purpose by a manufacturer of Italian cheeses (Bullock R. 1579, 1584). This price was paid only during the short season. Surplus milk is manufactured into butter principally during the flush season (Exhibit A–3–26, p. 97). There is no evidence that skim milk has any value during the flush season.

336 Samuel Miller testified (R. 820) that skim milk has very little value. The second sentence is true but immaterial. There is no evidence that approved milk makes better butter than unapproved milk. The third sentence is a conclusion from the first and second and is unsupported by the evidence. The reasonableness of the Class IV–A prices is amply supported by the evidence. See plaintiff's proposed finding 13 (A) and record references.

Finding No. 62: The second paragraph of this finding is not supported by the weight of the evidence. It is submitted that the weight of the evidence supports plaintiff's proposed finding No. 50 and that such finding should be adopted in lieu of defendants' proposed finding No. 62.

Finding No. 63: No objection.

Finding No. 64: This finding consists of an incorrect statement of some of the evidence. The witness Samuel Rootstein testified that prior to July 1, 1938, the Lincoln Milk and Cream Company delivered eight cases of milk a day to Weintraub (R. 2246). On July 1, 1938, this business was purchased by the Dairymen's League. Between July 1, 1938, and September 1, 1938, the sales of the Dairymen's League decreased from eight to three cases per day, while the sales of the Triboro Milk and Cream Company increased. The witness testified simply that on September 4, 1938, he saw ten cases of Dairymen's League milk and ten cases of Gold Medal Farms, Inc., milk in the Weintraub store. There is no evidence that either the Dairymen's League or Gold Medal Farms, Inc., acquired this business by price-cutting. The reason for the shift does not appear in the record and it is just as reasonable to suppose that it was caused by dissatisfaction

337 with the service given by the Triboro Milk and Cream Company as that it was caused by price concessions offered by the other two companies.

Finding No. 65: The first sentence of this finding is a correct statement of fact. The balance of the finding is an incorrect statement of certain evidence. The record does not disclose the purpose of the Sheffield Farms Company in making a rebate to Lavender. Furthermore, this witness testified that he stopped buying milk from the Sheffield Farms Company and Breakstone, so the concessions made by these companies were evidently insufficient to enable Sheffield to retain the business. The rebate referred to occurred in November 1938, after price cutting had become general.

The free milk given to Rose Paley by the Dairymen's League occurred prior to September 1, 1938 (R. 498, 504). The inference from the record is not that free milk was given by Sheffield and the

Dairymen's League to induce the witness to buy their milk, but because of a threat on her part to discontinue purchasing milk unless such concessions were made. She discontinued buying milk from Grandview Dairy after Grandview Dairy refused to give her free milk. She buys no more milk from the Dairymen's League now than formerly (R. 504). Glendale also gave her free milk (R. 500).

Finding No. 66: This finding is based upon the facts stated in finding No. 65 and is objected to for the same reasons.

Finding No. 67: There is no allegation in the answers of any of the defendants to which this finding could be relevant under any theory. Furthermore, the first statement is not a statement of fact, but an inaccurate description of certain provisions of Order No. 27. The second sentence is simply a statement of a part of the evidence and is only one isolated instance.

338 Finding No. 68: This finding is only a half truth. It implies that the only elements which have a bearing on the competitive situation are concessions made by dealers. It overlooks such elements as quality of service, consumer preferences, etc.

Finding No. 69: The record does not disclose the loss of any business by the defendant Jetter Dairy Company, Inc. It discloses the loss of a substantial amount of business by the Triboro Milk and Cream Company (Plaintiff's Exhibit G, R. 2270) but the reasons for such loss do not appear in the record.

Finding No. 70: This finding is not a proper finding of fact and in any event is irrelevant and immaterial.

Finding No. 71: The statement that the Farm Conference Board "proposed" the Rogers-Allen Law is not supported by the evidence (R. 1887). The reference to the "purported provisions" of said law is argumentative. With reference to the second paragraph of this finding the record merely discloses that the name of the General Attorney for the Dairymen's League appeared on the certificate of incorporation.

The substance of this finding is adequately covered in plaintiff's proposed findings Nos. 38 and 39.

Finding No. 72: Defendants' proposed finding No. 5 covers all the evidence in the record with reference to the statements contained in this finding. The additional statements herein contained are not supported by the evidence.

Finding No. 73: This finding is not a proper finding of fact but merely an incorrect recital of fragments of evidence. The statement

339 that E. M. Harmon spent three days a month, beginning in November 1937, in consultation with representatives of the Bargaining Agency is incorrect. E. M. Harmon testified that he spent three days a month in Syracuse from November 1937 to February 1938 (R. 1022) and that it was his duty to consult with state agencies, handlers, producers, and producer groups (R. 1024). It cannot be inferred that all or most of the time spent in Syracuse was devoted to consultations with the Bargaining Agency. The subject matter of this finding is adequately covered by plaintiff's proposed finding No. 40.

Finding No. 74: This finding is repetitious and unnecessary.

Finding No. 75: This finding is substantially identical with the first part of plaintiff's proposed finding No. 17. It is submitted that plaintiff's proposed finding No. 17 is more complete and that plaintiff is entitled to such finding. If the Court adopts plaintiff's proposed finding No. 17, defendants' finding No. 75 will be unnecessary.

Finding No. 76: The conclusions set forth in this finding are not supported by the evidence. It is submitted that plaintiff's proposed findings Nos. 17 and 18 correctly state the facts established by the evidence with reference to this issue.

Findings Nos. 77, 78, and 79: The first sentence in finding No. 77 is not supported by the evidence. The remainder of these three proposed findings contain nothing but argument.

Finding No. 80: This finding is identical with plaintiff's proposed finding No. 22.

340 Finding No. 81: This finding is not a finding of fact but only argument.

Finding No. 82: This finding should be rejected because of the inference, which is not supported by the evidence, that the Dairymen's League attacked anyone whom it believed to be opposed to the adoption of Order No. 27 and Official Order No. 126.

Finding No. 83: This finding is not a finding of fact but simply a recital of fragments of evidence. It is objected to on the further ground that it seeks to create an inference that the sums mentioned were all spent in connection with the proposed Federal-State program.

Finding No. 84: This finding is not a finding of fact but simply a recital of fragments of evidence.

Finding No. 85: No objection is made to the first paragraph of this finding. The second paragraph is objected to because it appears on the face of the Act that distributors are not permitted to vote in a producer referendum. The third paragraph is inaccurate. Such producers were permitted to vote through their duly elected representatives.

Finding No. 86: This finding is not a finding of fact but only argument.

Finding No. 87: This finding is not supported by the evidence. The record shows that the Dairymen's League was only one member of the Bargaining Agency. It is submitted that plaintiff's proposed finding No. 45 correctly states the facts established by the evidence with reference to this issue.

341 Finding No. 88: This finding is unsupported by the evidence. It is submitted that plaintiff's proposed findings Nos. 42, 51, and 52 correctly state the facts established by the evidence with reference to this issue.

Finding No. 89: This finding is argumentative and the description of the letters and statements as containing "threats against any dealer who might appeal to the courts" is not an accurate characterization of such letters and statements. Nor is the description of the market

ng agreement as a "contract which surrendered their rights to due rocess" a fair description of such contract. The evidence does ot support a finding that the persons herein named entered upon campaign to "compel" distributors to sign a marketing agreement.

Findings Nos. 90 and 91: These findings are not supported by the eight of the evidence. The subject matter of these findings is lly treated in the brief filed by the intervening plaintiff, the Bar-aining Agency.

Findings Nos. 92 and 93: These findings are not findings of fact, ut simply recitals of fragments of evidence.

Finding No. 94: The first paragraph of this finding is not sup-orted by the weight of the evidence. See the brief filed by the ntervening plaintiff, the Bargaining Agency.

The second paragraph is at most a recital of fragments of evi-ence, but plaintiff has been unable to find that the issue of the Dairymen's League News dated October 11, 1938, was ever offered or received in evidence.

342 Finding No. 95: This finding is simply a recital of fragments of evidence. The last paragraph of this finding is simply rgument.

There is no finding No. 96.

Finding No. 97: This finding is at most a recital of fragments of vidence, but plaintiff has been unable to find that the issue of the Dairymen's League News dated October 11, 1938, was ever offered or received in evidence.

Finding No. 98: The quotations in this finding are simply a recital of fragments of evidence. There is no evidence in the record sup-porting the first and last paragraphs of this finding.

Finding No. 99: This finding is not supported by the evidence. The evidence is that two producers delivering milk to the plants of the defendant Jetter, one of whom had previously delivered his milk to a plant of the Dairymen's League, were canvassed by Washbon. With reference to the alleged representations, the only evidence was the testimony of the witness Wilson that Washbon had told him that he had been told that Jetter had held back two weeks' payments from a certain producer (R. 394, 395). This falls far short of a representation that payments for milk were in danger.

The first part of the second paragraph of this finding is simply argument based upon alleged facts which have not been established. The excerpt from the Dairymen's League News is a statement of evidence which does not appear to be in the record.

343 Finding No. 100: The first paragraph of this finding is simply a recital of fragments of evidence. The second and third paragraphs are likewise a recital of fragments of evidence which, taken by themselves, present an entirely erroneous picture. In the fall of 1936 and the fall of 1937 the general level of dairy prices was substantially higher than in the fall of 1938. Compare, for example, the Class IV-B price of $.832 announced by the Market

Administrator for the month of September 1938 (Defendants' Exhibit 39), with the price of $1.44 computed pursuant to the same formula under State milk control in 1936 (Exhibit A–3–13, p. 6), and the price of $1.34 computed pursuant to the same formula which was used by the Dairymen's League in computing its September 1938 pool (Exhibit A–3–13, p. 5f). See also plaintiff's proposed finding 13 (A) together with record references.

A fair comparison would be one showing the relation between the prices paid in August and September in the years 1936, 1937, and 1938. Such a comparison follows:

	1936		1937		1938	
	Sheffield	League	Sheffield	League	Sheffield	League
August	$2.10	$2.02	$1.905	$1.76	.....	1.3
September	1.96	1.95	2.20	1.90	.....	1.8

[Ex. A–3–13, pp. 3f, 3a and 4; Ex. A–24 (Dairymen's League News dated September 20, 1938); and Defendants' Ex. 11.]

The record does not disclose the prices paid by Sheffield in August and September 1938. The production of milk in September 1938 was abnormally high for that time of year (R. 846). Despite this fact, the Dairymen's League increased its net pool return to producers 56¢ over the month of August, as compared with an increase of 14¢ in 1937 and a decrease of 7¢ in 1936. The above facts demonstrate that the statement in the last paragraph of this finding is not supported by the evidence.

344 Finding No. 100–a: This finding is unsupported by the evidence. See comment with reference to finding No. 88.

Findings Nos. 101–102: These findings are supported by the evidence. They are, however, statements of isolated facts which are unexplained in the evidence. The reasons for these actions do not appear and no inference relevant to the issues can be drawn therefrom.

Finding No. 103: The evidence is not sufficient to support any comparison between the operations of the Dairymen's League prior to and since September 1, 1938. The references cited by defendants' counsel relate to the operations of the Dairymen's League prior to May 1, 1938.

Finding No. 104: There is no objection to this finding if corrected to read "The intervening plaintiff, Dairymen's League."

CONCLUSIONS OF FACT

Conclusion No. 1: There is no evidence that Chapter 383 of the Laws of 1937 of the State of New York was prepared by the Dairymen's League, nor that the Dairymen's League was instrumental in procuring the enactment of the said statute. This so-called conclusion

Conclusion No. 2: This conclusion is covered by previous findings.

Conclusions Nos. 3–8: These conclusions are repetitious and
345 are not supported by the evidence. See comments with reference to previous findings dealing with the same subjects.

Conclusion No. 9: This conclusion is simply an inaccurate description of certain provisions of Order No. 27.

Conclusions Nos. 10, 11, and 12: These conclusions are argumentative and are not supported by the evidence. The defendants are required to account for the milk utilized by them at the class prices. The payments referred to are made out of money due producers and in no way affect the prices which defendants are required to pay for their milk. The statement that the defendant Jetter operates its stations in the same manner as the Dairymen's League has no support in the evidence.

Conclusions Nos. 13 and 14: These conclusions are not statements of fact but only argument.

Conclusions Nos. 15 and 16: These conclusions are repetitious and are entirely unsupported by the evidence. See comments with reference to previous findings dealing with the same subjects.

CONCLUSIONS OF LAW

None of the conclusions of law correctly state the law applicable to this case.

Respectfully submitted.

JOHN S. L. YOST,
John S. L. Yost,
CHARLES J. McCARTHY,
Charles J. McCarthy,
Special Assistants to the Attorney General.

RALPH L. EMMONS,
United States Attorney.
HAROLD L. SCHILZ,
Special Assistant to the Attorney General.
E. O. MATHER,
Senior Attorney, Department of Agriculture.

346 *Memorandum of Testimony, Exhibits, Concessions, Etc. Supporting Defendant's Proposed Findings*

1st Finding. Paragraph 1 and 20 of stipulation; also exhibit 18 (list of plants).

2nd Finding. Paragraphs 2 and 66 of stipulation.

3rd Finding. Paragraph 3 of stipulation.

4th Finding. Paragraphs 4 and 45 of stipulation; also pages 366 and 2207 of testimony.

5th Finding. Paragraph 55 of stipulation; also Exhibits 4 and 59; pages 367, 368, 399, 400, 413, 423, 424, and 1896 of testimony.

7th Finding. See intervening plaintiff's complaint.
8th Finding. Paragraph 5 of stipulation.
9th Finding. Paragraph 6 of stipulation.
10th Finding. Paragraph 7 of stipulation.
11th Finding. Paragraph 8 of stipulation.
12th Finding. Paragraph 9 of stipulation.
13th Finding. Paragraph 11 of stipulation.
14th Finding. Paragraph 12 of stipulation.
15th Finding. Paragraph 15 of stipulation.
16th Finding. Paragraphs 28 and 29 of stipulation.
17th Finding. Paragraph 30 of stipulation.
18th Finding. Interpretation of the Order.
19th Finding. Paragraph 39 of stipulation.
20th Finding. Paragraph 40 of stipulation.
21st Finding. Derived from provisions of the Order.
22nd Finding. Derived from provisions of the Order.
23rd Finding. Derived from provisions of the Order.
24th Finding. Derived from provisions of the Order; testimony of E. M. Harmon, page 1050.
25th Finding. Derived from provisions of the Order.
26th Finding. See Order and statute. Exhibit 26 to stipulation.
27th Finding. Title 7, Sec. 608c (5) (F).
28th Finding. Paragraph 41 of stipulation.
29th Finding. Paragraph 42 of stipulation.
30th Finding. Paragraph 44 of stipulation.
31st Finding. Paragraph 45 of stipulation.
32nd Finding. Paragraph 46 of stipulation.
33rd Finding. Paragraph 47 of stipulation.
34th Finding. Paragraph 51 of stipulation.
35th Finding. Paragraph 52 of stipulation.
36th Finding. Paragraph 53 of stipulation; also Exhibit 37.
347 37th Finding. Exhibits 11, 12, and 54.
38th Finding. Exhibits 39, 40, 41, 62, 63, and Order No. 27.
39th Finding. Exhibits 38 and 39 is uniform price established by Administrator; prices paid by Dairymen's League are contained in their statements given to their producers, Exhibits 11, 12, and 54 and also in Exhibit 82 which shows the return paid at Solsville, N. Y., to be identical with base prices stated in Exhibits 11, 12, and 54. The extra 6¢ per cwt. claimed by the League was received in extra differentials.

40th Finding. The computations are based on information contained in Exhibits 11, 12, and 54, 62, 63, and 81. Concession that Dairymen's League was engaged only in dealer-to-store and dealer-to-institution trade is found at pages 2218–2219.

41st Finding. Calculations are based on information contained in Exhibits 11, 12, 54, 37, 46, and 77.

42nd Finding. Exhibits 11, 12, 37, and 46, and concessions as to amount of milk sold by it in its wholesale business.

43rd Finding. Exhibit 46. Order No. 27, Article VII, Sec. 6. so Exhibits 11, 12, 58, and concession as to volume of milk used own business; testimony pages 2318 and 1920.
44th Finding. Exhibits 11, 12, 37, 54, and 82.
45th Finding. Based on Exhibits referred to in Findings 40 to inclusive, and calculations thereon.
46th Finding. Exhibits 43, 51, 77. Exhibits 25, 25–A to stipula-n.
47th Finding. See entire record.
48th Finding. Order No. 27, Article IV, Section 1.
49th Finding. Exhibits 78, 79. Order No. 27 and calculations ed thereon.
50th Finding. Calculations based on Exhibits 78 and 79, Article I, Sec. 6, Subdivision of the Order; Exhibit 80; also copy of edule produced on the trial by the Government as part of Ex-it A–3, not marked, but submitted herewith.
51st Finding. Order No. 27, Article VI, Sec. 8.
52nd Finding. Order No. 27, Article VI, Sec. 8.
53rd Finding. Order No. 27; Exhibits 11, 12, and 54.
54th Finding. Concession of January 16th; testimony 2365, also hibits 72, 76, and 77.
55th Finding. Testimony Nelson. All pages 717–18–761; conces-n January 16th, page 2365; testimony Gaynor pages 1760–1762.
56th Finding. See Findings Nos. 49 and 50.
57th Finding. Testimony Samuel Miller, pages 881–82; Harmon, 2–43; Rubenfeld, 1208–09, 1221–1228; concession at pages 2340–8–2369–2371. See also reports of Rubenfeld's plants, Exhibits 19–inclusive, and Queensboro reports, Exhibits 71–71E, inclusive. also Exhibit 77.
58th Finding. Testimony of E. M. Harmon, page 1498; Samuel ler, pages 817, 819, 869; Rubenfeld, page 1366.
59th Finding. See Findings 63 to 66, inclusive.
60th Finding. Evidence of witness Mills, pages 636–637–637–638–639–641–642.
61st Finding. Testimony Witness Barber pages 568–69; wit-ness Bullock as to skim milk pages 1579–81–85.
62nd Finding. Exhibit 4 to stipulation; paragraphs 78 and 79 of ulation.
63rd Finding. Witness Miller pages 874–75–76; witness Rubenfeld, es 1451–53; plaintiff's Exhibit B.
64th Finding. Testimony of Rootstein, pages 2216–2219–2238.
65th Finding. Affidavit of George Fitts; pages 2345–46–48; wit-es Harmon, Lavender, pages 520–522–530; witness Rose Paley, es 494, 95–98–99; witness Hock pages 622–23; witness Miller 874–76; Defendants' Exhibit 6, receipt form of Sheffield Farms Com-y for rebate money.
66th Finding. Witness Miller, pages 875–76–78; Eisenberg, 167–171.

67th Finding. Order No. 27, Article VI, Section 3; see testim
537, 598, 604, and 629.

68th Finding. Evidence of witnesses Lavender, Paley, Hock, M
ler,, Rubenfeld, Rootstein and affidavit of George Fitts quoted ab

69th Finding. Testimony of Witness Rootstein, pages 2208, 22
62-69-70-71, 2284-85.

70th Finding. See Terms of Order.

71st Finding. Concession page 1887; photostatic copy Defend
Exhibit 4 in evidence; testimony Treat pages 1643-44-46, privi
was claimed on the ground that Mr. Miller was attorney for
Bargaining Agency, page 383.

72nd Finding. Witness Wilson, page 367; witness Richmond, pa
413-23-25; Exhibit 59 containing annual report of treasurer of B
gaining Agency and which shows substantial sums of money
vanced for filing fees of cooperatives.

73rd Finding. Minutes of Bargaining Agency meeting July 20
1937, read in evidence page 1890; concessions by Dairymen's Lea
pages 1887-88; Testimony witness Harmon, page 1022; see
Marketing News, Exhibit 23 in evidence.

74th Finding. Paragraph 56th and Exhibit 21 to stipulation.

75th Finding. Exhibits 6, 7, 8, 9, 10 to stipulation.

76th Finding. Notice of hearing, Exhibit 21 to stipulation; bo
let of Bargaining Agency, Exhibit 22 to stipulation; see Market N
and Dairymen's League News, Exhibits 23 and 24 to stipulation.
also defendants' Exhibit 66 issued by Bargaining Agency, Exhib
67, 67-A, 67-B, 67-C, 67-E. Radio speeches constituting part
Exhibit 23 to stipulation. See also Department of Agriculture bo
let and other data included in Exhibits 6 to 10 to stipulation.

77th Finding. See Finding No. 53.

78th Finding. See Findings Nos. 58 and 59.

79th Finding. See preceding Findings.

80th Finding. Paragraph 14, stipulated facts.

81st Finding. See preceding Findings.

82nd Finding. Exhibits A-3 and Dairymen's League News co
tained in Exhibit 24 to stipulation; concession 1887-1888.

83rd Finding. See Exhibit 59 (Treasurer's report contained
report of annual meeting Bargaining Agency).

349 84th Finding. See Exhibit 59.

85th Finding. Concession by Dairymen's League as to nu
ber of votes, page 361.

86th Finding. Conclusion based on figures contained in Findin
Nos. 29, 30, 35, 36, 80 and concession by Dairymen's League as
number of votes cast.

87th Finding. See preceding Findings.

88th Finding. See testimony witness Faulkner, pages 431-33-3
Eisenberg, pages 121-22-154-176; Dake, pages 2017-18-19-20
Walter Kohn, pages 1130-1131-1136; witness Dumont, pages 23
2330-2331-2332-2333-2335-2336-2338; see also Dairymen's Lea
News September 20th, Exhibit 24-F to stipulation.

th Finding. See letters and statements of Baldwin and Treat, ibits 23–AA to 23–II to stipulation; also Market News, part of ibit 23 to stipulation.
th Finding. See testimony of witnesses Faulkner, Eisenberg, e, and Dumont cited under Finding No. 88.
st Finding. See Dairymen's League News, Exhibit 24 to stip- ion; Market News, Ex. 23 to stipulation; testimony of witnesses nberg, Dake, and Dumont.
nd Finding. Exhibits 23–AA, et seq.
rd Finding. See Market News attached to Exhibit 23–H.
th Finding. Dairymen's League News, Sept. C. part of Exhibit Market News, part of Exhibit 23.
th Finding. Dairymen's League News, September 20th.
th Finding. Dairymen's League News, September 27th.
th Finding. Dairymen's League News, October 11th.
th Finding. Market News, October.
th Finding. Statement in Exhibit A–3 that Washbon is sub- ict president of District 11 of Dairymen's League; testimony of esses Wilson, pages 392–94–95; Richmond, pages 427–28–29; ymen's League News, October 11th, 1938; concession page 446.
th Finding. Market News, December 1938, Exhibit 23–I to l- tion; statistic book of Dairymen's League part of Exhibit showing prices paid. Copy of book is submitted herewith.
st Finding. Concession by Dairymen's League, pages 1571–74.
nd Finding. Witness Harmon, page 1035 and defendants' Ex- 53.
rd Finding. See Exhibits 11, 12, and 54 and Exhibit A–3; tes- y of Mr. Coulter at Albany, May 16, 1938; see also "Dairy Sec- Economic Statement" which contains data as to manner of op- n by Dairymen's League prior to Federal Order.
th Finding. Concessions, page 2365–66.

In United States District Court for the Northern District of New York

Civil Action No. 32. Consolidated Cause

D STATES OF AMERICA, PLAINTIFF, HOLTON V. NOYES, AS COMMIS- ER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK ERVENING PLAINTIFF

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL., DEFENDANTS

rative statement of evidence introduced at the trial of the above-styled cause

plaintiff offered for identification a Stipulation of Facts and nce signed by counsel for the plaintiff, the intervening plain- Holton V. Noyes as Commissioner of Agriculture and Markets

of the State of New York, and each of the defendants; the intervening plaintiffs, Dairymen's League and Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., having been permitted to intervene subject to the stipulation; and the aforesaid stipulation was marked Exhibit A for identification. This stipulation reads as follows:

[Title omitted.]

Stipulation of facts and evidence

AGREED FACTS

It is hereby stipulated by and between the parties to the above entitled cause, by their attorneys of record, that upon the trial
351 of this cause for final decree the facts hereinafter stated may be taken by the Court as true. The exhibits hereinafter referred to are attached hereto and are hereby made a part hereof.

1. The defendant Rock Royal Co-operative, Inc., is a co-operative corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at Rock Royal, in the County of Delaware, State of New York.

2. The defendant Central New York Co-operative Association, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office and place of business in the City of Cortland, County of Cortland, State of New York.

3. The defendant Schuyler Junction New York Milk Shed Co-operative, Inc., is a cooperative corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office and place of business at Schuyler Junction, County of Herkimer, State of New York.

4. The defendant Jetter Dairy Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office and place of business at Oriskany Falls, Oneida County, State of New York.

5. Pursuant to the provisions of Section 8b and 8c of the Agricultural Marketing Agreement Act of 1937 (Public No. 137, 75th Congress; 50 Stat. 246; 7 U. S. C. 601 et seq.) (hereinafter referred to as the "Act"), the Secretary of Agriculture of the United States (hereinafter referred to as the "Secretary"), on April 29, 1938, gave notice of public hearings on a proposed marketing agreement and a proposed order regulating the handling of milk in the area which includes the territory within the boundary lines of the City
of New York and the Counties of Nassau, Suffolk, and West-
352 chester, all in the State of New York, the said area being hereinafter referred to as the "Marketing Area." On April 29, 1938, the Commissioner of Agriculture and Markets of the State of New York pursuant to the provisions of Chapter 383 of the Laws

f 1937 of New York gave notice of public hearings to be held at the me times and places on an order substantially identical with the foresaid order.

6. Pursuant to the terms of the said notices, and upon the request f the Commissioner of Agriculture and Markets of the State of ew York, pursuant to Section 10 (i) of the Act, and Chapter 383 f the laws of 1937 of New York, joint public hearings were conucted by Glen J. Gifford, an employee of the Department of Agriulture, who was designated by the Secretary to conduct such hearngs, and also designated by the Commissioner of Agriculture and Markets of the State of New York to conduct such hearings on behalf f the State. In accordance with the terms of said notice, the aforeaid public hearings were conducted at Albany, New York, on May 16, 938; at Malone, New York, on May 17, 1938; at Syracuse, New York, n May 18, 1938; at Elmira, New York, on May 19, 1938; and at New ork, New York, on May 20, 1938. The hearings were then reessed until May 24, 1938 and were continued at New York, New ork, on May 24, 25, and 26, 1938, and at Albany, New York, on June 3, 4, 5, and 7, 1938. At the times and places aforesaid all interested arties were afforded an opportunity to be heard concerning the rovisions of the proposed marketing agreement and the proposed rder. The said hearings were attended by producers, representatives of producers, handlers, and consumers of milk sold in the marketing area. All of the defendants knew of said hearings but none f the defendants appeared or was represented at any hearing.

7. On the 5th day of August 1938, the Secretary, pursuant to the provisions of Section 8c of the Act, made a finding and 333 proclaimed that, as to the milk produced for sale in the marketing area, the purchasing power of such milk during the ase period, August 1909 to July 1914, could not be satisfactorily determined from available statistics of the Department of Agriculture, but that the purchasing power of such milk could be satisfactorily determined from available statistics of the Department of Agriculture for that portion of the post-war period between August 1927 and July 1929, inclusive.

8. Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of, or in opposition to, the findings and provisions, or any of them, of the proposed order (which notice was published in the Federal Register on July 23, 1938), the Secretary, on August 5, 1938, issued Order No. 27, regulating the handling of milk in the marketing area in the manner provided in the Act, said order containing the terms and conditions held by the Secretary to be authorized by the applicable provisions of the Act, and no others, and regulating the handling of milk in the same manner as, and made applicable only to persons in the respective classes of industrial or commercial activity specified in the marketing agreement upon which hearings were held as aforesaid. Said Order also contains the findings by the Secretary, required by the applicable provisions of the

Act, to be made by him. A copy of the Federal Register of Aug. 9, 1938, containing a true, correct, and complete copy of said Order No. 27 is attached hereto as Exhibit I to this stipulation.

9. Upon the evidence introduced at the said hearings and after giving opportunity to interested parties to file written arguments in support of or in opposition to the findings and provisions, or any of them, of the proposed order, the Commissioner of Agriculture and Markets, on August 5, 1938, made the findings required by Chapter 383 of the Laws of 1937 of New York, and issued proposed
354 Official Order No. 126 which order is substantially identical with Order No. 27 and contains the terms and conditions held by the Commissioner to be authorized by the applicable provisions of Chapter 383 of the Laws of 1937 of New York and no others. A true, correct, and complete copy of Official Order No. 126 is hereto attached as Exhibit 2 to this stipulation.

10. A true, correct, and complete stenographic transcript of the evidence introduced at said hearing with exhibits attached thereto is hereto attached as Exhibit 3 to this stipulation. Included in this transcript are the briefs and arguments submitted to the Secretary and to the Commissioner of the evidence introduced at the said hearing. The briefs filed in support of and in opposition to the findings and provisions of the proposed order pursuant to the notice published in the Federal Register on July 23, 1938, as aforesaid, are not included in this transcript. A true, correct, and complete list of such briefs is attached hereto as Exhibit 4 to this stipulation.

11. On the 5th day of August 1938, the Secretary tentatively approved a marketing agreement regulating the handling of milk in the marketing area, and on or about August 6, 1938, delivered copies thereof to all handlers who would be subject to the provisions of the order, but prior to the issuance of said order, handlers of more than 50 per cent of the volume of milk covered by said order which was marketed within the marketing area failed or refused to sign said marketing agreement. A true, correct and complete copy of said marketing agreement is attached hereto as Exhibit 5 to this stipulation. Subsequent to the issuance of Order No. 27 a marketing agreement was signed by handlers of more than 50 per cent of the volume of milk covered by Order No. 27. A true, correct, and complete copy of the marketing agreement signed by said handlers with a list of the signatories thereto is attached thereto as Exhibit 6 to this stipulation.

355 12. Under authority of the provisions of Section 8c (19) of the Act, the Secretary conducted a referendum of producers in order to assist him in determining whether the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938 (said month having, on the 25th day of July 1938, been determined by the Secretary to be a representative period), were engaged in the production of milk for sale in the marketing area. The referendum was held at the times and places set forth in a schedule of polling places issued by the Department

of Agriculture prior to said referendum, a true, correct, and complete copy of which is hereto attached as Exhibit 7 to this stipulation.

13. Prior to the referendum there were sent to each producer as to whom available information indicated that he might be eligible to vote in said referendum (a) a copy of the order as issued August 5, 1938 by the Secretary; (b) a schedule of polling places (Exhibit 7 to this stipulation); (c) a pamphlet prepared by the United States Department of Agriculture, entitled, "Questions and Answers on the Federal-State Milk Program for New York" (a copy of which pamphlet is attached hereto as Exhibit 8 to this stipulation); and (d) a pamphlet prepared by the United States Department of Agriculture, entitled, "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27" (a copy of which pamphlet is attached hereto as Exhibit 9 to this stipulation). Approximately 70,000 copies of the said order, the said schedule of polling places, and the said pamphlets were sent through Federal-State Agencies to such producers. A copy of letter accompanying such material sent to producers in New York State is attached hereto as Exhibit 10.

14. The results of the aforesaid referendum were as follows: 45,644 votes cast of which 7,017 were rejected as invalid. Of the 38,627 votes counted as valid, 33,663 votes, or 87.1 per cent were in favor of the issuance of the order, and 4,964 votes, or 12.9 per cent were opposed thereto. Of the 7,017 votes which were rejected, 6,547 votes were rejected either because the voters were members of cooperative associations which had cast ballots for all of their members or because the voters were not qualified to vote, not having delivered milk to an approved plan during the month of May 1938. Of the votes rejected for this reason, 5,110 votes were in favor of the issuance of the order, and 1,437 votes were opposed thereto. 470 votes were rejected because the voter had failed to mark his ballot either for or against the order or because it was not possible to determine whether the ballot was marked for or against the order.

15. After conducting said referendum and after the refusal or failure of handlers of more than 50 per cent of the volume of milk covered by said order which was marketed within the marketing area to sign the tentatively approved marketing agreement relating to milk, the Secretary on the 24th day of August, 1938, made a determination which determination was approved by the President:

(a) That the refusal or failure of said handlers to sign such marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(b) That the issuance of the order is the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and

(c) That the issuance of the order was approved or favored by at least two-thirds of the producers who, during the month of May

1938 were engaged in the production of milk for sale in the marketing area, and who voted in the above-mentioned referendum.

Said findings and determination were published by the Secretary in the Federal Register on August 27, 1938, a copy of which is attached as Exhibit 11 to this stipulation.

16. The following paragraphs numbered 17 to 25 inclusive are adopted from an affidavit of E. W. Gaumnitz, chief of the
357 Dairy Section of the Agricultural Adjustment Administration, United States Department of Agriculture. The statements of specific facts therein are to be taken by the Court as true; the reasons assigned by said E. W. Gaumnitz are to be taken by the Court as the basis of his and/or the Secretary's acts to which they pertain.

17. On July 25, 1938, Wellington J. Griffith, Assistant Marketing Specialist, Dairy Section, Agricultural Adjustment Administration, was designated by Acting Secretary of Agriculture M. L. Wilson as agent of the Secretary of Agriculture to conduct a referendum among producers, who during the month of May 1938, said month being determined by the Acting Secretary of Agriculture to be a representative period, were engaged in the production of milk for sale in the New York Metropolitan Milk Marketing Area, to aid the Secretary of Agriculture in determining whether such producers favored or approved the issuance of an order regulating the handling of milk in said area. This designation was amended on August 15, 1938. Copies of the order, designating Mr. Griffith as referendum agent, and the amendment thereto are attached hereto as Exhibits 12 and 13 to this stipulation.

18. Prior to this time, exhaustive and painstaking efforts were made to secure a complete and accurate list of all cooperative associations who might be qualified to vote in the referendum. Such efforts included consultations with county agents, extension workers from various universities in the Northeastern States, and officials of local departments of health throughout the area, examination of the corporation records in the office of the Secretary of State of the State of New York, conferences with leaders of producer groups and of handlers organizations, with officials of the New York State Department of Agriculture and Markets and with other informed sources. After weeks of work, a list of 193 cooperative associations was secured which was, as far as could be ascertained, a complete list of
358 cooperative associations whose producers delivered milk to plants approved by health authorities in the New York Metropolitan Milk Marketing Area.

19. On July 8, 1938, a letter was sent to the last known address of each of said cooperative associations over the signature of said E. W. Gaumnitz and that of Mr. Kenneth F. Dee, Director, Division of Milk Control, Department of Agriculture and Markets, State of New York. This letter advised the cooperative associations of the steps which must be taken by them in order that they might be determined to be qualified to express the approval or disapproval of

producers belonging to such associations. A copy of this letter is attached hereto as "Exhibit 14" to this stipulation.

20. Copies of the letter mentioned above were sent to the Central New York Cooperative Associations, Inc., at Cortland, New York, and to the Schuyler Junction New York Milk Shed Cooperative, Inc., at Schuyler Junction, New York. These letters were never returned as unclaimed, but no reply was received from either of these associations. The defendant Rock Royal Cooperatives Association, Inc., did not start receiving milk from producers until August 6, 1938, and its name did not appear on any list as having been a cooperative association receiving milk from producers during the month of May 1938.

21. Replies were received from 54 cooperatives to whom the letters mentioned above were sent and 17 letters were returned unclaimed. Of the 54 cooperatives replying, 13 indicated that they did not desire to vote for their producers, 8 stated that they were not eligible to vote, 11 were not qualified, primarily because the information submitted was insufficient on which to make a determination, and 22 were determined to be qualified to vote for their members.

22. Attached hereto and marked Exhibit 15 to this stipulation is a list showing the 22 cooperatives determined to be eligible to
359 vote for their producers; the 17 cooperatives as to which letters were returned unclaimed; the 13 cooperatives, which indicated they did not desire to vote for their producers; the 8 cooperatives who declared they were not eligible to vote; and the 11 cooperatives determined not to be qualified to vote.

23. On August 15, 1938, M. L. Wilson, Acting Secretary of Agriculture, sent a memorandum to said Griffith, Referendum Agent, to which was attached a list of the 22 cooperatives qualified to vote for their members. This memorandum directed the said Griffith to notify these cooperatives of such determination by registered mail and to prepare voting lists of all producers eligible to vote in the referendum who were members of, stockholders in, or under contract with such associations. In addition, said Griffith was specifically instructed to emphasize to each qualified association the importance of taking special and practical steps to convass the true sentiment of its producers before exercising the privilege of representing them as accorded by law.

360 24. Pursuant to such instructions, said Griffith directed auditors to check the membership and contract lists of the 22 cooperatives approved by the Acting Secretary of Agriculture in order to determine the correct number of producers who were members of, stockholders in, or under contract with such associations during the month of May, 1938. In addition, each of such cooperative associations was given a ballot. A copy of such ballot is attached hereto as "Exhibit 16" to this stipulations.

25. By reason of the fact that a special ballot was provided for cooperatives, the polling officers at the various polling places were

instructed to accept only ballots cast by individual producers and not to accept ballots cast on behalf of cooperative associations.

26. The defendant Rock Royal Cooperative, Inc. made no application to the United States Department of Agriculture or to the Department of Agriculture and Markets for qualification to vote as a cooperative, nor did it apply to the aforesaid Griffith for a cooperative ballot, and when its representative appeared at a polling place established for producers and sought to vote on behalf of said defendant as a cooperative association, for all of its members, said representative was informed that such a ballot could not be accepted at said polling place.

27. The defendant Schuyler Junction New York Milk Shed Cooperative, Inc. made no application to the United States Department of Agriculture or to the Department of Agriculture and Markets of the State of New York for its members as a cooperative association and did not apply to the aforesaid Griffith for a cooperative ballot. The president of the said defendant, David Doolen, appeared at a voting place established for producers, to wit at Ferguson Coal
361 Office, at Schuyler Junction, New York, on August 19, 1938, between 7:00 A. M. and 8:00 P. M. of said day, said time and place being the designated time and polling place stated in Exhibit 7 to this stipulation, and there attempted to cast the votes of the members of the said defendant. Said Doolen was told by the person in charge of the voting that he could not cast such votes on behalf of said corporation. When said Doolen insisted, he was allowed to make out a ballot, but was told that the votes would not be counted.

28. The Commissioner of Agriculture and Markets of the State of New York, pursuant to the provisions of Chap. 383 of the Laws of 1937 of New York, conducted a poll to assist him in determining whether the issuance of Official Order No. 126 was favored by at least 75 percent of the producers of milk produced in the production area. Laurence L. Clough was designated by the Commissioner to conduct said poll. This poll was conducted at the same times and places as the referendum conducted by the Secretary of Agriculture. All producers located within the State of New York who had delivered milk to approved plants at any time after January 1, 1936, were permitted to vote in said poll and cooperative associations of producers were permitted to vote for their members in the same manner in which they voted in the referendum on Order No. 27. The results of such poll were as follows: 29,883 votes counted as valid were cast, of which 25,935 votes or 86.8 percent were in favor of the issuance of the order and 3,948 votes or 13.2 percent were opposed thereto. Attached hereto and marked Exhibit 17 to this stipulation is a list showing the cooperatives which were qualified by the Commissioner to vote in said poll, and a list of the cooperatives which were determined not to be qualified.

29. On August 25, 1938, the Commissioner of Agriculture and Markets, pursuant to the provisions of Chapter 383 of the Laws of

1937 of New York found, on the basis of such poll, that the issuance of Official Order No. 126 was favored by at least 75 per cent. of the producers of milk produced in the production area for the marketing area and declared Official Order No. 126 to be effective on September 1, 1938. Said order has not been terminated.

30. On August 26, 1938, the Secretary issued an order which was published in the Federal Register on August 27, 1938, said order providing that Order No. 27 should become effective on September 1, 1938. Order No. 27 has not been terminated.

31. The following paragraphs number 32 to 38, inclusive, are adapted from the affidavit of E. W. Gaumnitz, Chief of the Dairy Section of the Agricultural Adjustment Administration, United States Department of Agriculture. The statements of specific facts therein are to be taken by the Court as true; the reasons assigned by said E. W. Gaumnitz are to be taken by the Court as the basis of his and/or the Secretary's acts to which they pertain, and the conclusions are those of E. W. Gaumnitz, whose qualifications are as follows: He is a graduate of the University of Minnesota, B. S. 1921. He also holds the degrees of Master of Arts and Doctor of Philosophy from the same institution. Since 1921 he has occupied the following positions: 1921 to 1925, Instructor and Assistant Professor of Agricultural Economics, University of Minnesota; 1925 to 1928, Agricultural Economist, Dairy Production, Iowa State College; 1928 to 1930, Agricultural Economist, California State Department of Agriculture; 1930 to 1933, Agricultural Economist, Market Research and Dairy Products, Bureau of Agricultural Economics of the United States Department of Agriculture; 1933 to July 1, 1935, Economic Advisor to the Dairy Section of the Agricultural Adjustment Administration; July 1, 1935 to date, Chief of the Dairy Section of the Agricultural Adjustment Administration. He is the author of numerous articles, bulletins, and studies pertaining to the marketing of milk and dairy products.

32. Article VII of Order No. 27 provides that on or before the 15th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to butterfat, transportation, and location differentials. There is no similar provision with reference to payments by cooperatives.

33. In formulating Order No. 27, serious consideration was given to the advisability of including a provision requiring cooperative associations of producers to pay the uniform price, but such a provision was not included because the Secretary and Chief of the Dairy Section were advised by counsel that such provision could not be legally inserted because of the provisions of Section 8C (5) (F) of the Act which provides that "Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the act of Congress of February 18, 1922, as amended, known as the 'Capper-

Volstead Act,' engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets, in all use classifications and making distribution thereof to its producers in accordance with the contract between the association and its producers. Provided, that it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk."

34. Moreover, it was felt that such a provision was not necessary to place the cooperative on an equal footing with other handlers, and that such a provision might result in substantial prejudice to the interest of cooperatives and place them at such a disadvantage that they could not compete with other handlers.

35. A cooperative association of producers is a handler in competition with other handlers to the extent that it operates a country receiving plant or engages in the wholesaling of milk. However,
the primary interest of the cooperative is in securing for its
364 members the highest possible return from the sale of their
milk. In formulating Order No. 27, it was recognized that a cooperative association which engages in the handling of milk must be treated as a handler and required to participate in the market wide pool, as otherwise the pool would not represent the market wide utilization of milk and a cooperative whose market was largely a fluid milk market would not be bearing its fair proportionate share of the burden of surplus milk and would receive an unconscionable advantage over other handlers. It was also recognized, however, that it would not be feasible to require a cooperative to return to its producers the exact uniform price each month because of the nature of the cooperative association and its relationship to its producer members.

36. A cooperative association of producers is under constant pressure from its producer members to secure the highest possible return for the milk which it handles and is also required to find some means of utilization for all the milk produced by its members. In the absence of a market-wide pool, a cooperative association would be under the same economic compulsion as other handlers to compete for the fluid milk market and might be under constant temptation to cut prices in order to secure a larger proportionate share of the market. With a market-wide pool in operation, the same compulsion does not exist and the interests of the producer members of cooperatives can be better served by disposing of the surplus milk in the form of manufactured products than in selling fluid milk at a price which will not reimburse the cooperative association for the expenses which it has incurred in handling such milk. If a cooperative association sells milk for fluid purposes at a price which will not compensate it for the handling, it is unable to return to its producers
the uniform price. Instead of selling its milk at such a price
365 the cooperative can cause this milk to be made into manufac-

sold at a price which will compensate the cooperative for the cost of handling, the cooperative can return to its producer members the full uniform price. The cooperative is therefore relieved of the incentive which formerly compelled it to meet the competition of the proprietary handlers in the fluid milk market.

37. Cooperative associations may have as producer members anywhere from a few to several thousand farmers. These farmers are loosely held together by reason of membership in the cooperative, but if the cooperative returns to them month after month a price substantially lower than the uniform price, these members will cease to do business with the cooperatives. The possibility that cooperative associations might be able to undersell other handlers by paying their producers less than the uniform price was carefully considered during the time that Order No. 27 was in process of formulation, but it was realized by all concerned that the interest of the producers in securing the highest possible return for their milk would make such a result not only improbable but impossible. To assume that a cooperative association would set out deliberately to capture the fluid milk market by underselling proprietary handlers would require the assumption that the thousands of producers involved would deliberately make a sacrifice of thousands or hundreds of thousands of dollars per month in the hope of ultimately securing domination of the fluid milk market. Experience has shown that such a hope would be futile. Long experience in dealing with agricultural problems has also demonstrated that such a concerted long range program could never be successfully carried on by thousands of scattered farmers even when joined together through a cooperative association.

366 38. The cooperative association must dispose of all the milk of its producer members whereas a proprietary handler is subject to no such compulsion. A proprietary handler, by closing plants or selection of producers, can limit its purchases to its business needs but a cooperative association must find an outlet for all the milk of all its producers even though the finding of such an outlet may result in substantial extra expense. The expenses necessarily incurred in performing this service may cause its expenses for a period to exceed its income from its handling operations and if the cooperative were forced to return each month to its producers the uniform price without deducting such expenses, it might be forced either to go out of business or to cease performing these services. It has long been the policy both of Congress and of the State of New York to foster the development of cooperative associations. Since it is only through cooperation that the producers are enabled to meet handlers on anything approaching even terms, it was felt that any provision in the order which might make it impossible for cooperatives to exist would be an unwarranted discrimination against them.

39. The Metropolitan Marketing Area, as defined by Order No. 27 and Official Order No. 126, includes the City of Greater New

York, and territory adjacent thereto, wholly within the territorial boundaries of the State of New York.

40. Milk dealers, licensed as such, under the provisions of Sections 253 and 257 of the Agriculture and Markets Law, of the State of New York, alone, have the right to engage in the purchase and sale of milk in said Marketing Area, and the term "milk dealer" includes

367 "Any person who purchases or handles or sells milk, including * * * cooperative corporations and unincorporated cooperative associations."

A "dealer" who handles milk received at an approved plant is a handler within the meaning of Order No. 27 and Official Order No. 126. All of the defendants are handlers as defined in Order No. 27 and Official Order No. 126. (Central New York Co-operative Association, Inc., does not join in the last sentence of this paragraph.)

41. The principal health authority in the Metropolitan Milk Marketing Area, as described by Order No. 27 and Official Order No. 126 is the Department of Health of the City of New York, which inspects country receiving plants, farms, dairies, and other facilities of milk producers, as well as bottling and distributing facilities covering all milk sold within the City of New York. The inspected and approved country receiving plants, farms, dairies, and other facilities of milk producers above referred to, also supply a large part of the milk sold in the Counties of Westchester, Nassau, and Suffolk, but the exact proportion of said milk which is included under New York City inspection is not exactly known.

The producers entitled to vote or whose votes were entitled to be cast by cooperative associations in said referendum were those producers delivering milk in the month of May 1938 to plants approved by the New York City Department of Health and all those producers delivering during May 1938 to plants approved by any other health authority in the marketing area. Attached hereto, and marked Exhibit 18, is a list of milk receiving stations approved by the Department of Health of the City of New York, dated August 1, 1938, listing the stations in the production area, with location, ownership, and number of producers (dairies) delivering to each, as of said date.

368 Some of the milk-receiving stations in the production area which were approved by the Department of Health of the City of New York were also approved by the health authorities of the City of Newark, State of New Jersey, and by the State of New Jersey for delivery to Newark and other cities and communities in said State. Attached hereto and marked Exhibit 19 is a list of milk-receiving stations approved by the health authority of the City of Newark, New Jersey, dated April 1, 1938, giving the location and ownership as of said date. Exhibit 20, attached hereto, is a list of milk-receiving stations approved by the health authority of the State of New Jersey dated July 30, 1938, giving the location and ownership as of said date.

42. The official records of the Department of Health of the City of

New York, as of August 1938 disclosed that there were 54,111 milk producers whose dairies had been inspected and approved for the production of Grade B milk for shipment to and sale in the City of New York; 6,109 milk producers whose dairies had been approved for the production of Grade A milk for shipment to, and sale in the City of New York, making in all 60,220 milk producers. Said producers were located in the States of New York, Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania, and Vermont, hereinafter referred to as the "New York Milk Shed." Included therein are the producers delivering to defendants' plants. The minimum production of milk delivered to the defendant Jetter's plants is upwards of 40,000 quarts of milk daily.

43. Approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York. Approximately one-third of the milk produced in the State of New York for sale in the marketing area passes
369 through other States on its way to be sold in the marketing area; a large part of the milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside of the State of New York for sale in the marketing area of which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing area. Unless all milk which is produced for sale in the marketing area is subject to the same regulation the result will be discrimination against the milk which is regulated.

44. Approximately 420 country receiving plants have been approved for the receiving and shipping of Grade B milk, and approximately 86 milk-receiving plants have been approved for receiving and shipping Grade A milk, making a total of approximately 506 milk-receiving stations in all in said New York Milk Shed. Included therein are defendants' receiving stations.

45. At all the times hereinafter mentioned, defendant Jetter Dairy Company, hereinafter referred to as "Jetter," was a competitor of, and has sold milk in its business, in competition with dealers operating the country milk-receiving stations in the New York Milk Shed above referred to, and who shipped milk received at said stations to the Metropolitan Area and sold the same in competition with milk sold by said defendant. The defendants Rock Royal Cooperative, and Schuyler Junction Cooperative, at all the times herein mentioned, have been and now are, selling milk to independent dealers for re-sale in competition with milk received at the country receiving plants described in the next preceding paragraph.

370 46. Defendants' principal competitors are as follows:

a. The Borden Company and various corporations subsidiary thereto, hereinafter referred to as "Bordens."

b. Various subsidiaries of National Dairy Products Corporation, hereinafter referred to as "National Dairy."

c. Dairymen's League Cooperative Association, Inc., hereinafter referred to as "Dairymen's League."

d. Other dealers, known in the industry as "independent dealers." Defendant Jetter is an independent dealer.

The defendant Jetter, the dealers purchasing the milk supply of the defendants Rock Royal and Schuyler Junction, and said competitors above enumerated, insofar as they are engaged in the sale of milk for fluid consumption in the City of New York are all "milk dealers" as defined by Section 253 of the New York Agriculture and Markets Law, and are all "handlers" as defined by Article I, Subdivision 6 of Order No. 27 and Official Order No. 126.

47. Defendant Jetter, customers of defendants Rock Royal and Schuyler Junction and their competitors are also known in the industry as distributors. The Dairymen's League occupies a dual capacity as a cooperative agent of producers and as a distributor. The Dairymen's League as a distributor sells milk in competition with the defendant Jetter and other distributors including distributors purchasing their supplies from it, and is a factor in the price which defendant Jetter and their competing dealers can demand and procure for fluid milk.

48. The average quantities of fluid milk sold in the marketing area handled daily by Dairymen's League, including milk distributed by Dairymen's League and milk sold by Dairymen's League to distributors, during the months of September, October, and
371 November 1938, was approximately 26,000 40-quart cans daily or about 34% of the fluid milk sold in the marketing area.

49. The records of the Department of Health of the City of New York show that as of August 1938, the Sheffield Farms Company, Inc., and Sheffield Condensed Milk Company, operated and now operate, 87 approved milk receiving stations in said New York Milk Shed, receiving milk from 10,334 producers. The greater part of said producers deliver milk to Sheffield Farms Company, Inc., and are organized in a membership cooperative corporation, known as Sheffield Producers' Cooperative Association, Inc., hereinafter referred to as "Sheffield Cooperative."

50. Sheffield Farms Company, Inc., and some National Dairy subsidiaries, also purchase supplies of milk from other cooperative associations operating approved milk receiving stations in the said New York Milk Shed.

51. Dairymen's League was in August 1938, operating 109 approved receiving plants in the New York Milk Shed, receiving milk from 11,391 producers.

52. The records of the Department of Health of the City of New York show that as of August 1938, Bordens operated 65 approved milk receiving stations, receiving milk from 8,404 producers. All of said producers were and are members of Dairymen's League; milk of said producers is delivered to Bordens and payment therefor is made by Bordens to said Dairymen's League, which in turn pays

and producers, and also pays producers delivering milk to its own plants.

53. The number of approved producers included in Dairymen's League membership was in August 1938 upwards of 19,500.

54. Subsidiaries of Borden purchase milk from producers who are not members of Dairymen's League at other approved milk receiving stations in the New York Milk Shed.

55. On June 7th, 1937, a Certificate of Incorporation of "Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.," 573 hereinafter referred to as "Bargaining Agency," was filed in the Office of the Secretary of State of the State of New York whereby there was created a membership corporation. Said Certificate provided in part:

"10. The membership of the corporation shall be limited to cooperative associations organized under or subject to the provisions of the Cooperative Corporations Law of the New York State, or of similar laws of any other State, and organized and controlled by milk producers."

Shortly thereafter the Dairymen's League and Sheffield Cooperative became members of said new corporation or Bargaining Agency. Other cooperatives, operating country receiving plants, were solicited to become members of the Bargaining Agency, and some did so. The officers, members, agents, and servants of the Bargaining Agency, assisted in the formation of cooperative corporations among the milk producers delivering milk to plants owned by independent dealers, including defendant Jetter.

56. The Bargaining Agency presented to the Secretary of Agriculture of the United States, and to the Commissioner of Agriculture of the State of New York, a proposed marketing agreement and Order, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and requested a hearing thereon under the authority of the Act, and under the provisions of Chapter 383 of the Laws of 1937 of the State of New York. A true, correct, and complete copy of such proposed marketing agreement and order, together with the notice of hearing thereon, is attached hereto as Exhibit 21 to this stipulation.

57. Prior to the joint hearings on the proposed Federal and State Orders referred to in Paragraph 5 hereof and on or about April 28, 1938, the Bagaining Agency issued a 24-page booklet, on the cover of which was contained the following statement: "Mr. Dairyman * * * Save this Booklet. The Plan It Explains May Save Your Farm." A true, correct, and complete copy of said booklet is attached hereto as Exhibit 22 to this stipulation.

58. Printed statements and radio broadcasts issued by the 573 Bargaining Agency and its officers are attached hereto and marked Exhibits 23A to J and 23AA to II inclusive: attached hereto and marked Exhibits 24 to 24H inclusive are the printed statements issued by the Dairymen's League through its

official newspaper the "Dairymen's League News"; Exhibits 25 a
25A contain the published statements by the Sheffield Producers
their official newspaper, the "Sheffield Producer." Exhibits 26
26S inclusive are official statements and official news releases a
other printed matter, relating to the Federal and State Orders, issu
by the Commissioner of Agriculture, Department of Agriculture a
Markets, the Cooperative Extension Department of Agriculture a
Home Economics of the State of New York. Exhibit 27 contai
printed statements published by the Dairy Farmers Union. E
hibit 28 contains handbills in opposition to Order No. 27 and Offi
Order No. 126 which were passed out to all persons attending t
hearings held on said Order and at meetings of producers he
elsewhere.

59. The evaporated milk plants named in Article 4, Section
paragraph 4 of the Orders, are owned as follows:

a. Mount Pleasant, Mich.; Greenville, Wisc.; Black Creek, Wis
Orfordville, Wisc.; and Belleville, Wisc.; by the Borden Compan

b. Sparta, Mich.; Chilton, Wisc.; Berlin, Wisc.; Richland Cent
Wisc.; Oconomowoc, Wisc.; and Jefferson, Wisc., by the Carnati
Company.

c. Hudson, Mich.; Wayland, Mich.; Cooperville, Mich.; Ne
Glarus, Wisc.; Belleville, Wis.; Cold Water, Ohio, and Delta, Ohi
by the Pet Company.

60. Pursuant to Article II of Order No. 27, the Secretary
August 27, 1938, designated E. M. Harmon as Market Administrat
under said Order, and pursuant to Article II of Official Order N
126, the Commissioner of Agriculture and Markets of the State
New York designated said E. M. Harmon as Market Administrat
under Official Order No. 126. Said E. M. Harmon, in t
374 execution of his duties as Market Administrator under s
Orders, has supplied all handlers, including the defendan
with forms prescribed in accordance with the provisions of t
Orders upon which to report purchases, sales and use of milk, a
said E. M. Harmon has been and now is acting as Administrat
under said Orders.

61. Each of the defendants have filed the reports which were d
on October 10, November 10, and December 10. True, correct, a
complete copies of each of such reports are attached hereto as E
hibits 29 to 40, inclusive, to this stipulation. Matter appearing
said reports in red pencil constitutes notations made by the Mark
Administrator's office.

62. If the order is valid, and if the defendants are subject there
the amounts due from such defendants to the Market Administra

for payment to producers through the Producer Settlement Fund are as follows:

	September	October	November
Acme Dairy Co.	Paid	14,516.05	9,030.77
Rock Royal	3,618.56	3,668.24	1,808.74
Lafayette Junction	1,808.00	1,337.40	737.64
Central New York	20,115.56	19,581.60	11,068.13

63. The members of Central New York Cooperative Association at all times have been and are dairy farmers producing milk upon their own farms. The farms of all members of Central New York co-operative Association are in New York State. Central New York Cooperative Associations, Inc. does not own any farms. A copy of the standard membership contract executed by a producer with Central New York Cooperative Association is attached hereto as Exhibit 41.

64. Central New York Co-operative Association, Inc., was organized June 12, 1934, pursuant to the Co-operative Corporations Law of the State of New York. Shortly thereafter it entered
375 into a contract with a corporate body known as Hegton Corporation, by the terms of which the Hegton Milk Corporation leased to the Central New York Co-operative Association, Inc. all of the country milk receiving plants and the city distributing plants and all of the equipment used in the receiving, handling and distribution of milk, which plants, equipment, etc. were then owned by the Hegton Milk Corporation. Copy of the said lease is attached hereto as Exhibit 42 to this stipulation.

65. The Hegton Milk Corporation was organized on or about June 1934, for the purpose of acquiring all of the physical assets owned by Hegeman Farms Corporation and the Hamilton Milk & Cream Co. Inc. and shortly after its organization it did acquire said assets. Said assets are the physical properties referred to in the preceding paragraph as being leased by the Hegton Milk Corporation to Central New York Co-operative Association, Inc.

66. Central New York Co-operative Association, Inc. was organized for the purpose of marketing milk received from producers at four milk plants located respectively at Sheds, Youngs Crossing, Maybury Mills and Kortright, all in the State of New York, and the principal activity of the said Central New York Co-operative Association at all times has been and is to act on behalf of its members in the marketing of the milk produced by the members upon their own farms.

67. Central New York Co-operative Association, Inc. owns no physical assets, except the interest of the lease as herein mentioned. Central New York Co-operative Association, Inc. owns all the issued and outstanding stock of the following business corporations: Hegeman Farms Corporation, Hamilton Milk and Cream Co. Inc. and Cato Milk Company, Inc., the ownership of which corporate stock is

authorized by Section 19 of the New York Cooperative Corporation
Law. The Milk of its members is received by Central Ne
376 York Co-operative Association, Inc. at the aforesaid receiving
plants and from said plants shipped to the New York Ci
depot located at 1624 Center Avenue, Ridgewood, Long Island, Ne
York City, which depot is also owned by Hegton Milk Corporati
and under lease to Central New York Co-operative Association, In
as aforesaid. The milk is thence distributed and sold in the Ne
York Metropolitan Marketing Area to retail stores and consume
through three corporations known respectively as Hegeman Farm
Corporation, Hamilton Milk & Cream Co. Inc. and Cato Milk C
Inc., all wholly owned subsidiary companies of the Central Ne
York Co-operative Association, Inc.

68. The said three subsidiaries utilize in the sale and distributio
of such milk the physical assets owned by the Hegton Milk Co
poration and under lease as aforesaid to the Central New York Co
operative Association, Inc.

69. The directors of Central New York Co-operative Associatio
Inc. are all producers.

70. There is no written contract between Central New York Co
operative Association, Inc. and any one of its three subsidiarie
aforesaid, but the aforesaid arrangements whereby the milk of th
members of Central New York Co-operative Association, Inc. i
distributed and sold in the New York Metropolitan Milk Marketin
Area through the aforesaid three subsidiaries have been made b
the officers of Central New York Co-operative Association, Inc. an
the officers of its subsidiaries.

71. Each of the aforesaid subsidiaries in the operation of th
physical assets leased as aforesaid from Hegton Milk Corporatio
by Central New York Co-operative Association, Inc., hires an
pays the necessary labor and collects the money received fro
stores and other customers to whom the milk is sold and afte
deducting the expenses of operation, remits the balance t
377 Central New York Co-operative Association, Inc.

72. On or about July 1, 1934, Central New York Co-operative Association, Inc., applied to the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, for a milk dealer's license.

73. The exhibits referred to in paragraphs "63" and "64" above together with all other instruments referring to the organizatio of the Central New York Co-operative Association, Inc. and of i ownership, control and utilization of the subsidiary companies we exhibited to the Director of the Division of Milk Control at the tim that the said application was being considered. A full hearing o the same was held by the said Director and by the Commissioner Agriculture and Markets, and thereafter the license applied for w issued to the Central New York Co-operative Association, Inc., whic said license permitted the marketing of the said milk through th Hegeman Farms Corporation and Hamilton Milk & Cream Co. Inc

two subsidiaries owned by the Central New York Co-operative Association, Inc. Thereafter the said Central New York Co-operative Association, Inc. and the said Hegeman Farms Corporation and Hamilton Milk & Cream Co. Inc. continued to conduct business and licenses were thereafter issued permitting the conduct of such business by the Central New York Co-operative Association, Inc. and the Hegeman Farms Corporation and Hamilton Milk & Cream Co. Inc. Thereafter all of the capital stock of the Cato Milk Co. Inc. was acquired by Central New York Co-operative Association, Inc. and at all times the Cato Milk Co. Inc. was licensed under the said State Law to engage in the milk business. From the date of the commencement of business by the Central New York Co-operative Association, Inc. the monthly reports required by the Division of Milk Control were filed by the Central New York Co-operative Association, Inc., and at all times one monthly report was filed by the Central
378 New York Co-operative Association, Inc. which indicated the receipt of the milk by the Central New York Co-operative Association, Inc. and the sales through the subsidiary companies, Hegeman Farms Corporation and Hamilton Milk & Cream Co. Inc. and, later, Cato Milk Co. Inc.

74. Central New York Co-operative Association, Inc. also markets the milk of approximately 75 producers, who have their farms in New York State, and who are not members and do not have any written contract with Central New York Co-operative Association, Inc. The milk of said producers is marketed and the proceeds thereof remitted to them by Central New York Co-operative Association, Inc. in the manner as though the said producers were members of said Central New York Co-operative Association, Inc.

75. The milk received by Central New York Co-operative Association, Inc. at its receiving plants is shipped to its New York City Depot by tank trucks, which since October 1, 1937, have usually followed a route entirely within the State of New York. Prior to October 1, 1938, such trucks often passed through the State of New Jersey en route to New York City. When tank trucks are not available, milk is shipped to New York City via Delaware, Lackawanna and Western Railroad and via Lehigh Valley Railroad through the State of New Jersey.

76. Central New York Co-operative Association, Inc. is holding in its treasury a sum of money in excess of $5000, which represents the difference between the aggregate distributions to its members for the month of September, 1938, at the uniform price announced by the Market Administrator, and the total amount available at that time for distribution, and which would otherwise have been distributed to said producers.

77. The minimum wholesale cost per quart of milk delivered to stores and other customers in the wholesale trade in the marketing
379 area, including efficient operation of country receiving plants, freight, processing, bottling, delivery, taxes, license fees, and minimum overhead expenses which are incident thereto, have

been the subject of wide investigations based on audits of operati
distributors or handlers, including an audit made by Dr. Lel
Spencer, an audit by Ernst & Ernst, public accountants, an investig
tion made by the Attorney General of the State of New York in 1
and by independent accountants employed by various distributo

78. For the purpose of this action, it is stipulated that the Dai
men's League, in its official newspaper, the Dairymen's League Ne
dated November 15, 1938, makes the following statement:

"To pay established prices, pay for full butterfat content a
all other charges 8¢ is figured as the absolute minimum at whi
handlers can sell milk to stores and make full payment to producer

The "established prices" referred to in said item, mean the pri
contained in Order No. 27 and Official Order No. 126.

79. The foregoing statement by the Dairymen's League News
the opinion of a substantial number of other and competi
380 milk dealers distributing milk to the wholesale trade in t
metropolitan area to the minimum delivered wholesale c
of milk bottled in glass per quart.

80. It is stipulated that the affidavit of Paul Grossman verif
November 25th, 1938, a copy of which is attached as Exhibit #
may be considered as the evidence of said Paul Grossman, with
same force and effect as if said Grossman had testified to the matt
herein stated.

81. If the Court rules that the number of producers accredi
to each Co-operative qualified to vote in the referendum and p
is not privileged or confidential and is competent in evidence,
plaintiffs will supply such information in Exhibit #15 stating
names of each Co-operative which was so qualified; which vo
in the referendum and in the poll and the number of producers
credited to and for which votes were cast by each such Co-operat
in said referendum and in said poll.

82. If the Court rules that such information is not confiden
and privileged, the plaintiffs will also furnish a statement of the to
number of votes cast by Co-operatives on behalf of producers, b
for and against said Orders in both the referendum and poll.

83. If the Court rules that such information is not confiden
or privileged the plaintiffs will furnish a statement of the num
of votes cast by Co-operatives on behalf of producers and wh
were rejected, stating in detail the names of the Co-operatives wh
attempted to cast said votes and the number of votes rejected as
each such Co-operative.

84. As to any document published by or on behalf of the Se
tary, the Commissioner, Federal and State Agricultural Exten
Agencies, the Dairymen's League, the Bargaining Agency, The D
Farmers Union, the Rural New Yorker, each side waives formal p
of identification and will limit any objection thereto to
381 relevancy, materiality and competency thereof.

85. It is expressly understood and stipulated by and betw
the parties to the above-entitled cause by their attorneys of record

ch party reserves the right to object to the admissibility of any ement, fact, or matter contained in their foregoing stipulation on ground that the same is irrelevant or immaterial, but no objection y be made on any other ground, and it is further expressly under- od that all facts and matters stipulated are stipulated for purposes this case only.

Dated December 22, 1938.

(s) John S. L. Yost,
JOHN S. L. YOST,
(s) Charles J. McCarthy,
CHARLES J. McCARTHY,
(Special Assistants to the Attorney General, Attorney for United States of America.)

(s) Milo R. Kniffen,
MILO R. KNIFFEN,
Counsel,

(s) Louis S. Wallach,
LOUIS S. WALLACH,
Assistant Counsel,
(Attorneys for Holton V. Noyes, as Commissioner of Agriculture and Markets for the State of New York.)

Charles W. Jenkins,
(s) by WILLARD R. PRATT, G. R.,
CHARLES W. JENKINS,
(Attorney for defendant Rock Royal Cooperative Association, Inc.)

Willard R. Pratt,
(s) by SAMUEL RUBINTON,
WILLARD R. PRATT,
(Attorney for Schuyler Junction New York Milk Shed Co-operative, Inc., and Jetter Dairy Company, Inc.)

(s) Albert Haskell, Jr.
ALBERT HASKELL, JR.,
(Attorney for Central New York Co-operative Association, Inc.)

Plaintiff introduced in evidence the following parts of the aforesaid ipulation:

The preamble and paragraphs, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 30, 39, 40, 42, 43, 44, 45, 46, 60, 61, 62, 63, 66, 75, and 85, together with the exhibits referred to in the aforesaid paragraphs. These exhibits were received in evidence and marked "Exhibits Numbers 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, and 41" to the stipulation.

The intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, introduced in evidence the following parts of the aforesaid stipulation:

Paragraphs 9, 28, and 29, together with the exhibits referred to in the aforesaid paragraphs. These exhibits were received in evidence

and marked "Exhibits Numbers 2 and 17" to the stipulation. The intervening plaintiff, Holton V. Noyes, also adopted the paragraphs of the stipulation previously offered by the plaintiff.

The plaintiff and the intervening plaintiff, Holton V. Noyes, rested. With consent of defendants the intervening plaintiffs, The Dairymen's League and the Bargaining Agency, reserved the right to introduce evidence at a later date.

Defendants' motion for nonsuit

At the close of plaintiff's case the defendants moved for a non-suit and dismissal of the several complaints in the consolidated action on the following grounds:

First: That the plaintiffs have failed to prove the causes of action alleged in the complaint against the defendants, or any cause of causes of action against any of said defendants.

Second: That the provisions of title 7, section 608–C, known as the Marketing Agreement Act of 1937, re-enacting, amending, and supplementing the Agricultural Adjustment Act, as amended, is unconstitutional and void on the following grounds:

a. On the ground that the same authorizes and permits the issuance of marketing orders, having the effect of law, fixing the prices to be paid by business or proprietary handlers of milk, while, by the provisions of sections 8c (5) (B) and (F), exempting other
383 persons of the same class, engaged in the same business, to wit: Cooperative corporations, from compliance therewith, and from payment of said prices so fixed, in violation of the Fifth Amendment.

b. In that the same delegates to cooperative handlers, the right to enact or legislate such price fixing orders, by casting one vote for each producer delivering to such handler, and at the same time, denies to the defendant Jetter Dairy Company, and other proprietary handlers, who are all handlers and dealers of a like class, the right to vote thereon, or to be considered in the legislating of such order, in violation of the due process clause.

c. In that it delegates to cooperative handlers, the power to regulate the affairs of competing handlers of the same class, the same delegation being clearly arbitrary and a denial of the rights safeguarded by the due process clause of the Fifth Amendment.

d. In that the delegation of such powers to legislate said order, is unwarranted by the Constitution and the Congress was without power to grant such delegation.

Third: That the provisions of Chapter 383 of the Laws of 1937 of the State of New York, are also invalid for the same reason and on the further ground that they are violative of the provisions of the Fourteenth Amendment and of Article 3, Section 1, of the New York State Constitution, providing that the legislative power of the State shall be vested in the Senate and Assembly.

Fourth: That it now affirmatively appears that Order No. 27 was promulgated or issued in accordance with the provisions of the agriculture marketing agreement act of 1937 in the following particulars: In that the same was predicated on a referendum of producers; that prior to the voting on said referendum, the Secretary Agriculture issued a pamphlet Exhibit 8 in evidence, which was delivered to all producers believed to be entitled to vote on said orders, in which it was stated in substance that the proposed order established "uniform prices for milk sold by producers to handlers in the Metropolitan Market:" and that the same required "uniform return to producers for milk sold in the marketing area, regardless of the handler to whom the milk was sold," whereas, in truth and in fact, cooperative handlers of milk were not required pay a uniform price for milk, nor were such cooperative handlers required to return uniform returns, or, indeed, any returns to producers for milk sold in the marketing area. So far as the order provided, such referendum, therefore, established only that the persons voting therein favored a marketing order which provided for uniform payments to producers and uniform charges to handlers, established by inference that such voters were not in favor of order as issued whereby uniform payment to producers were not required and uniform prices were not charged to all handlers.

Fifth: That the said order fails to contain a provision required by section 608–c (5), (F) which reads as follows: "Provided that it [a cooperative handler] shall not sell milk or its products to any handler use or consumption in any market at prices less than the prices established pursuant to paragraph (A) of this sub-section (5) for such milk," but on the contrary, said Order No. 27, by the provisions of Article VII, Section 1, permitted handlers, cooperative or otherwise, to pay for milk produced in the production area and sold in other markets, at any price such handler designated.

Sixth: That said order is confiscatory and violative of the Fifth Amendment by permitting the taking of money or property of cooperative handlers selling solely in the marketing area, the money and property of producers delivering to certain cooperatives, and money and property of proprietary handlers, for the purpose of paying the same to competing cooperative handlers, and money and property of producers delivering to proprietary handlers, and thereby discriminating against said classes of persons whose money is thus expropriated. (The motion was denied on all grounds except constitutional grounds, and the variance of the order with the statute as to which the Court reserved decision.)

Defendants' case offers in evidence

The defendants, Jetter Dairy Company, Inc., Schuyler Junction of York Milk Shed Co-operative, Inc., and Rock Royal Co-op-

erative, Inc., introduced in evidence the following parts of the a said stipulation:

Paragraphs 16 and 17, together with the exhibits referred t the aforesaid paragraphs. These exhibits were received in evid and marked Exhibits Numbers 12, 13, and 14 to the stipulation.

The first sentence and the last sentence of paragraph 18. this point plaintiff introduced in evidence the remainder of p graph 18.)

Paragraphs 19, 20, 21, 22 and 81, together with the exhibit refe to in paragraph 22. This exhibit was received in evidence marked Exhibit Number 15 to the stipulation. The said defe ants asked for a ruling on the questions presented by paragraph Plaintiff objected to furnishing the information described the on the ground that the Secretary of Agriculture had issued structions that such information be kept confidential, but plai offered to furnish a statement showing the total number of v cast by all cooperatives, the total number of votes cast by co eratives in favor of the order, and the total number of votes by cooperatives in opposition to the order. The Court ruled t the Government must furnish the names of the cooperatives wh voted for their members in the referendum and the total numbe votes cast by cooperatives, but that it need not disclose the num of votes cast by the individual cooperatives, with the exception the Dairymen's League, as to which question decision was reserv It was stipulated that the Dairymen's League cast 22,287 votes the poll on Order No. 27, and 17,361 votes in the poll on Offi Order No. 126.

386 Paragraphs 23, 24, 25, 26, and 27, together with the exhi referred to in paragraph 24. This exhibit was received evidence and marked Exhibit Number 16 to the stipulation.

The first sentence of paragraph 31, and the second sentence of s paragraph, down to and including the phrase "the conclusions those of E. W. Gaumnitz." (At this point plaintiff introduced evidence the remainder of paragraph 31.)

Paragraphs 32, 33, and 34.

The first and third sentences of paragraph 35. (At this poi plaintiff introduced in evidence the remainder of paragraph 35.)

The last three sentences of paragraph 36. (At this point plai tiff introduced in evidence the remainder of paragraph 36.)

The third sentence of paragraph 37. (At this point plaintiff i troduced the remainder of paragraph 37 and the whole of par graph 38.)

Paragraph 41, together with the exhibits referred to in the afor said paragraph. These exhibits were received in evidence and mark Exhibits Numbers 18, 19, and 20 to the stipulation. The last thr sentences of paragraph 41 and Exhibits 19 and 20 were received evidence over plaintiff's objection, on the ground that such eviden is irrelevant and immaterial, that the question of what milk recei ing stations were approved for the City of Newark or for the Sta

f New Jersey has no bearing on the constitutionality of the act
the order, the question of whether the order was validly issued,
on any issues involved in the case.

Paragraph 47.

Paragraph 48, over the objection of the plaintiff and the Dairymen's League, on the ground that evidence as to the operations of the Dairymen's League is irrelevant and immaterial, because the operations of the Dairymen's league have no bearing on the validity of the order involved in this case.

87 Paragraphs 49 and 50, over the objection of the plaintiff, on the ground that evidence as to the operations of the Sheffield Farms Company, Sheffield Condensed Milk Company, and other National Dairy subsidiaries, is irrelevant and immaterial, because such operations have no bearing on the issues involved in the case.

Paragraph 51, over the objection of the plaintiff, on the ground that evidence as to the operations of the Dairymen's League is irrelevant and immaterial, because the operations of the Dairymen's League have no bearing on any of the issues in this case. (The Dairymen's League joined in this objection and asked that it be deemed to have joined in every objection made by the Government, and the Court held, in compliance with this request, that all objections made by the Government would be deemed also to be made by the Dairymen's League.)

Paragraphs 52, 53, and 54, over the objection of the plaintiff, on the ground that evidence as to the operations of the Borden Company and the Dairymen's League is irrelevant and immaterial, because the operations of the Borden Company and the Dairymen's League have no bearing on the issues involved in the case.

Paragraph 55, over the following objection made by the plaintiff: "We object to that, Your Honor, on the ground that it is irrelevant and immaterial. The question of whether or not there was such a corporation as the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., has no relation to the constitutionality of the act or the validity of the order, or any of the issues properly in this case. If it goes to anything, it goes to the motive of the Secretary of Agriculture in issuing the order, and we submit those are not in issue in this case." The Bargaining Agency joined in this objection.

Paragraph 56, together with the exhibit referred to in said paragraph. This exhibit was received in evidence and marked "Exhibit Number 21" to the stipulation.

88 Paragraph 57, together with the exhibit referred to in said paragraph, which exhibit was received in evidence and marked "Exhibit Number 22" to the stipulation. Plaintiff objected on the ground that said evidence is irrelevant and immaterial, and on the further ground that the Bargaining Agency is not shown to have had any authority to bind either the United States or the Secretary of Agriculture. The intervening plaintiff, Holton V. Noyes, joined in this objection.

Paragraph 58, together with the exhibits referred to in the s
paragraph (with the exception of Exhibits 24I, 24J, 27, and 2
which exhibits were received in evidence and marked "Exhibits Nu
bers 23, A–M, inclusive, 23 AA–II, inclusive, 24, 24 A–H, inclusi
25, 25 A, 26, 26 A–S, inclusive" to the stipulation. The plaintiff a
all the interveners objected to all of said paragraph and all of s
exhibits, except Exhibit 26, on the ground that such evidence is irre
vant and immaterial and that the parties issuing the various do
ments included in the exhibits are not shown to have had author
to bind the United States or the Secretary of Agriculture. (T
plaintiff then introduced in evidence exhibits 24 I, 24 J, 27, and 2

Paragraph 59.

Paragraph 77, over the following objection made by plaint
joined in by all the intervenors: "Mr. McCARTHY. We object to th
Your Honor, on the ground that it is irrelevant and immater
The order does not attempt to fix the retail price for milk but th
price is fixed entirely by forces of competition, and under t
cisions of the Supreme Court, in the Hegeman Farms and Pu
Sound Power and Light Cases, the price which the defendants c
get for their milk in a competitive market is not material. M
PRATT. This refers to cost and not retail price. Mr. McCart
The cost is likewise immaterial."

Paragraphs 78 and 79, over the objection of the plaintiff, on t
same ground as its objection to paragraph 77, and the further grou
that the publication of a statement as to cost in the "Dai
389 men's League News" has no probative value. All the int
venors joined in this objection.

Paragraph 80, together with the exhibit referred to in said pa
graph, which exhibit was received in evidence and marked "Exhi
Number 43" to the stipulation over the objections of the plaintiff a
all the intervenors on the same grounds as their objections
paragraph 77.

The defendant, Central New York Cooperative Association, In
introduced in evidence the following parts of the aforesaid stip
lation:

Paragraphs 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, and 76, togeth
with Exhibit 42 referred to in paragraph 64. This exhibit w
received in evidence and marked "Exhibit Number 42" to t
stipulation.

390 ALEX EISENBERG, called as a witness in behalf of the defen
ants, testified as follows:

Direct examination by Mr. PRATT:

I am President and the active General Manager of Eisenbe
Farms, Inc., a New York corporation. I reside at 2022 Avenue
Brooklyn, N. Y. I am also identified with Eisenberg Farm Produ
in Pennsylvania and Sunnydale Farms.

The principal office of Eisenberg Farms, Inc., is 290 Junius Street, Brooklyn, N. Y. It is licensed as a milk dealer by the Department of Agriculture and Markets of the state of New York and has been since that Department started issuing licenses. We have had a New York City Health Department license since I started in business, about twelve years ago, under the name of Alex Eisenberg. Then when the corporation was formed, about nine or ten years ago—Eisenberg Farms, Inc., it obtained a Control Board license as soon as the control board went into effect, in 1932 I think it was. Eisenberg Farms, Inc., has been licensed for six or seven years as a New York corporation.

I am President of Eisenberg Farm Products Corporation, which is incorporated in Pennsylvania, and have been President for about two years now. This corporation was formed in 1930. It is licensed to do business in the City of New York by the City Health Department. It does not have any state license issued by the Department of Agriculture and Markets as I have never made any application for it.

Eisenberg Farms, Inc., operates no milk receiving stations in the State of New York. Eisenberg Farm Products Corporation does operate milk receiving stations in Pennsylvania only. These stations are approved by the Department of Health of the City of New York. They are not approved by the State of New Jersey.

I signed a milk marketing agreement after the issuance of Order No. 27 by the Secretary of Agriculture. I don't recall on behalf of which corporation I signed it for the reason that I have so many corporations. A few more are Rugby Farms and Oxford Products of New York.

Oxford Products Corporation operates a milk receiving station at Galeton, Pennsylvania. I don't recall whether I signed a marketing agreement for it. I signed the agreement for one of the corporations.

(It was stipulated that Eisenberg Farms, Inc., signed a marketing agreement subsequent to September 1, 1938.)

I was the officer of Eisenberg Farms, Inc., which signed that agreement. I signed one agreement: I don't remember the name. If they say it is Farms, then it must be that name. I signed the agreement at the office of the Market Administrator. I don't recall the date in September that it was signed. (All of the following testimony was given over objection by plaintiff and all intervenors on the ground that such testimony is irrelevant and immaterial, having no bearing on the constitutionality of the act, the validity of the order, the question of whether the order has been violated or any issues involved in the case. The court ruled that the objection would run to the entire line of testimony.)

Prior to signing the marketing agreement I had been purchasing milk from the Red Rock Dairy Corporation at De Kalb Junction, New York, and transporting it from De Kalb Junction to Junius Street, Brooklyn. The milk we bought in De Kalb Junction we sold also to other dealers. In the Junius Street depot we have a bottling plant where milk is pasteurized, processed, and bottled.

The Junius Street station is owned by another corporation, a
arate processing company, whose name I don't know offhand m
I have an office for Eisenberg Farms, Inc. at this address a
office of Eisenberg Farm Products Corporation of Pen
392 vania at this address.

The milk which I am purchasing from Red Rock Dair
was milk which was approved for sale in the Metropolitan are
was getting daily shipments from Red Rock, receiving about
cans. A can holds about 40 quarts of milk. The first time Red
ceased delivering milk to us was just for a day or two in Nove
1938, if I am not mistaken.

Q. Did you write on the agreement that it was signed under
test?

A. Yes.

Q. Did you write in words or in substance on the agreement
statement that it was signed under protest.

A. I don't recall if that was written on the agreement or not.
It was made out at the Market Administrator's office. The Ad
istrator's girl made it out. I delivered it to Bert Miller. I t
he is an employee of the Administrator. I saw him in the offic
Mr. Harmon, the Administrator.

I have known Mr. Miller for a number of years through the
trol Board.

Q. Did you know him as an employee of the Dairymen's Le
before the milk control?

A. I don't know that.

Prior to my going to the Administrator's office to sign this ag
ment there was some interruption to my milk deliveries from
Rock. That milk was suspended about two days, amounting to
cans a day. Milk from Andover, New York, was also interrup
The names of the concern at Andover, where I was purchasing m
is Oxford Products Company of Pennsylvania. I don't know who
the principal owners of stock in that company. The Manage
Mr. Snyder. Milk from that plant was withheld from me for ab
two or three days. I was getting about 250 cans a day from it.

I had a contract for the purchase of milk from Andover and
the purchase of Red Rock milk.

393 Milk was withheld from me during the period of two
three days at Canajoharie, New York. The concern which
erates that milk plant, I think, is Canajoharie Cooperative; I am
sure. It is a cooperative corporation operating only one plant.
Kiniry is the had of it. Milk from this plant was withheld a
about two days. I was purchasing about 300 cans a day from
I don't remember any other milk supply that was withheld from
There were in all about 850 cans daily withheld.

I had a talk with a representative of Commissioner Noyes ab
signing this contract and having my milk released. The name of
person to whom I talked was Mr. Gaynor. He called me on the te
phone, I think, from his home at Leonardsville, New York. I w

my office in Brooklyn when I talked with him. I had talked to Mr. Gaynor before just over the telephone a few times. I have met him once before.

Q. Did you recognize his voice as that of E. Manning Gaynor?

A. I would not say I recognized his voice. I was at his home. He asked me to come to his home one day.

I discussed the conversation which I had had over the telephone at his home and more than that. The trip to his home was after the telephone conversation. I mentioned something about this talk that I had with him over the telephone at that time. We had some other talks. There was one shut-off I didn't mention. That was from Saratoga Cooperative, 300 cans of milk a day coming in from Platts-burg, New York.

The man who called me on the telephone said he was Mr. Gaynor. When I went to Mr. Gaynor's office afterwards I referred to the conversation I had over the telephone.

I was told in the conversation over the telephone that if I don't sign the agreement I won't get any milk.

(At this point the intervening plaintiff, Holton V. Noyes, interposed the further objection that there was no proof as to Gaynor's authority, which objection was overruled.)

Mr. Gaynor told me that if I came up to the Market Administrator's office and signed the marketing agreement, he would release the milk so that we could get the milk. After I signed, the milk was released. We got the milk until we stopped some of the shipments and made other arrangements. I stopped the shipments from Red Rock Dairy Corporation myself. We couldn't agree on the price; that was later on.

The contract in writing which one of my corporations has with Red Rock provided the price to be paid. I took the milk from the Red Rock Dairy Corporation until either September 30 or October 30, I am not sure which date.

Q. And at the end of that time the Red Rock Dairy Corporation billed you for milk in accordance with the prices stated in this federal marketing agreement; is that so?

A. No. There is no such price to be added in the federal marketing agreement. There is no price for handling. There is no price for freight. It says nothing about it in the marketing agreement. You can buy milk at $2.47 a hundred and don't have to pay any handling or freight rate.

That is my construction of the federal marketing order. That is what it says, unless it is different. I have read the order and found no provision for payment to the cooperative or to anyone, not only a cooperative, of a handling charge. I had an invoice sent to me from Red Rock Corporation.

Q. Do you remember the base price which was charged you for that milk by the Red Rock Corporation?

A. We had an arrangement, a full delivery price to our plant.

I don't remember what prices were charged in that last invoi
and if more than one charge was made, what the charges were, a
the respective amounts. (An agreement signed by the witness Eise
berg was marked defendant's Exhibit 1 for identification.) I don
remember where the agreement marked Defendant's Exhib
395 1 for identification was signed or who was present when
signed it.

I was buying milk from Dairymen's League Cooperative Assoc
tion before I ceased buying milk at Red Rock. I first commenc
buying milk from the Dairymen's League over a year ago.

I recall that on April 1, 1937, milk control expired in New Yo
State. At that time I had about the same number of corporatio
selling milk in New York City.

I don't think I was buying milk from the Dairymen's League
April 1, 1937. If we bought any our books would show it.

I am acquainted with a concern known as the Moss Milk Compa
Inc. I do not own that company. I furnish it with milk. I w
furnishing milk to this company on November 11, 1938. This mi
was furnished by Oxford Products or Eisenberg Farm Produc
one of the two. It was delivered in bottles to the Moss Milk Compa
in New York City.

Q. And do you know in what quantities you or your corporati
furnished milk to that company?

A. As I said, I wouldn't want to answer the question how mu
milk or what he paid for the milk it would be unfair.

Q. I didn't ask what he paid. Approximately how many case
day did you furnish the Moss Milk Company?

A. I wouldn't want to answer how much milk, the amounts boug
it is unfair.

Moss Milk Company is a small company. It delivers to sto
only in New York City in competition with every wholesale dea
in New York, including Eisenberg Farms, Inc., and Jetter Da
Company, Inc. It is in competition with the Dairymen's League.
sell the Moss Milk Company all of its requirements.

I wouldn't care to answer how much milk we were buying in N
vember 1938, from the Dairymen's League, if I did know offha
I had stopped buying milk from Red Rock on October 31, 19
but was not replacing part of that milk with additional purcha
from the Dairymen's League.

396 In September when milk was withheld from me to m
me sign this marketing agreement the Dairymen's Lea
withheld some milk too, whatever we were purchasing. I do
know offhand the amount we were purchasing. It was about
or 500 cans a day.

Q. Now when you made a settlement with the Red Rock you
not pay anything for handling charge?

A. I wouldn't say that. We certainly did.

Q. How much handling charge did you pay them for that m
in September and October over and above the $2.45 base price?

A. I don't know about the $2.45. We paid more than the contract called for, and you have the contract.

The contract was not superseded by the federal order. There is nothing in the contract that supersedes it. It was based on the Sheffield Farms price and it is still the Sheffield Farms price going to the farmers today.

(A photostatic copy of a contract between one of witness' companies and Red Rock Dairy was marked defendant's Exhibit 2 for identification. Witness identified his signature but could not identify the agreement.)

Q. Now when you discontinued purchasing milk from Red Rock and commenced purchasing more milk from the Dairymen's League, will you tell us whether you paid the Dairymen's League as much as you were then paying Red Rock?

A. I didn't purchase more milk from the Dairymen's League.

Q. Whom did you buy milk from to take the place of this Red Rock milk in November?

A. I cannot tell you.

I am positive the milk wasn't purchased from Dairymen's League. I also purchased about the same amount of milk from the Dairymen's League on October 31, four or five hundred cans daily. On November 1 I was buying about the same amount. I am buying nothing from the League today. I discontinued buying from them on December 30, 1938.

I sold one of my companies, Lincoln Farms Co., to the Dairymen's League in June 1938. I don't own the Lincoln Farms business now. I sold it. I don't know offhand how much milk Lincoln Farms Company was handling a day at the time of its sale to the Dairymen's League.

Four or five hundred cans of milk purchased a day from the Dairymen's League would make as to 500 cans approximately 1,500 cases and as to 400 cans approximately 1,250 cases. During September, October, and November 1938, when I was selling milk to the Moss Milk Company, I was handling about 1,500 cases of milk a day from Dairymen's League sources.

Q. Since September 1, have you lost trade to competitors, that is, have competitors taken business from you?

A. They take and we take.

I don't take business. I haven't taken business by cutting prices against competitors. Competitors have taken business from me by cutting prices. There are several of them as far as I am concerned. I can name about twenty dealers. I mean everyone cut prices. I say we didn't take any customers by cutting prices. We may cut prices on our old customers to hold them, but we do not cut prices to take any. We didn't take customers from other dealers. There are dealers that take from one another. We are holding our own business as much as we possibly could. I didn't take any business from anybody else that I knew of. With all those companies it is possible

that some of my many drivers may take some business that di
come to my personal attention but it wasn't probable, because t
do not cut prices. They do not go out soliciting trade. I would
say that business taken by cutting prices is known in the indus
as chiseled business. I have heard of that and the term is u
commonly in the industry but I don't mean to say cutting price
chiseled business.

Q. Tell me do you chisel business? Explain that to the Court.

A. There is Kingsborough Dairy Bottling Milk for retail busine
that has no wholesale business——

Q. (Interrupting.) Never mind the name. How do y
chisel?

398 A. I am explaining. He has no wholesale business He se
to peddlers only. A peddler is a fellow that delivers to t
home and he goes to them and solicits trade and then he tries to s
that trade.

I don't know as a wholesaler how I would chisel trade if I wa
going to. I don't know any wholesalers that do that. There
Hegeman, Jetter, and the League. I don't think they call themselv
chiselers. The man who does the chiseling is the one that goes t
and solicits business, cuts prices and then tries to sell their trade.

If a new store opens up we give free goods and put in an expensi
box. We may pay him fifty or one hundred to paint signs on th
window, or for free circulars, electric boxes, etc. I would not s
that we never got any business by price cutting since we have be
in business, as that is years ago. Probably we did. We never o
tained 5,000 cases of trade in that way. We never had 5,000 ca
of trade in one company. We never had 5,000 cases in my variou
companies. I don't know whether we had 3,500 cases.

We weren't serving twelve or fifteen hundred cases from the Dair
men's League milk. We could bottle that milk. We sell tank mi
to dealers. We sell Dairymen's League milk to Hegeman Farm
Jetter, and other dealers and through them.

I haven't any idea how many cases of milk we were selling in Se
tember, October, and November 1938.

We didn't lose any trade to Dairymen's League in Septembe
October, and November 1938 or to Borden's or to Borden Subsid
aries. We lost quite a lot of trade to Sheffield Farms Company
those months. We lost it by them cutting prices. That was
Breakstone Milk. We lost that milk when they went out with pap
containers for nine and one-half cents; when they came out with t
name "Breakstone" and right along the line until toda

399 During September, October, November, and in the beginni
of December 1938 they came out with twelve cent half pi
of cream and we lost some business again on that. It costs more f
a bottle of milk delivered in paper than glass, one and one-half ce
more.

Q. So if your cost price of milk in glass was nine and one-h
cents in paper it would be about eleven cents?

A. Well, glass is not nine and one-half cents, the paper should be
d for ten and one-half.
Q. I didn't ask what it was sold for:
The independent glass is sold for nine cents. The paper should
be sold for ten and one-half. Milk in glass containers is now
being sold mostly at nine cents by all independents. Some milk
in glass containers is sold for eight in the Bronx. Sheffield
selling Breakstone milk in paper for nine and one-half cents. In
ss they go as low as eight and one-half. I lost some trade at
ces of eight and one-half on glass and nine and one-half with
per but I have no idea how much trade I lost in that regard.
In connection with the milk being shut off from my company until
igned this milk marketing agreement I had some talks with ex-
missioner Baldwin. I knew him long prior to 1938. He was
merly Commissioner of Agriculture and Markets.
Q. Do you know him to be the Executive Secretary of the Metro-
litan Bargaining Agency?
A. I don't know what he is. He is something in the Agency.
r. Baldwin called me personally on the telephone. I recognized his
ice. It was a day or two before the milk was shut off each time.
just said if I signed up I would get my milk, that is all. I
s told if I didn't sign up I wouldn't get milk. That is what hap-
ed. No one else talked with me personally. I received a few
grams from the Bargaining Agency. I think they were sent from
racuse. They referred to my signing up if I wanted to continue
get milk.
The following motion to strike was then made and denied:
Mr. McCarthy. I move to strike out all the testimony of the wit-
s Alex Eisenberg on the ground that the same is irrelevant and
aterial. He has discussed the circumstances leading up to the
ning of the marketing agreement. There is no question of the
ning of the marketing agreement in this case. The order is based
on the failure of handlers to sign. The fact that he may have
ned under protest, or may not have signed, appears to be imma-
rial. The question of whether he has bought milk from the Dairy-
n's League and the prices at which milk has been sold by other
panies in New York City has no bearing on the issues in the case.
The court denied the motion.
Mr. Wallach. Your Honor: In joining in this motion I also
wish to add that there is not a word in the answer that talks
out the marketing agreement, and by this witness's own testimony
without attempting to concede that he did sign the marketing
reement under protest, or duress, that was done after both orders
nt into effect, and had absolutely nothing to do with the order at
ll. Now it may be argued that it would be relevant had the mar-
ting agreement been signed before the order went into effect, but
cededly this marketing agreement was signed by Eisenberg after
ptember 1st, and after the order went into effect.
The court denied the motion.

Cross examination by Mr. McCarthy:

I have three receiving plants in Pennsylvania located at Gale Elizabethville, and Oxford, Pennsylvania. The Galeton plan is erated by Oxford Products Company, a New York corporation, the other two plants are operated by Eisenberg Farm Produc Pennsylvania corporation.

I first began purchasing milk from the Dairymen's League June 1937 but have purchased no milk from them before that d that I remember.

Offhand I cannot give the names of the twenty or more deal to whom I have lost milk business as a result of price cutting. Th are about 125 in New York and it would be unfair to mention names, I not knowing exactly which ones I lost trade to, except do know one, and that is Breakstone, a branch of National Da We lost trade to some of the independents. I couldn't say offha about how many we lost trade to. We lost some to the Kin borough Company, not much. We may have lost some to Jett I don't recall that offhand.

I remember specifically that we lost trade to Manchester Milk Co pany in the Bronx, an independent handler. He is selling m today for nine cents in paper containers. Trinity Dairy Co
402 pany is selling for nine cents in bottles. It is one of t independents.

Q. Is there at all times sharp competition among the independe in the New York market?

A. Not at all times. There are fights that break out every o in a while. One dealer may get into a battle with another deal but generally one dealer may be friendly with 50 other dealers a not touch their trade or try to solicit their trade.

At the present time I would say that conditions are pretty friend We are not scrapping with anyone, none of our companies are, t I know of. We have lost trade to about twenty some independen but now, right now, we are only losing trade to three or four a I have mentioned Breakstone, Trinity Dairy, and Manchester three, offhand. There may be one or two more.

I first lost trade to Breakstone when it first came out with t bottled milk. They are only out about six months with bottled mi in containers. They are only out a shorter period than that—abo a month or so prior to September 1, 1938.

The Oxford Products Company of Pennsylvania is not one of companies. It operates the plant at Andover, New York.

Cross examination by Mr. Wallach:

Kingsborough Dairy Company gets its milk I think from Fre man's Dairy, or Jetter Dairy Co., one of the two. Freeman's Dai gets its milk from the Dairymen's League, Jetter Dairy and vario others. I don't know whether Mr. Jetter has an interest in Fre man's Dairy or who owns it. I wouldn't say I know who owns an one's business. I would not say I knew Freeman's Dairy purcha

lk from Jetter. I know Jetter tanks probably go there. I think bottles milk for Jetter. I think that, because my man goes over there once in a while, and they come to our plant, and we sell milk once in a while to Freeman Dairy. Eisenberg Farm Products sell Freeman Milk once in a while. It is delivered in k trucks.

Cross examination by Mr. COOKE:

Lincoln Farms isn't the only part of my business that I have ever d. We sold several businesses during the last couple of years. re were some transactions with the League and some with Hege- n Farms. I sold the Cato business to Hegeman Farms about a r ago.

Redirect examination by Mr. PRATT:

In the sale of business such as Lincoln Farms, or the Cato Milk mpany, or any milk companies in New York City, the goodwill ue is considered in connection with the number of cases of trade. at is, the goods in trade have a certain value. I couldn't answer at was the fair market value in September 1938, of goodwill of wholesale business such as that in which the Jetter Dairy Co. was gaged.

There is no such thing as recognized value of a case, or goodwill. e may give it away for $10.00; another for $100.00; another for 00. I don't remember any sales made since September 1 of this ar on milk alone where the goodwill value was figured at a set ce. There is no such thing as value of goodwill at the present e per case. One company may ask $75.00 a case, another $25.00 case. If someone wanted to buy it, some business might be sold at 5.00 and some at $25.00 a case. So far I don't know of any. I n't know of any business being sold lately on the basis of $50.00 case. That is since January 1, 1938.

In the sale of the Lincoln business I don't remember what was sidered, whether goodwill was considered in the purchase price. don't have any idea whether I was paid anything for goodwill or t.

GEORGE WILSON called as a witness on behalf of the defendants testified as follows:

I live in Solsville, Madison County, New York. I have been a rmer for the past twenty years. I own a herd of cows. I sell ilk to the Solsville plant of the Jetter Dairy Company. The airymen's League has a plant across the highway from the Jetter ant at Solsville.

I was on of incorporators of the Solsville Milk Producers, Inc. r. Charles H. Baldwin and Mr. Cooper, another employee of the rgaining Agency, came to that vicinity to form this cooperative rporation. They held about three meetings before the coopera- ve was formed. I am Secretary and Director of the cooperative.

I have been delivering milk to the Jetter Dairy Company f the last twenty years except for two or three years when I delivered the plant at Bouckville, New York, which is a little further from farm than the Jetter plant. This plant has been operated at dif ent times by Muller Dairies, a subsidiary of the National Da Company, Keystone, and Mr. Stuhring. It is twelve or fourteen ye since I last delivered milk to the Bouckville plant. During that ti I have delivered milk to Jetter.

On the Friday before November 28, 1938, I sent out notices of meeting of milk producers delivering to Solsville, to be held at Ka Hall in the town of Madison on November 28, 1938.

Q. And who asked you to send those notices out, Mr. Wilso (Plaintiff objected to this question and to this entire line of tes mony on the ground that it is wholly irrelevant and immaterial the issues of the case. Objection was overruled.)

Mr. Carl Ford, President of the Solsville Cooperative, authori me to send out the notices. (The witness identified Defendan Exhibit No. 3 for identification as a copy of the post card sent o to different members of the cooperative.)

405 Exhibit No. 3 for identification was offered in evidence.

I sent cards having the same wording as Exhibit No. 3 f identification to all producers delivering milk to the Solsville pla About the time I sent this card out I was visited by a Mr. Washbo an employee of the Dairymen's League. (Plaintiff moved to stri out the evidence of this witness. Motion was denied.)

GEORGE WILSON, recalled as a witness on behalf of the defendant testified as follows:

Direct examination by Mr. PRATT:

It was about six weeks ago that Mr. Washbon called on me, some time in November.

I learned that the Jetter Dairy Company brought an action to re strain the Bargaining Agency and some other people from certai things. Mr. Washbon called on me, I believe, after that action wa brought, but I am not positive on that point. He drove up in my yard.

One part of the conversation was that he asked me where I wa drawing my milk and I told him that I was drawing it to the Jette Dairy Company. He said, "Wouldn't you prefer drawing your mil to the Dairymen's League where you would be sure of getting you check every month?" I told him I always got my check from Mr. Jetter, and he said, "Well, that is not what your neighbors just told me." I asked him what the neighbors said and he said how he hadn't received two weeks' check, he had kept back two week on him. "Well," I said, "I don't hardly think that unless he wa under some obligation to Mr. Jetter. I have never known but what Mr. Jetter has always paid." Well, he said, that is what the neigh bors said and I told him what I thought and he said that might be

Plaintiff moved to strike all the testimony of the aforesaid witness.

Cross-examination by Mr. COOKE:

I am Secretary of the Solsville Cooperative. It is not a member of the Metropolitan Cooperative Milk Producers Bargaining Agency. It has not been a member at any time to my knowledge. Mr. Baldwin and Mr. Cooper (representatives of the Bargaining Agency) came to see us on two or three occasions before we were organized. We were organized probably a year ago. They came there two or three times at the time we were organized and incorporated.

I think it was both Mr. Baldwin and Mr. Cooper who gave us the idea for the meeting of November 28th. I know Mr. Baldwin and Mr. Cooper met us on two or three occasions about a year ago. On one occasion it was in Oriskany Falls and on another occasion it was in the schoolhouse. I last met Mr. Baldwin and Mr. Cooper at a neighboring farmer's house but I cannot think of his name. I think it was last November, I cannot tell you whether it was in October. Neither Mr. Cooper nor Mr. Baldwin said anything to me about having a meeting in Kanes' Hall on November 28th. I don't know whether they said it to any officer of my cooperative. Outside of material that they have sent me through the post I have not had any communication with Mr. Baldwin or Mr. Cooper during the past three months. I don't know whether Mr. Ford has had any communication with them. I don't know whether any members of the Cooperative have had any communication with the Bargaining Agency or any officer or employee of the Bargaining Agency during the past three months. I don't know of any such communication as late as that.

I went to the meeting at Kane's Hall on November 28th. A number of farmers were there. Felix Piseck was not there. Stanley Piseck was not there.

One of the Directors, Mr. Thomas Kane, told me that the Bargaining Agency was going to send one of the Piseck boys to this meeting at Kane's Hall on November 28th. That is the only authority for claiming that the Bargaining Agency was going to send a speaker there that night. I cannot just remember whether we received any letters. We didn't hold the meeting as we were going to. There was nobody from the Bargaining Agency at that meeting that I know of. There was no speaker at the meeting, we practically didn't hold the meeting.

Q. You didn't hold the meeting?

A. No.

I was told to get out the notice for this meeting by Mr. Ford. At that time Mr. Ford did not say anything about the Bargaining Agency, I don't remember that he did.

My mind is backward on the dates, but Mr. Cooper did drive me home one night but I cannot remember the date. He drove me home

from one meeting held at Kane's Hall. I cannot think what the meeting was for. It was in 1938, not so long ago, but I cannot remember just when. I cannot remember whether it was within three months or six months.

Redirect examination by Mr. PRATT:

That this meeting didn't materialize is due to the fact that the United States Marshal came down and served some restraining order. I was at every meeting at Kane's Hall. I cannot tell whether I was there in August or not. My mind is backward on dates.

HOWARD B. RICHMOND was called as a witness on behalf of
408 the defendants.

Direct examination by Mr. PRATT:

I live at Waterville, Town of Sangerfield. I am a farmer and deliver milk to the Jetter Dairy Company. I have been delivering to that company for two years the 1st of January. I have met Mr. Baldwin and I have met Mr. Cooper of the Bargaining Agency. I am a member of the Oriskany Falls Milk Producers Cooperative Inc. I am secretary and treasurer of that corporation which was formed in either August or September 1937, I think.

Carl Ford asked me to join with them in connection with this proposed meeting to be held at Kane's Hall, November 28, 1938. He asked me to call up Bridgewater. I was to call one of the Directors of the Bridgewater Cooperative. I tried to call him on the phone and I failed to get him; and that was all there was. I didn't get in touch with anybody. I did not send out the notices.

(All of the following testimony was received in evidence over the objection of plaintiff and all intervenors on the ground that it is irrelevant and outside of the issues in the case.)

In the month of August 1938 I was visited by a man who said he was a representative of the Bargaining Agency, but I don't know his name. He had a typewritten paper which he asked me to sign. It is the same as Def. Ex. 5 for identification. I signed it after I requested him to see the other Directors of our Local and he saw, I think only one and he was the vice-president and came back, and he gave me permission, or told him to give me permission and said it was all right, and I signed it. I did not mail it to the Jetter Dairy Company. He did. He took it away with him. (Def. Ex. 5 for identification offered in evidence. Copy of a letter dated August 4, 1938 recommending that the Jetter Dairy Company become a mem-
ber of the Distributors Bargaining Agency was received in
409 evidence, subject to being connected with the identity of the person who approached the witness. Decision was reserved as to whether or not such connection was proved. My cooperative corporation was formed in either August or September. It was stipulated that the Oriskany Falls Milk Producers Cooperative Inc. was incorporated in August 1937.)

Prior to the formation of this corporation I was not personally visited by Mr. Baldwin and Mr. Cooper. I saw them at a meeting in Oriskany Falls. The proposed corporation was explained at the meeting. I am not sure who provided the form to fill out in order to incorporate this cooperative. I was at the meeting at which Mr. Baldwin was present.

Q. Did this Cooperative, the Oriskany Cooperative, ever join the Bargaining Agency?

A. There was never any dues paid; no.

We signed up, but no dues were paid after we signed up. We have received mail from the Bargaining Agency right along. I get the Bargaining Agency News. I have received various letters from Mr. Baldwin signed "Charles Baldwin, Executive Secre-
410 tary." I don't recall whether I received a letter from him dated August 29th about the time this federal marketing order went into effect. I received letters every little while, but I wouldn't be able to recall.

Since September 1st, 1938, I was visited by a man who represented himself as an employee of the Dairymen's League. His name was Mr. Washbon. He lives in the vicinity of Nelson, I think. I am not acquainted with him, only as I met him that day. I had heard of him, but I did not know him. He made himself known and as to whom he represented, and wanted to know where I drew my milk and if I had ever drawn milk to the Dairymen's League and I told him I had, and he also wanted to know if I wouldn't like to return, and I told him "no." After that I don't remember as there was anything in particular said about the milk business. He could see from what I said I was not interested. He asked me if I wouldn't like to deal where I would get my exact weights and test and I told him I had always been satisfied where I was and had no fault to find.

There was no cross examination on behalf of the plaintiff or intervening plaintiffs. Plaintiff and the Dairymen's League moved to strike.

Mr. Pratt resumed his examination as follows:

Mr. Washbon visited me in November, but I couldn't say the exact date. I couldn't say whether it was before or after the action was brought by the Jetter Dairy Company concerning the Federal milk marketing order because I do not remember the exact date.

LEONARD FAULKNER was called as witness on behalf of the defendants.

Direct examination by Mr. PRATT:

I am a milk producer residing at Oriskany Falls. I deliver to the Jetter Dairy Company and have been for about thirteen years.
411 I met Mr. E. Manning Gaynor, of Leonardsville, New York, about September 15, 1938. Charles Fox, a milk peddler in Oriskany Falls, asked me to come and see Mr. Gaynor. It is about twenty miles from where I live to Leonardsville. I should say I

drove over there to see Mr. Gaynor, and had some talk with him about the Jetter Dairy Company.

The following testimony was received over the objection of plaintiff and the Dairymen's League on the ground that the evidence is wholly irrelevant and immaterial to the issues of the case and not binding upon either of such parties.

He asked if I understood Jetter hadn't signed the final order, and I told him I supposed he had, and he said "no," that he hasn't, and if we farmers didn't get busy and compel him to sign it at the end of the month we would get a big gypping on our September milk. Maybe he didn't say just those exact words, but it meant the same thing. That was the substance of it. And I told him that I thought the contract had been signed. I told him that I had seen a notice to the effect posted on the Jetter plant. I saw such a notice. I told when I had seen such a notice. He told me that he would advise me to go home and see the farmers and get them together for the purpose of withholding the milk if Jetter didn't sign the Federal order.

I received the Bargaining Agency News and have received letters signed "Charles H. Baldwin" for a long period of time. We were a member of the Bargaining Agency. I signed the contract with the Oriskany Falls Cooperative and heard some mention made of the Bargaining Agency. Lately I haven't received this literature from the Bargaining Agency.

(There was no cross-examination.)

Mr. Pratt resumed as follows:

Since September 1st I have not been visited by anyone representing himself to be with the Dairymen's League.

412 Stipulation

It was stipulated that Floyd Washbon, Cazenovia, New York, is one of 31 subdistrict presidents of the Dairymen's League. He receives no salary but occasionally does work on a per-diem basis. Among his duties is the duty of soliciting membership contracts for the Dairymen's League.

MAX BRONFELD, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I live at 408 Saratoga Avenue, Brooklyn, New York. I run a grocery and dairy store at 409 Saratoga Avenue. I buy milk from the wholesale milk dealers in New York City. We buy from Ferndale Farms. I buy from Caldwell Dairy, which is owned by Jake Beyer. I buy from Breakstone. I buy Breakstone milk from Sheffield Farms; that is, the Sheffield Farms Company truck delivers Breakstone milk to me. I have bought milk from Ferndale for about five and one-half years; since I had the store. I have bought milk from Jake Beyer for five and one-half years at the same time.

I started to buy Breakstone milk in the summer of 1938, a couple of weeks after it was first put on the market.

I buy ten to eleven cases of milk a day from Breakstone Brothers. Altogether I buy from fifteen to twenty cases. Some days the people use more milk. On the average I buy from fifteen to twenty cases a day, except Saturday, when the store is closed.

Just before September 1st, 1938, I was buying five or six cases of milk from Breakstone. I buy nine or ten cases from Breakstone. I started buying nine or ten cases from Breakstone a couple of weeks or two months ago, maybe more.

Q. About two weeks, maybe?

413 A. A couple of weeks; a couple of weeks; five or six weeks; I cannot remember how long this is.

I buy two cases of milk a day from Ferndale now.

Q. Two cases a day. Now for the five years that you bought from Ferndale up to six months ago, how much did you buy a day from Ferndale?

Plaintiff objected to this question and this entire line of testimony. Objection overruled.

A. Not all the times the same. Sometimes more; sometimes less. The average was about 50 or 60 cases a week.

I only buy 12 to 14 cases a week now. Before I started buying from Breakstone I bought about three or four cases a day from Jake Beyer. I buy the same amount now from him.

I have paid Breakstone, or Sheffield Farms Company, for this Breakstone milk since the first of September until now nine and three-quarters cents.

A man came to the store and paid me back three-quarters of a cent a quart at the end of the month on the Breakstone milk. I did not sign a receipt for the money he paid me back and my wife did not sign one. Maybe my wife does the figuring for me as to how much I have got coming, since I don't. I cannot tell you.

I have paid Ferndale nine cents a quart for milk since September 1st, 1938. I have paid Jake Beyer nine cents a quart for milk since September 1st. Sometimes I paid Beyer a little less than that; sometimes I take off one dollar or two dollars—a couple of times. I did not do this with Ferndale at this time.

Q. And some of the times the Sheffield man gives you an extra dollar or two, doesn't he?

A. No.

Q. Now, are there other stores in your neighborhood that sell milk?

414 A. Nine cents.

Q. I didn't ask what for. Are there other stores in competition with you?

A. Nine cents they sell for milk.

I charge ten cents for milk. I have a one-cent profit and these other stores undersell me. Since they have started to sell at nine cents a quart I have lost about four or five cases of business in the last couple of [illegible]

Plaintiff moved to strike on the ground that the prices at wh the named dealers sell milk has no relevancy to the issues involved i the case. Motion denied.

Cross examination by Mr. WALLACH:

I never personally got any rebates from the Sheffield man.

Q. How do you know that your wife got any?

A. He say that he give back.

I cannot remember being present at any time when he came in a paid any money to my wife. I know that my neighbors are sellin for nine cents because the customers tell me so. I get them to a Three houses from my store is a split market.

Motion made by the intervening plaintiff, Holton V. Noyes, t strike the testimony of the witness as hearsay. Motion denied.

Redirect examination:

The Sheffield driver told us he would give a rebate of three-quarter of a cent. I don't know the name of the driver. I pay the drive for the milk every day.

415 ROSE PALEY was called as a witness on behalf of the de fendants.

Direct examination by Mr. PRATT:

I live at 255 Van Buren Street, Brooklyn, New York, and keep a store near Lafayette Avenue and Van Buren Streets, Brooklyn. Th address of the store is 157 Lewis Avenue. I sell milk in the store. I sell about thirteen cases a day. I buy that milk from Glendale Farms, Breakstone, and Dairymen's League.

Breakstone and Sheffield's together have a wholesale truck that delivers the Breakstone milk to my store. The name "Sheffield Farms" is on that truck.

The following testimony was given over plaintiff's objection.

I pay nine and three-quarters cents for Breakstone milk. I pa nine and three-quarters cents for a while until I get my rebate. I get a rebate from Breakstone. Somebody from Sheffield's comes an pays me every month. I just don't remember how much rebate I get because I don't get the same every day. Sometimes I get les or more. It comes out to nine cents a quart. That is, I get three quarters of a cent rebate. I have gotten a rebate about twice, t little after the first, about the third, or fourth day after the first o the month.

Q. Did you get a rebate in September right after the first?

A. Yes.

Q. That was for what month's milk?

A. I am supposed to get it now this month. That will be the thir time.

Each payment is for a month's milk and the money was paid to m personally. I started buying Breakstone milk a month after the came out with the milk. It is about a couple of months, abou

three months, I guess. I bought from Glendale Farms and Dairy League before I started buying Breakstone milk. I also
416 bought from Grand View Dairy. I quit buying from Grand View Dairy when I found out I had too much milk. I saw I had too much so I sent away Grand View. I bought three cases a day from Dairymen's League. I have been buying three cases from the Dairymen's League right along for seven months. I used to buy two, and I raised it to three.

I started buying three cases from the Dairymen's League in the summertime, in the hot weather. It was before September 1st. I pay the Dairymen's League nine cents for milk now. I just cannot remember how long I have paid them nine cents. I paid nine and three-quarters and then they came down to nine. I never got any rebate from the Dairymen's League, but I did get free milk from them. I cannot remember what month that was. I got thirty-five cases of free milk. That was when I started buying three cases.

Q. When did you quit buying from Grand View Dairy?

A. I didn't like them very much.

I stopped buying from Grand View Dairy right after the summer; I cannot remember what month. Breakstone gave me thirty-five cases of free milk. I am buying three cases from Breakstone now and I buy four cases from Glendale. I pay Glendale nine cents for milk.

Q. How long have you paid that?

A. I just cannot remember how long it is. They all came down at the same time.

All three dairies came down in price at the same time. Glendale gave me some free milk about three months ago. I don't like Grand View. Grand View did not give me any free milk.

Plaintiff moved to strike all the evidence of the witness as irrelevant. Motion denied.

Cross examination by Mr. SCHOENECK:

I have been in the grocery business sixteen years. I have
417 a small store. There is one clerk in the store besides myself.

I carry a general line of groceries, everything, groceries and dairy, including flour, canned goods, and things of that sort. I do my own buying.

I have plenty of competition, with the big A. & P. stores, and stores of that kind. There is a constant change in the price of all groceries and a constant attempt on my part to buy the various types of groceries cheaper. I have to meet the competition of the neighboring grocery stores. If they lower their prices on canned goods I have to lower mine.

The Breakstone people began selling me milk sometime last summer. I told them I would buy some milk from them if I would get something free.

Breakstone gave me the thirty-five cases of milk about a month after I asked for it.

Q. About a month later. And then when they gave you the thir five cases of milk, you told the Dairymen's League man about th didn't you?

A. That was first, the Dairymen's League and then I told Brea stone. I got from the Dairymen's League before.

Q. When was that?

A. About five months ago.

Q. About five months ago?

A. Something like that.

Q. That was before the federal and state orders were issued?

A. That is right.

I am buying three cases of milk from Breakstone now and I ha been buying three cases from them for about two month
418 Before that I bought a case, only one. I am buying thr cases from the Dairymen's League now and was buying thr cases from them all summer. I am not buying any more milk fro them now than I have been during the last year.

This free milk that I get from the Dairymen's League last summ was the first free milk that I had ever gotten from milk distributor I asked the driver of the Dairymen's League for the free milk. was paying nine cents for milk at the time I got the free milk a I am paying nine cents for milk now. I pay all the companies t same price.

I was dealing with four dealers at one time and now I am deali with three dealers. I discontinued dealing with Grand View Dai about three or four months ago; I just don't remember exactly.

Q. It was before the federal order came down?

A. Yes.

I was paying nine and three-quarters cents last summer and I a paying nine cents now. I don't remember who reduced the pri first. We heard—I heard that somebody else gets it for nine cen so I started to kick. I don't remember who did it first. I kicked all of them and they came down to nine cents. I heard that somebo else was buying their milk cheaper than me.

Cross examination by Mr. WALLACH:

Q. Mrs. Paley, isn't it a fact you haven't paid nine and thr quarters cents to Glendale for at least a year?

A. I cannot remember. I did pay nine and three-quarters, but how long I cannot remember.

I have been in business sixteen years and remember when we h price fixing in the city of New York for milk. I remember a time when the Board of Control was in existence that you could sell the bottled Grade B milk for less than eleven cents. I can recall whether I paid Glendale at the rate of nine and thi
419 quarters cents after the law expired. The law expired almo two years ago. I did pay nine and three-quarters cents in last two years. It is very hard to remember when I reduced the pr paid to Glendale. I don't think it was reduced more than a y

ago; I think it is less than a year. I would say it is something like about eight months ago. I cannot remember for sure.

Redirect examination by Mr. PRATT:

Q. Did you pay less to the Dairymen's League at that time too?
A. No I paid them all the same. When I got it cheaper, they all came down to the same price.

I paid Dairymen's League nine and three-quarters cents and I paid Grand View and everybody else the same. During the strike in November and December of last year I paid nine and three-quarters cents for a short time.

HERMAN LAVENDER was called as a witness on behalf of the defendant.

Direct examination by Mr. PRATT:

I live at 780 Beck Street in the Bronx, New York City, and have a store at 694 Dawson Street in the Bronx. I have been in
420 the grocery business about three years or so. I buy milk from Sunnydale Farms, Queensboro, Meadowbrook and Samuel Adler. During November 1938, I bought milk from Sheffield Farms Company. I received from the Sheffield Farms Company the paper marked Def. Ex. No. 6 for identification.

At the time I received that receipt I received a sum of money, exactly how much I don't know. At that particular time I received the money I was quite busy, but I know it was more than one dollar; exactly how much I don't know. I couldn't remember just exactly how much I received.

(Witness was shown Def. Ex. No. 6 for identification and testified that he received $1.48.)

All the following evidence was given over plaintiff's objection that such evidence is immaterial.

During November 1938, I received twelve quarts of milk to the case from Sheffield Farms Company. I also received more than twelve quarts to the case during that month but paid the driver for twelve quarts. When I got more than twelve quarts I received thirteen to the case. That is, I got one quart free.

I was charged nine and three-quarters cents for Breakstone milk delivered to me during November 1938.

It was not the driver that gave me the money; it was the salesman, or the representative. He gave me Def. Ex. No. 6 when he paid me the money.

(The receipt previously marked for identification was received in evidence as Def. Ex. No. 6.)

I started buying milk from Samuel Adler about February of 1938 when I purchased the store. I average two cases a day in purchases from Mr. Adler and averaged that about September first. I have paid Mr. Adler or his company nine cents for milk since Sep-
421 tember first. I have not at any time received an extra bottle of milk per case from him. I buy on the average two cases

of milk from Queensboro and have paid them nine cents. I am paying them eight and a half cents now. I am paying Adler nine cents. I never got any extra milk from Queensboro. Until three days ago I paid Sunnydale nine cents; now eight and a half cents. I bought six cases a day from Sunnydale. I buy two cases a day from Meadowbrook and pay them eight and a half cents. Since September 1st I have not had any free milk from any of these corporations other than Sheffield Farms Company. I buy Breakstone milk from the Sheffield Farms Company.

Plaintiffs moved to strike all the evidence of the witness on the ground that it is irrelevant. Motion denied.

Cross-examination by Mr. McCarthy:

At present I am not buying any Sheffield or Breakstone milk. I formerly bought both Sheffield and Breakstone but not at the same price. I paid fourteen and one-half cents a quart for Sheffield Grade A milk; I think it was more than that. One case a day is all I have ever purchased of Breakstone milk.

Cross-examination by Mr. Wallach:

I got thirteen quarts of Breakstone milk for a case of twelve but not of Sheffield milk. And this Def. Ex. 6 is a receipt for the Breakstone milk that was purchased, not the Sheffield milk. I really got it from Breakstone.

Cross-examination by Mr. Schoeneck:

422 I am not buying any Breakstone milk now. I discontinued buying from Breakstone about two weeks ago. I am not buying any milk from Sheffield. I was buying one case of milk from Breakstone at the time I discontinued. When I discontinued, that business had fallen off. At present I pay Mr. Adler nine cents a quart for milk. I pay eight and one-half cents to Sunnydale, Meadowbrook, and Queensboro. I am buying milk from three of these companies at eight and one-half cents and I pay nine cents to the other. I don't buy any milk from the Dairymen's League.

Redirect examination by Mr. Pratt:

I didn't quit Sheffield's because of any personal controversy with the driver. I buy my Grade A milk now from Borden's.

Q. And that is a small quantity?

A. Grade B. Four bottles.

The Court. Just a minute. Are you now paying one or two prices for milk? Is he paying all the same, all one price for one, and another price to others?

The Witness. That is billed for nine, but it is understood that after this week is up I will get paid back for as many cases so many half pennies on every bottle from Samuel Adler.

By Mr. Pratt:

Q. So that the price to Samuel Adler will really be eight and one-half cents to you?

A. That is right.

ISAAC HOCH was called as a witness on behalf of the defendants.

Direct examination by Mr. PRATT:

I live at 86 Bay 26th Street, Bensonhurst, Brooklyn, New York. I have a dairy store at 8406 20th Avenue. I buy milk from Ferndale and Balsom. I also buy from Borden's and Sheffield's. I have been buying about five cases a day of milk from Ferndale for about a year. I have been buying an average of nine cases from Balsom for about two months, since September 1st, 1938. Mr. Balsome has a dairy of some several hundred cows himself. I started buying from Balsom because I was getting a better price. Before I started buying from Balsom I was buying from 15 to 20 cases a day from Ferndale.

At the time that I started buying from Balsom I had been paying Ferndale nine cents a quart. Mr. Balsom charged me eight and one-half cents. That must have been in September 1938.

Q. When did you start buying from Sheffield?

A. Sheffield, I buy all the time Sheffield milk.

RAYMOND J. BARBER was called as a witness on behalf of the defendants.

Direct examination by Mr. PRATT:

I live in Norwood, New York. I am manager of the Norwood Creamery Company. I am a graduate of Clarkson Tech, and Harvard Business School.

The creamery is situated in Norwood, St. Lawrence County, between Malone and Ogdensburg. That is about 380 or 385 miles distant from New York City by rail mileage.

The name of the corporation is Norwood Creamery Company, Inc. It is a stock corporation and not a cooperative. It is privately owned. The corporation is engaged principally in the manufacture of butter from cream bought from farmers. There are about 25 farmers within a radius of 10 or 15 miles of the plant who furnish us with cream. Cream is also purchased from farmers living some further than that.

The skimmed milk from the whole milk from which the cream is derived remains on the farms. We do not receive the skimmed milk, at any rate and we do not know whether the farmers retain it or sell it or what they do with it.

We pay for the cream and the cream contains the butter fat which is part of the milk content. We manufacture the cream into butter; we pasteurize it first. We manufactured cream into butter in the month of September 1938. We also manufactured cream into butter in October 1938.

At this point the following objection was interposed to this line of testimony and overruled.

Mr. MCCARTHY. The Government objects to any evidence along that line, Your Honor. It is nowhere alleged that the price of milk

to be manufactured into butter is not the same for all handlers. It is nowhere alleged that the Jetter Dairy Company manufactures
425 butter. If the price for butter is the same to everybody who manufactures butter, it is difficult for me to see how the company which does not manufacture butter can complain as to those prices.

There are not, to my knowledge, any other butter factories within the state of New York engaged wholly in the manufacture of butter; that is, any other company than mine. The butter from my factory is sold mostly in the northern part of the State. If we draw a circle through Watertown and around to Burlington, Vermont, that would account for a good 75 per cent of our sales. We sell some in the city of New York when we have an especially large volume of cream, as we sometimes do in the summertime; as a seasonal matter, we do sell some butter outside of that area which would mean New York or Boston.

I have been engaged in this particular business since March of 1934. We always comput the value of cream every month as a routine matter.

The price paid in September 1938, for the cream equivalent of 100 pounds of 3.5 milk averaged to farmers 88.4¢ in Norwood. That is delivered in Norwood. In October we paid 90.1¢. That is the average. We pay every day.

Cross examination by Mr. McCARTHY:

It is hard to say the average amount of butter per month which we produced during the past year; the average varies so widely. I can give you the year's figure. I can give you the figures say for September and October 1938. I have it here in terms of butter fat.

'Butter fat bought from farmers in September 1938—38,499½
426 pounds of fat, and in October—30,616.1, for November—19,008.6.

I haven't the figures for last spring with me. This is just for three months. I can state approximately that for April, May, and June of 1938 it was on an average of 50,000 pounds for those months; that is it would be less than that in April; it would probably be 30,000 in April; 40,000 in May and 50,000 in June. My average was too high. It is within 10,000 pounds one way or the other.

I don't know what the prices fixed in the Federal Order were for the months of September and October. I don't know whether they were more or less than the prices we paid. We buy all kinds of cream from the farmers, both high and low content. It will be anywhere from 15 per cent fat to 60 per cent fat; and it will be in varying degrees of sourness and cleanliness. It is separated on the farm and it is necessarily subject to all sorts of variations, separator speeds, milk temperature. No two farmers have the same kind of cream as to butter fat content.

I don't know whether any of our farmers are qualified for the New York Market or not. We sell our butter both in tubs and in

packages. Much of it is sold under our own trade name, "Norwood Brand." Another part is sold under private handlers' brand names. Some of it is sold without any brand at all; that is in tubs sold in bulk. We sell substantially all of that butter in the upstate New York market except in those times when there is an especially large quantity, more than our local market up there can absorb, and we have to ship some outside in order to avoid building up a heavy inventory.

Our principal competitors in the sale of butter in that section are other manufacturers, the local manufacturers up there. They are St. Lawrence Creamery Company, Potsdam, New York; De Puyster Creamery, De Puyster, New York; Chateaugay Creamery, Chateaugay; Parishville Creamery, Parishville, and then besides the local butter makers there is always competition from western butter which is shipped in—Armour and Swift, I mean those butters.

Q. That is a substantial competition from the western creameries?

427 A. Oh, yes.

I wouldn't dare say whether our butter commands a higher or lower price than the nationally advertised brands. Some of the nationally advertised brands are very fine butter, and to say that our butter commands a premium price over that would be outside of what I know. I cannot answer that. There are recognized brands that are good and that are bad. Our butter generally gets more money than all the bad brands, and as good a price as the good brands. There is a certain preference up around our section for Norwood butter.

Q. Could you furnish us with figures as to the actual amount of butter that you made during the months of September and October?

A. I can give you butter fat. Now butter can be computed from this by simply adding one-quarter of this figure on to it. In other words, our butter contains 80 per cent butter fat. Therefore when I say we churned a total of 108,900 pounds of butter fat in September, that would mean therefore about 135,000 pounds of butter.

The COURT. I thought you said 38,000 pounds in September.

A. That was cream purchased from farmers. That is the question as I have understood it.

For commercial sweet cream purchased from other places we paid an average in September of 94.7¢, that is, cream that we buy from such companies as the Dairymen's League and Sheffield when they have more cream than they need for door-step use. That is 3.5 milk equivalent. That comes to 27.05¢ per pound of butter fat. We have an over-run of 20 per cent of the butter weight.

For October, 1938 on commercial sweet cream we paid 94.5¢, that is for 3.5 milk equivalent, and for November we paid 98.6¢.

Cross-examination by Mr. WALLACH:

I am treasurer and manager of the Norwood Creamery Company. I get my figures from our own company records. It is a small com-

pany and we all have a hand in doing the figuring. I took the figures from the books. Entries are made in the books by three different people. There are entries as to writing checks; as to receiving cash; and as to invoicing customers and they are done by three different persons for the purposes of internal check. In the compilation of these figures that I bring with me I took them off the books, I took these figures from the record of the corporation personally.

Cross-examination resumed by Mr. McCarthy:

The actual prices that my company paid the farmers per pound of butter fat was for the month of September 25.27¢ and for the month of October, 1938 25.74¢. The figure for the price paid to farmers for butter fat averaged in November 26.38¢.

Cross-examination by Mr. Schoeneck:

The farmers from the surrounding territory separate the milk on the farm and bring it to the creamery in the form of cream. The butter fat content as it comes to us varies between the farmers and as between the trips of the same farmer. When it is brought to the creamery, we weigh it and test it and then pay for it strictly on the basis of the butter fat. We don't take into consideration the number of pounds of milk that is required to produce a given amount of butter fat; we do not know that.

Butter is all that we manufacture. I don't know whether we have what you call a low-cost producing plant. I don't know what other people's costs are. I don't know whether or not if you are manufacturing butter in a shipping plant it would cost more to produce it than it does according to the methods employed in my plant. I haven't made any study of it.

With the exceptions I have mentioned our market for butter is the market up in the north country section. In addition to the local butter we are in competition with butter which comes from the west. When I speak of Swift's and the "Land-o-Lakes" and that type of butter I am talking about the butter that has a country-wide distribution. I don't know whether Swift's butter is sold in New York City but I think you can assume that it is.

When we have got a surplus of cream that is brought to our plant and haven't a local market for it, we sometimes dump it into New York City. This does not occur every June. It sometimes occurs in September and October. We ship sometimes to New York and sometimes to Boston.

I don't know how many times a year we ship to New York, that is highly variable, sometimes not at all. We shipped some last year but I don't know how much we shipped last year. To my best recollection we shipped about 40,000 pounds to New York in June and October of this year. In June we shipped 30,000 pounds and in October 10,000. We dispose of it in the market in New York by sending it to a firm that buys butter and then sells it again. They do not sell

as an agency. They take title to the butter and pay us immediately for it at the time when they receive it.

I cannot answer whether or not this Western butter is shipped into New York City and sold in competition with our butter but I have my ideas on it.

The production of my plant varies widely throughout the year. It is operating every day in the year, excluding Sundays and holidays.

I know that there exist shipping plants which manufacture butter and send some of their milk to New York as fluid milk but I am not familiar with the operations of such plants.

Redirect examination by Mr. PRATT:

The commercial cream which I buy from the Dairymen's
430 League must all be cream from approved sources. It must be because all Dairymen's League farms are approved, if I am not mistaken. Milk from approved sources is no more valuable so far as the products that I get from such cream. It is necessary to have sweet cream to make butter which brings a premium. There are grades in the quality of butter and to make a good quality of butter you must have good sweet cream. Sweetness is one factor, although there can be very good butter made from sour cream if it has a good clean flavor. I would say that milk which was approved under the New York City Health Inspection would have a better flavor ordinarily than cream that was not produced under the conditions required by that Department.

Q. So that you pay a little higher price for this commercial sweet cream, is that right?

A. Not for that reason. We do pay a little higher price, but it comes in large quantities and that accounts for it.

I don't know what becomes of the skimmed milk with reference to this cream we buy from the Dairymen's League. It is not delivered to us.

We paid for the butter fat content of 100 pounds of milk the sum of 94.7 cents for instance, in the months of September, and 94.5 in October; and 98.6 in November. All we get is the cream. Whether or not the Dairymen's League sold the skimmed milk I do not know.

There are 3.5 pounds of butter fat contained in 100 pounds of milk of 3.5 per cent butter fat content. To determine the price of 100 pounds of milk equivalent you multiply the price per pound of butter fat by 3.5.

ISRAEL HOCH was recalled as a witness on behalf of the defendants.

At this point defendant Jetter Dairy Company moved to amend the 31st paragraph of its amended answer by inserting after the words "Bargaining Agency" in the 6th line the words "and other competing dealers and handlers." Plaintiff made the following objection which was joined in by all the intervenors:

431 Mr. MCCARTHY. That amendment, Your Honor, is rather vague, but if it is intended to allege that the order is uncon-

stitutional because it exempts producer distributors from paying into the producer-settlement fund, as I assume that it is intended, we object to it on the ground that that is no defense whatsoever to this action.

The court overruled the objection and granted the motion.

Direct examination by Mr. PRATT:

I am buying two bottles a day of grade B and four bottles a day of grade A milk from Borden's. I buy two cases a day of the milk produced by Borden's subsidiary, Reid's Union Dairy Milk Company. They refused me a rebate unless I would take more than two cases of milk. I do not buy any milk of the Sussex Milk and Cream Company.

Q. Did you have a talk with any agent of Borden's as to the rebate on this Reid Union Dairy milk if you took more than two cases?

A. Yes.

I don't know the name of the man that came down to talk with me. I talked to an employee. I had a talk with the driver about the discount, I paid the driver every day for the milk purchased from Borden's Company—for this Reid's Union Dairy milk.

I also buy milk from Sheffield's. I pay the driver for that milk. I also pay the driver of the Ferndale Company for its milk and the driver of the Balsom Company for its milk. I discussed with the driver the question of price to be paid for milk in the purchases that I made from Ferndale of milk since September. The Balsom price was fixed right from the office. I called up the office. Sheffield's had a representative down there from their place who fixed the price.

"Q. And with Borden's who fixed the price?

432 A. Also a representative.

Q. Was it the man whom you say the driver sent down with whom you talked about the price?

A. Yes, that is the same man.

Q. Did you pay for milk on the terms that you talked with the man?

A. I paid 9¾ cents, but I was promised to get a rebate, but never got it so far. The Borden man promised to give me a rebate of ¾ of a cent. I have been buying Borden's milk since I was there, about nine months.

Q. When was it he told you he would give you a rebate of of a cent? What month was that?

A. That was since the September raise when they fixed the price of all at 9¾ cents.

After they all gave me 9 cents I asked him to give me the same rebate. He promised to, but I never got it. I buy four cases a day of Breakstone Milk from Sheffield's and I buy two cases of Reid milk from Borden's.

I paid Ferndale 9 cents and paid Blasom 8½ cents. I never got any free milk from Breakstone, only from Ferndale. I paid 9¾ cents for the Breakstone milk and got a rebate on that of ¾ of a cent. That was paid every month in cash. I signed a receipt for the amount of cash that I got, a receipt on a form similar to Def's. Ex. No. 6. A man from Sheffield comes down and brings me that rebate.

The intervening plaintiff moved to strike as follows:

Mr. McCauley. On behalf of the Intervening Plaintiff Dairymen's League I move to strike the entire testimony first upon the ground that it is immaterial to the issues in this case; and
433 second, on the ground that insofar as it relates to rebate payments it is either hearsay in its nature, or is testimony which is not binding upon any of the parties in this case.

Plaintiff and the intervening plaintiff Holton V. Noyes joined in this motion.

Cross examination by Mr. McCauley:

I have been in the dairy business fifteen years. My place is located at 8406-20th Avenue in the Bensonhurst section of Brooklyn. I am engaged in competition with other stores located somewhat near to my store. I have to meet their prices.

Q. Well now the truth of the matter is that whenever you hear from any of your customers that they are getting milk at a price lower than that which you have been paying that you immediately ask those from whom you have been purchasing milk to give you the same price, isn't that right?

A. Yes.

Cross examination by Mr. McCarthy:

I cannot remember exactly what I was paying for milk during the months of July and August, 1938. I think it was 9 cents. On the first of September all the companies delivering milk to me went up to 9¾ cents. That condition remained only a couple of days.

Q. When was it that Ferndale came down below the 9¾ cent figure?

A. Well, I believe I got that from the first day on." I mean they went up to 9¾ cents, but I got back my rebate to 9 cents from the first day on from Ferndale.

Redirect examination by Mr. Pratt:

Q. Who was the first company that dropped the price?
434 A. They all dropped the price.
Q. On the same day?

A. Yes.

Earl R. Mills was called as a witness on behalf of the defendants.

Direct examination by Mr. Pratt:

I reside at Watertown, New York. I am a manufacturer of cheese and have been engaged in that business ten years. My factories are

ville, R. F. D. The factory is called Eagle Four Corners. I ha operated the South Rutland factory during the entire time I have be in the business. I acquired that April 1, 1929, and the others a varying, some of them have been acquired since. All of these factor are within the production area from which some milk is shipped the Metropolitan area of New York City. There are near my seven cheese factories, milk receiving stations which have been approved f shipment of milk to New York City.

Prior to September 1, 1938 I received milk in those five factor from approximately 250 or 300 producers. Since September 1, 19 some of those producers from whom I formerly received milk co plied with the requirements of the Board of Health in the City New York so as to deliver milk to approved stations.

In these plants I manufacture American cheese primarily. T majority is American cheese.

Q. And with whom is that cheese sold in competition?

A. The world markets, I suppose, with everyone.

In New York State some of my competitors are Miller Richards Company, a subsidiary of Kraft-Phoenix, a subsidiary of the Na tional Dairy; and then there is an independent cheese company, Shef ford Cheese Company, and the McAdam Cheese Company in Heuve ton; and Leslie Virkler in Syracuse.

435 The Borden Company is engaged in the cheese busines through a subsidiary. There is a plant operated by the Borden Company or one of its subsidiaries which makes cheese in the terri tory where I operate, at Antwerp. It is about 40 or 45 miles from my nearest plant.

My cheese is sold in competition with cheese made by the National Dairy and Borden's and other people from milk which is approved for New York City fluid consumption. I am in direct competition with that cheese. I manufactured cheese at my five plants in the month of September 1938.

We paid twice: we separate the months into two halves, the first to the fifteenth, and then from the sixteenth to the end. For 3.5 milk the first half of September we paid 94 cents, and the second half $1.07.

By dividing the two to strike the average, the average price was $1.005. That would vary a little bit because the amount of milk would vary a little from the first half to the last half.

I believe the class IV–B price under Order No. 27 was 83.2 cents in September.

The milk which I purchased ran higher than 3.5 butter fat content in September. The September average butter fat content was 3.712. The average base price I paid for milk of that butter fat content for September was $1.09 a hundred.

I have computed the price of milk of 3.712 butter fat content under Order No. 27. I arrived at a price of 87.45 cents.

I considered this price of $1.09, which was paid, the fair and reasonable market value of the milk in the zone where my plants are

ted. I think we have been able to manufacture cheese and make reasonable margin of profit after paying that price. I haven't the figure so I could be sure, but that is my best judgment. My nearest plant is in the neighborhood of 240 miles, I think, or 250 miles distant from New York. That is the plant at Lowville.

My plant is within four miles of Lowville, probably west. It is off from the railroad.

My next factory is located about 10 miles from Watertown towards Copenhagen, towards Lowville. It would be about 35 or 40 miles from Lowville by railroad. My other plants are also beyond the 200-mile zone.

Since September 1, 1938, some of my producers who formerly delivered to me have left my plants, and milk is now going to various approved plants for New York City. Some of those plants are the United Milk Products, at Adams Center, and the Northern Milk Corporation, at Adams, and Hygienic Dairy Company, in Watertown, and the North Eastern Dairy Corporation, at Ogdensburg, and Philadelphia Milk Producers, at Philadelphia. Mr. C. A. Brown is the head or the manager of Hygienic Dairy at present. I understand he is also head of the Adams plant and of the North Eastern plant. Philadelphia Milk Producers is Mr. Maynard's Company. The United Milk Products at Adams Center is not operated by Mr. Brown. The three companies managed by Mr. Brown are not also engaged in the manufacture of cheese that I know of. Of course, they handle milk and produce cream. I don't know just what their products are, what their output is.

I am not able to state whether or not skimmed milk had any value in the months of September, October, and November, 1938. Various types of cheese are made from skimmed milk, as are also milk powder and casein.

Q. Casein?

A. Yes.

By the Court: I would like to ask this witness if he makes any of those products he mentioned just now.

A. The various types of skimmed cheese we do; that is, part skimmed cheese; we make some of those products.

Part of the milk used in making this cheese is skimmed and the cream sold elsewhere. I am not able to state the value of the skimmed milk which I utilized in making part skimmed cheese, that has not any definite price. It would vary in price from day to day and time to time. I would have to confine myself to any range within which it would vary from day to day, the low and the high.

I have made part skimmed cheese all during the greater part of the ten years I have been in the cheese business.

I sell my cheese in practically every state East of the Mississippi. I sell in competition with National Dairy and Borden's in the cheese market.

The plaintiff moved to strike all the testimony of this witness on t ground it is irrelevant and immaterial and not covered by any ple ings in this case and not germane to any of the issues in this ca All the intervenors joined in this motion. Motion denied.

Cross examination by Mr. MATHERS:

Besides American cheese and part skimmed cheese I manufactu or process at my five plants Munster, Limberger, and some types Italian curd cheese. I believe I am familiar with the Marketi Area as defined in Order No. 27. None of my plants are approv by any of the Health Authorities in that Marketing Area for t sale of milk in that Marketing Area. I would estimate about percent of the milk received in my five plants is manufactured in American cheese. During the month of September the average pri per pound received by me for American cheese manufactured at t five plants was approximately from 12¼ cents to 12¾ cents p pound f. o. b. the plants.

Of the remaining 10 percent of the milk received at my five plan probably a little over half would go into the Munster and then may one-quarter or so would be in Limburger. It is rather indefini It depends on the market. The Munster cheese price received follow the American cheese market very closely. The price is about t same.

I do not think we made any part skimmed cheese in the mont
438 of September. I do not think we made any in October. I so, it was a very small amount. In November we manufa tured some part skimmed cheese. We manufacture various type that is 3–1; three part skimmed and one part whole. I am not sur what price we got for that. That changes, of course. There reall isn't a market for that. You get the amount you can for that. I believe it went around 7 cents per pound. The proportion of th other type is 2–1. I think for that we received around 8 cents These are the Italian cheeses.

During the month of September we shipped whey cream fro our plants. That is sold on a butter fat basis, so much per pound butter fat. The rate per pound is determined by the New Yor Market.

439 I cannot give you any idea of the volume of cream sold ou of my five plants during September but per 1,000 pounds o whey it will vary from 2 to 2½ pounds of whey butterfat.

During September we received at our five plants in the neighbor hood of 35 or 40,000 pounds of milk a day. That is an estimate. I haven't lately purchased milk from any source other than directl from producers. I didn't during September. In the past we hav occasionally received from from other sources than producers.

Cross examination by Mr. SCHOENECK:

I would say that the cheese which I manufactured is in a country wide competition. My cheese is shipped into almost every state Eas

tion with cheese manufactured in the cheese plants in the State of Pennsylvania and in the State of Wisconsin and all the Western States. Wisconsin is a very large producer of milk and a large manufacturer of butter and cheese. Their products come to the New York Market.

Redirect examination by Mr. PRATT:

Referring to 3.5 butter fat content in October, the first half I paid $1.12; the second half $1.12. It averaged $1.12 for 3.5 milk. The Administrator's price for that period was 92.2 cents. For November we paid $1.03 the first half; and $1.13 the last half, an average of $1.08. The Administrator's price for that period was 87.5 cents, I believe.

NELSON ALL was called as a witness on behalf of the defendants.

440 Direct examination by Mr. PRATT:

I reside at Westford, New York. I am a milk producer and an secretary of the Worcester Cooperative Association, Inc. That cooperative was organized about the 24th of May 1938. After its organization it built a milk-receiving plant located in the town of Worcester, county of Otsego, New York state. That plant is approved for the sale of milk shipped to the Metropolitan Area. I believe at present 68 producers belong to the cooperative. It is a solely farmer-owned cooperative, a stock corporation with the stock all held by milk producers.

That station was approved by New York City, I believe, the first of September 1938. The corporation has a license. I don't remember the exact date that they got it. The license was issued by the Department of Agriculture of the State of New York. The corporation started shipping milk to New York on the first of September 1938.

On behalf of my corporation, with the help of an assistant, I made application to Mr. Harmon as Administrator, for qualification for cooperative payments which are provided for in Order Number 27. The assistant was Mr. Cruickshank of Utica, and accountant employed by the cooperative. He made out some form that was provided by the Administrator's office which I delivered to the Administrator. It was sent to us from the New York office of the Administrator and I mailed it back. (The plaintiff moved to strike all testimony of the witness relative to application for qualification to receive cooperative payments. Motion denied.)

Our milk plant receives all of the milk of its members. The cooperative of which I am secretary collects the money for milk received at the plant. We have a plant capacity with the equipment which we now have up to 1,000 40-quart cans daily. About 100 cans are being received at that plant daily. We take all the milk of the 441 producers who are members.

The corporation first sold its milk September 1 to the Eastern Farm Products Company, Brooklyn. We delivered to that company

It is a distributor in New York City and is engaged in the whol saling of milk to stores.

(The following testimony was given over objection interposed Dairymen's League that it is irrelevant, incompetent, and not bindi upon it.)

I had some talk with one of the officials of Eastern Farms, Nath Sacks. I believe he is president of Eastern Farms. Mr. Sacks s that under present conditions he was unable to accept this milk the butterfat content was too high; that he, under the present orde was unable to compete with the market and pay the butterfat price The butterfat content of such milk was running at an average 4.1 percent. That called for a payment of a premium of 24 cent over the base price.

I had a telephone conversation with Mr. E. Manning Gaynor the about disposing of our milk. I was referred to him by someone, believe Mr. Sacks.

I went to the Administrator's office in that connection and w talked with Mr. Harmon at the Administrator's office. By "we," mean Mr. Barnes, the president of the cooperative, and myself. Mr. Harmon told us that Mr. Gaynor was in a position to place this milk for us. We then talked to Mr. Gaynor. He told us if we wanted to divert our milk that they would accept that milk at the Queensboro Farms at Canastota. We then shipped the milk to Queensboro a Canastota.

Our plant is equipped simply as a receiving plant. We diverted our milk to the Queensboro plant at Canastota until about the twenty-sixth of October, I believe. Supbsequent to the time that our milk was diverted and delivered to Canastota we sent into the Market Administrator a statement of the amounts of money
442 which we made claim for. That was for milk delivered dur- ing September and October. An auditor from the Adminis- trator's office came to check with our auditor, in November sometime. They checked our records. The names of the auditors from the Administrator's office are Mr. Lambert and Mr. Murrary. They came together. Our auditor, Mr. Cruickshank was there. There was agreement between the Administrator's auditors as to the amount found to be due to my corporation. The amount agreed upon was $1,797. That amount was not paid to the cooperative. $145 was paid, I believe it was the twentieth of December. I did not receive a copy of the alleged audit on which that payment was based. That amount was arrived at upon the alleged audit of Mr. Aex. That payment was withheld until we made additional payments to the fund. I am not quite sure how much we paid into the fund before we received that check but I believe it was around $900.

Our plant is in the 200-mile freight zone.

We have not received any decision as to our application for payment under the provisions of Article seven, Subsection five, of the Order. (Plaintiff moved to strike the testimony of the foregoing

...ness on the ground that it is irrelevant to any of the issued in the ... Motion denied.)

Cross examination by Mr. McCarthy:

We made our application on or about the tenth of October. I ...n't the exact date. I believe we filed our report for the month of ...tember on or about the tenth of October. I don't know the exact ...te. I am not just sure on what date we filed our October report ...d I believe that it was filed on or about the tenth of November. ...e filed our November report in December. When these auditors were up at my plant we did not sign any written statement
443 or contract agreeing to the amounts of these payments. This was simply an oral agreement that I had with the auditors, Mr. Lambert and Mr. Murray. They told me that their examination of our records indicated that the amount of $1,797 was due us from the pool.

Q. You don't know that these auditors had any authority to bind the Market Administrator as to the correctness of the figures which were arrived at on that date?

A. Not to my knowledge.

We got the $140 on or about the twentieth of December. The payment of $900 into the pool was the payment of our obligation to the Producer Settlement Fund for the month of November. We claimed these payments due us from September and October milk. We did not owe money to the Producer Settlement Fund for the month of October but did owe some money to that fund for the month of November. I couldn't be certain as to the exact amount. I believe it was around $800 and some odd dollars. We were obliged to pay that to the Administrator before we had any kind of settlement.

Q. The Market Administrator then refused to pay you the money which was due you for market service payments until you paid your obligation to the pool?

A. That is right.

Cross examination by Mr. Wallach:

I testified on direct examination that we had a conference with Mr. Harmon after Eastern Farms refused to purchase our milk. He told us to go and see Mr. Gaynor. I telephoned Mr. Gaynor. I did not know him and I had not met him before. With reference to the milk, I explained to him that we were asked to divert our milk by Mr. Harmon.

444 The fact was we had asked Mr. Harmon where we could divert our milk. We happened to go to see Mr. Harmon because we did not have a market for our milk after this Order. Mr. Sacks of the Eastern Company told us to go to see Mr. Harmon. Mr. Harmon told us to speak to Mr. Gaynor. Mr. Gaynor said he would help us and find a market for milk and he did but we weren't satisfied with the price we received.

Q. He didn't force you to deliver your milk to Queensboro did he
A. He did not.

He said that would be a good place. He offered us the facilities of the Dairymen's League but we wouldn't put our milk in there. He did not offer us the facilities of Sheffield. He asked us if we wanted to sell our milk to the Dairymen's League and we refused. He gave us the opportunity of the facilities of Queensboro and we accepted. After we delivered milk to Queensboro for some time we stopped selling milk to Queensboro and went back to Eastern Farms for one day. We then went back to Queensboro and are now selling to them. We stopped selling milk to Eastern Farms the second time for the reason that Eastern Farms thought they might be able to use that milk with this percentage of butter fat but found out they could not and we then went back to Queensboro.

I was present at the conversation between the auditors of the administrator and Mr. Cruickshank, my auditor. The paper that Mr. Pratt showed me was typewritten by Mr. Cruikshank at his office after the audit. I am not certain how long after the audit this paper was typewritten. It was not the same day. The
445 auditors from the Administrator's office possibly never saw that paper at all, that exact paper.

The auditors received their figures from our books. I don't know where Mr. Pratt got that paper. I would have to have my books to be exactly sure, but the amounts here stated on the paper that Mr. Pratt showed me are the exact amounts, to the best of my knowledge that are on the books.

Cross examination by Mr. SCHOENECK:

I have been in the milk business since the beginning of this co-operative. Prior to that time I have been farming. I had twenty-five cows. When I became an officer of the cooperative I sold my milk to Eastern Farms, a large concern in New York. I imagine that they buy milk from other cooperatives, I am not certain. I have seen their plant in New York City. I do not have any idea how much milk they handle. I do know they handle a considerably greater amount of milk than they buy from me. They are handlers, I believe. My cooperative is also a handler. I do not know of anything in these orders which fixed the price of milk in a transaction between a handler and a handler. I have read the orders several times.

The representative of Eastern Farms told me that he was unable to take my milk. He didn't take our milk from that time on. There was some discussion with him with reference to the high butter fat content of our milk. He said he couldn't use it in that form at that time because of the high butter fat test. This man, Mr. Sacks, suggested that we get in touch with Mr. Harmon.

The President of my company and I visited Mr. Harmon at the Hotel Commodore. We talked of diversions. Mr. Harmon is the man who mentioned the diversions. He said there were several

which would take this milk and he said that was what his
tment was set up for. I did not ask him to tell me what to
do with the milk. He volunteered that information.
Our plant is in the town of Worcester. The next receiving
plant is, I believe, five miles either side of us. They are both
the same distance. We eventually took this milk to Queens-
at Canastota, which is around one hundred five miles away.
field and the Dairymen's League own these plants that are
n five miles of us. Mr. Harmon suggested that we could take
milk to the Dairymen's League plant which is five miles from
plant and we refused to take it there. We preferred to deliver
Canastota.
that conversation with Mr. Harmon he said we could arrange
that the milk would be taken by the Dairymen's League. We
ed it. We preferred to take it one hundred and five miles. I
not certain whether that plant is a butter factory or not, I have
r been there. At all events they took the cream with the high
er fat content. I do not know whether that cream was used for
purpose of making butter.
We were entitled to a uniform price on that milk, subject to the
ter fat differential, and that is exactly what we would have been
tled to if we had sold the milk to the Eastern Farms. We were
erned by the uniform price in either event.
am not certain when we took this milk to Canastota but I believe
was the 26th of September. We were entitled to a payment from
settlement fund at the end of that month and we made a claim
it. I am not certain as to the amount of the claim. We based
claim on the milk diversion, the milk that went to Canastota,
d on our cooperative handling charge. The claim represented
difference between the net pool price and the price we received
r our milk.
We based our claim on the milk that was used for manufacturing
rposes. I do not know whether this Canastota plant was a butter
factory but we learned that the milk went into butter. The
basis of our claim was that the milk which we sent to Can-
astota was used for the manufacture of butter. I am not
rtain as to the amount. I would be unable to make a statement
to how much we claimed for that month of September.
We made a like claim in October. We did not make a claim in
ovember. During the month of November we sold our milk to
the consumer farmer cooperative for use in fluid form.
48 For that we did receive or will receive the uniform price.
We owed the Administrator some money in November and
December. We owed him, I would say, around nine hundred dol-
ars in November as a pool obligation. That was a pool obligation
according to the price we received for our milk. That was for the
November milk. The Administrator notified us of the amount
which we owed the pool somewhere near the 10th of December. We
paid it on the 20th of December.

I am not certain of the date when these auditors came to look at books but it was along the latter part of November, I believe. owed the pool around eight or nine hundred dollars for Novem milk. We do not owe them anything for the month of October.

Redirect examination by Mr. PRATT:

The nine hundred dollar payment for November milk was a p ment that was due in December.

Q. Now I call your attention to the provision of the order co tained in section 6 of Article 7 which provides that the administ tor shall pay out of the producers settlement fund to any handl immediately after audit of claims for such payment made on for supplied by the Market Administrator. Payments including th twenty-three cents plant handling charge, and I ask you wheth your company had any reserve from which to pay the Admini trator a payment due after December 15th of nine hundred dolla when the Administrator was withholding one thousand seven hu dred ninety-seven dollars of money due your corporation from th producers settlement fund?

A. It did not.

449 MR. SCHOENECK. That is objected to as incompetent, irrel vant, and immaterial.

The COURT. The fact remains it did pay it.

SAMUEL MILLER was called as a witness on behalf of the defendant

Direct examination by Mr. PRATT:

I live at 3001 148th Street, Flushing, New York. I am in the mi business and am president of Queensboro Farm Products Company That corporation is licensed as a milk dealer by the Department o Agriculture and Markets of the State of New York and is a handl as defined by the provisions of Order No. 27 which is known as th Federal Marketing Order. I have been in the milk business twenty- nine years. Queensboro owns some country receiving plants in th New York production area. It owns plants at Canastota, Clinto in Madison County, Blossvale, Indian Castle in Herkimer County, and we have a lease from Van Hornesville. We leased that plant. We never had a plant at Taberg. We own part of the machinery in the Van Hornesville plant. We have a leased plant at Steamberg which is in the New York production area. We own part of the machinery in that plant. We take the output from the Canton plant. We do not lease that plant because it belongs to the Canton Co- operative. The machinery in that plant belongs to them. We bought and put in the machinery but they are paying us back. We sold them the machinery on conditional sale. Canton is in St. Lawrence County. We also receive the output of the co-opera- tive at Cannonsville, Delaware County, New York. I am not sure that it is a co-operative, I think it is. On September 1, 1938, we were operating all those plants except Cannonsville. We started getting milk from Cannonsville in October. All of the eight plants mentioned are approved for shipment of milk to the City of New

ork except Canastota. There is a new law which provides
t in case you receive skimmed milk or ship skimmed milk
u are not allowed to ship any milk. That just came in
rough the Health Department. That is a rule of the Health
ent of the City of New York. Canastota is excluded from
York group only in shipping fluid milk from there. I think
t get a permit within about a month to be allowed to ship
d milk from there, or receive skimmed milk. In September
tober we were permitted to ship fluid milk out of Canastota.
der some new permit to handle skim milk, ship it and receive
re barred from shipping fluid milk. It is a special permit
ve you. At Canastota we have equipment for processing or
cturing condensed and powdered milk. We have a cream
or with which we manufacture cream and skimmed milk.
ed milk is utilized in several different ways. Skimmed milk
into buttermilk, powdered milk, and skimmed condensed milk.
ake all those products at Canastota. We were operating in
mber 1938. We have constructed a special building for the
acture of butter since September 1, 1938, which is when the
l order went into effect. We get the cream out of which we
facture butter right from the Canastota building. We sepa-
e milk on the premises and take the cream and manufacture
with it. We sometimes manufacture cream for storage pur-
We store the cream manufactured at Canastota at Syracuse in
yracuse Cold Storage Warehouse. On the first of September
d possibly six or seven thousand tins of storage cream on hand.
ad a lot of cream we put away during the summer months.
not tell positively the exact amount. A tin contains forty-seven
ds of cream, a little over twenty quarts. Three tins would make
two cans, or about eighty quarts, because it is higher in fat.
that cream is taken out it is sometimes reprocessed with fresh
to cut it down to forty percent butterfat content. We usually
ardize in the city, so we have to add milk because we are not
using skimmed milk in the city as yet. We have facilities for
rerunning storage cream at the Canastota plant. Since Sep-
tember first we have withdrawn cream from Syracuse and
it to the Canastota plant to rerun, usually for sour cream.
isually make sour cream from frozen cream. There is a differ-
in price between fresh and frozen cream. There is a difference
rice between sour and sweet cream. Sour cream is only eighteen
ent fat. In terms of actual fat content there is a difference in
price of sour cream and sweet cream. A can of cream that is
en has a lower classification. We freeze sweet cream. We don't
sour cream. We make the sour cream from sweet frozen cream.
storage the value of sweet cream and our cream made from frozen
m checks about the same. You cannot make butter from sour
m. I suppose you could make it from frozen cream, but we
n't try it; I don't know. We have never tried to make butter

from either sour or frozen cream. I haven't sold any frozen cr
to any butter factories. We never sold any cream to the Nor
plant.

The first time I ever engaged in the butter business was the f
of October 1938. I presume we received some milk from the p
down at Worcester on the twenty-sixth of September. Most of
milk that we receive from different milk stations is made into cr
and we put it in storage. I believe that the milk we received f
Worcester went into storage as Class III–B. We separated that
and used the cream in Class III–B. We make the skimmed milk
powdered or skimmed condensed. One hundred pounds of skim
milk delivered at the Canastota plant in September 1938 was w
very little. We usually get what the casein factories are paying fo
I didn't buy skimmed milk. You ask what it is worth. I said i
worth very little. I didn't buy any skimmed milk. I buy all wh
milk. I made some of this skimmed milk into powdered. I s
say that you get about six and one-half pounds or so of powder fr
one hundred pounds of skimmed milk. I should say the value
milk powder per pound in September 1938 was about three
452 three and one-half cents a pound. That was about the hig
price we sold it for. I don't think that in September we s
it for less than three cents. It usually takes about from three
one-half cans to four cans of skimmed milk to make a can of skim
condensed milk. We did not quite get from twenty-five to thi
pounds of skimmed condensed out of one hundred pounds of skim
milk. You can figure about twenty-five pounds. Skimmed c
densed was worth as low as One dollar and seventy-five cents a c
delivered to the city in September 1938. It will go up close to t
dollars, but from one dollar and seventy-five cents up to two doll
delivered to the city of New York. It weighs about ninety pou
or a little over that. So that we got at least two cents a pou
for it during that period. Skimmed condensed delivered in N
York City brought about two cents a pound or about fifty ce
a hundred for skimmed milk. You get twenty-five pounds
skimmed condensed out of one hundred pounds of skimmed mi
The freight from Canastota to New York for one ninety-pound c
of skimmed condensed in September 1938 was about thirty-eig
cents if I am not mistaken. That is about one-third of a cen
pound in round figures.

We had facilities for manufacturing in September 1938 in t
plants at Canton and Steamberg. At Canton we make powdered s
condensed milk and cream. We do not yet ship any skimmed mi
in fluid form from Canastota to New York City. I do not deli
any skimmed milk in the city and have not bought any in the ci
I do not know the price of skimmed milk in the city at the pres
time. Before I obtained this permit which shut out shipments
fluid milk from Canastota I did not make any inquiry as to wh
the price of skimmed milk was delivered in New York. If I get th
price, I expect to sell skimmed milk. I don't know what price

price. So far I didn't get any calls for it. I don't know whether there is any market for skimmed milk in New York City. I don't have any calls for it. I got the permit to ship skimmed milk from Canastota because if I wanted to take skimmed milk to another plant, I am not allowed to take it in for I have no permit. The main thing is to get in skimmed milk from other plants to the Canastota plant.

Last year I shipped some skimmed milk to the Canastota plant. I bought some skimmed milk last year from the Eastern Farms plant at High Bridge for shipment to Canastota. High Bridge is just a short distance from Canastota. I have not bought any skimmed milk from anywhere since September first, 1938. At the Canastota plant we have facilities for cooling fresh milk. In a plant which ships milk for fluid purposes to New York City it is necessary to have a cooler and a weigh can. You weigh the milk from the farmers in any plant. You must have a weigh can and a receiving or cooling tank and a storage tank. I have all those things in Canastota. Notwithstanding this permit I could cool milk at Canastota so that it could be shipped to New York City and be received there in sweet form.

(The evidence in the following paragraph was introduced over objection that it is irrelevant and immaterial.)

I cannot ship fluid milk from Canastota to the City of New York now because if we receive skimmed milk from the outside we are not allowed to ship any fluid milk from the Canastota plant. That is a new law. I have not shipped any fluid milk from Canastota to New York City since September first, 1938. We shipped it in tanks to Boston during the flood. That milk was approved for the New York City Marketing Area and I presume it was also approved for the Boston Area. I reported that milk into the pool. I would not attempt to answer now whether I paid any assessment on that milk into the pool. I don't know whether that was reported as unpriced milk. I am the general manager of the company and the one who personally made the sale of that milk over the telephone. I received ten cents per quart for that milk. That is four dollars a can. When I paid for my September milk I really don't know whether I paid my patrons a blended price which covered the blending of milk within the pool or within Order 27 and unpriced milk.

I am acquainted with Mr. Erskine Harmon; I saw him a few times. I think I heard him explain the provisions of this order down at the Hotel Pennsylvania once. I was present at the Hotel Pennsylvania meeting when dealers were invited to come there and have the Order explained to them by Mr. Harmon. I don't remember whether Mr. Harmon at that time made an explanation that you could pay whatever you pleased for unpriced milk. I never talked with Mr. Harmon about that. I never talked with Mr. Griffith at that office. Harvey Miller takes care of these things. Possibly he talked with Mr. Harmon; I don't know. After this Order went into effect I

installed this butter-making machinery in Canastota. Prior
stalling that machinery in Canastota I had been processing
running my storage cream that was kept in Syracuse with ma
at the Canastota plant, only for sour cream. I had custo
rerun my storage cream at my New York City plant. Prior t
tember first I had not rerun that storage cream for the purp
making sour cream in New York City. I had made sour cr
Canastota prior to September first and right along for many
I have not been making more sour cream in Canastota since
tember first than prior to that ime. I doubt if I have re
larger amounts of sour cream as being made there. I do not
I have ever tried to make butter out of storage cream. I don't
whether butter can be made from storage cream or no.

Since October first, when we got this butter machinery in Cana
we have been engaged in the manufacture of butter there. I
we made butter for a few weeks in October 1938. I really c
tell you how much.

In the Canton plant we have separators, condensing
455 powder roll, facilities for making milk powder, conde
milk, and cream. That plant is approved for shipmen
whole milk to New York City in fluid form. It was approved s
time in the early part of May 1938 by the New York City He
Department and we have been shipping fluid milk from Canto
New York City. We shipped our entier intake there during
tember, October, and November. We manufacture at that plan
the flush period. Those months are May, June, July, part of Aug
The flush is May and June. That is the main flush. There w
flush period of milk in September of this year. That is we
plenty of milk, more than the average run.

At Steamburg we have separators for cream, powder roll, and c
densed pan. We really have three condensed plants. We rec
close to five hundred cans, or a little less, daily, in the the sh
season at Steamburg. Now is the shortest time. In September
were possibly receiving a few hundred cans more there, I sho
say pretty near seven or eight hundred. At our high point,
production there we take in around twelve or thirteen hundred ca
Our low point is a little less than five hundred.

That plant is not now approved for shipment of milk to the St
of New Jersey. Since September, I took it out of New Jersey. I
shipped no milk from there to any market other than New Yo
City. I do not now have any other plant approved for New Jers
I do not sell milk in any other market than New York City. Sin
September first I have sold no milk outside of New York City, oth
than the small amount of milk that went to Boston. I don't thi
I reported any unpriced milk to the Administrator. As I told yo
I am not taking care of it.

In all of these plants the intake would be around thirty-fi
hundred cans or more daily now. I do not now buy milk from oth

lers besides the amount of milk received at those plants. Now I ly buy at Cannonsville.

There are a few nearby plants that sent milk to our Canastota t. Mr. Gaynor called me up about Worcester, if I could use k that was diverted, and I said, "Send it over." I visited Mr. ynor in Leonardsville, sometime at the end of September. I don't mber what date it was. I told him we had room to take some milk in. I didn't actually go up there to talk to him about , diverting milk or purchasing diverted milk. I told him we had room to take in diverted milk. That was the only time had ever visited there. Before that I had seen him once when he was ith the Commissioner of Agriculture in the Canton plant. I called m up and asked if I could see him and he said I could come over. wasn't so familiar with these new regulations and I told him we ve got a plant right in Canastota where we can handle quite a t of diverted milk. I suppose he explained these new regulations me, I don't remember every word I spoke to him. I don't remem- r what he told me I could and could not do under Order No. 27 ith diverted milk. I went over there just to get familiar with ese new regulations. It happened I was in the country and Leon- dsville wasn't far. That is why I went there. I don't remember here I called Mr. Gaynor from about this diverted milk. It was ssibly either Utica or Canastota. I presume Leonardsville is bout thirty miles from Utica. I went there by automobile. One of ur men took me there I suppose, in one of my own cars. I talked ith Mr. Gaynor possibly twenty minutes or so. He told me I could ivert milk if I manufactured; I could put it in any class I wanted; t was what I used it for. If I froze it, it could be for frozen eam—if I froze the cream I paid for III–B. If I shipped it as uid cream I would have to pay the fluid price. It is according to hat I do with it. If I shipped cream to New York I would have o pay Class II–A, and if I sent it to storage it would be III–B. presume he told me that it must be over seven days in storage. I eally don't know. I did not have any talk with him about dealers ho had not signed the Milk Marketing Agreement. I don't think e mentioned it to me. We had signed the Milk Marketing Agree- ment the first of September. I did not sign anything myself. My rother must have signed it at that time. I know we were the irst ones to sign. That is what I heard.

I did not call from New York to make the appointment with Mr. Gaynor. I never talked with Mr. Gaynor about milk com-
457 ing from certain dealers who wouldn't sign this milk market- ing agreement. After I talked with Mr. Gaynor I took diverted milk from other plants. I got it from the plant at Holland Patent, the plant of the Holland Patent Milk Producers, a cooperative The manager of that plant is Mr. Humphrey. He used to be one of our patrons. I have known of that plant for many years but never had it myself. They only sent us the surplus milk, whatever he had over. I believe he is selling his milk which is not surplus to

the Queens Farms. I really don't know. I know Mr. Dan Ketch
the proprietor of Queens Farms. Mr. Gaynor never told me anyth
about that milk being diverted. I think Joe McGinley must h
called up in Jim Lombard's office about taking the Holland Pa
milk. Jim Lombard is a broker. I don't know whether Jim La
bard is formerly a Dairymen's League employee. We did not
ceive the entire milk output from the Holland Patent for seve
days. We did not receive the entire output for any day. I am
receiving milk from Holland Patent now. We received milk fr
there about a week or so, off and on. Some days he would s
and some days not. It was not the entire intake of the plant bec
he was sending as little as two hundred cans or so, and that plant t
in much more.

We received milk from other plants besides Holland Patent, f
Onatavia which is operated by Cooperdale. We did not receive
entire output of that plant. We received a few tanks off and on.
was not a steady shipment. I never asked Cooperdale whe
458 he refused to sign this milk-marketing agreement. I re
cannot think of the names of the other plants we got
from, but not far from Indian Castle there are a few plants. I th
I got it through Hovey. There were quite a few which brough
milk. I do not remember all the names, but we have books to s
where we got the milk from. I didn't receive any from Ft. Hun
I think we received some from Poland. I presume that is the Pol
Milk Producers. I don't know who is the head of that co-operat

I know the Piseck Brothers. I don't know whether Mr. Pi
delivers milk to the Poland plant. I was never in that plant.
bought milk nearby there for several years, at Herkimer, but I
took care of my plant. I didn't go to other plants. I don't k
whether Mr. Piseck had anything to do with this co-operative
I bought milk from or not. I don't remember how much milk I
from Poland. I cannot tell you without checking up the books.
was for a period of time off and on. I don't know who had been
ting that milk when it was diverted to me.

I got some milk from the P. & K. That plant is at Oneida.
wasn't from a regular plant of that company. One day they w
send from one station, and another day from another station.
P. & K. have four plants. One is at Oneida, one at Clock
459 one at West Lee and one at La Fargeville. I don't k
whether the La Fargeville plant belongs to a different
poration. I don't remember whether I got any milk from th
Fargeville plant. It wasn't steady. It was just changed ar
every day from a different plant.

I got milk from Boonville. The name of the co-operative
there is Boonville Co-operative I think. I think we just got o
two tanks from it, that is all. I think one tank or two, but I th
was the end of September or October; I don't remember the day
was not the early part of September, it was the latter part. I
know what Boonville takes or what it ships to. I presume

ester Farms is getting some of that milk. Manchester has one his own plants, too. We get milk from Worcester, too.

In September we didn't make any butter. In October we made me butter and put quite a lot of cream in storage, but I don't remember how many cans. We stored it at Syracuse Cold Storage. the same time that we were putting in storage cream we also took rage cream out. I don't remember how much we took out but we ve books to show.

I have not sold milk in any other area than the Metropolitan New rk area since September 1st, with the exception of Boston, if that s after. Just this month we sold a little for Italian cheese right r Canton, possibly a few hundred cans, that is all. That was hole milk. It was sold in Canton, New York, to some little factory r Canton, for Italian cheese.

I operate a processing or bottling plant in New York City. The pacity of that plant varies according to the time of the year. Now, e are processing possibly a couple thousand cans of milk a day. hat is, cans and bottles. We bottle possibly fifteen hundred cans glass and I should say a couple of hundred cans in paper conners. It will be, say, about thirteen or fourteen hundred cans in glass and two or three hundred cans in paper. I presume that would be about five thousand cases in glass and about seven hundred fifty cases in paper, in round figures; maybe a uple hundred cases more.

We sell possibly a couple of thousand cases of milk to stores per y. I don't know whether my company is about the fourth largest erating company in New York City. I never looked the other mpanies up and I don't know whether we are one of the eight rgest companies. I just mind my own business. I presume the rden Company is larger and I suppose Sheffield is larger.

On the first of September I asked a retail price of nine and threearters cents a quart for milk in glass containers in New York City. think I got that price for a few weeks. I shouldn't say that I got hat on all of my milk for that period because a lot of these small stomers which agreed to pay, when the price weakened, they took down.

After the price from the store trade dropped from nine and threearters the next price I got for my milk was nine cents. Then it ent lower than that. The average price from stores on milk now is ight, eight and a half, nine cents. If you have a customer at nine nd three-quarters you are afraid he will kick you out. That is also ue in many places if you ask nine cents. Competing dealers didn't top chiseling after September 1 and neither did I. When they ake my customers I take theirs. That is the way for me to keep he business. About three weeks we didn't change the price and the rade just flitted away, and then we had to go and get the trade ack.

Q. You laid low on chiseling for three weeks, is that right?

A. That is right.

During that three weeks I was receiving diverted milk from these several companies. We received it for quite a long time, pos-
461 sibly a month or more. We received some in October. We received it right along. I started taking this diverted milk when they called me up in the early part of September. It wasn't just on the first. Canastota was the only plant at which I handled diverted milk.

I manufactured condensed milk at Steamberg during September and October. I did not ship any fluid milk from that plant during September and October. We shipped only fluid milk from there in November and December. We are shipping fluid from there now. That is two months.

I transported milk from some of my own plants to others of my plants for the purpose of manufacture. We will take some milk from Indian Castle and some from Van Hornesville or Blossvale; it is according to the demand. We transported that milk to Canastota and manufactured it into c. am and buttermilk. From the skim you make buttermilk. From the milk you make cream. We made some whole condensed in Canastota. But at this time of the year it was not a large volume. We do not now make whole condensed milk for the Gordon Baking Company. We stopped making condensed milk for them since the strike a year ago. We do not lease part of our plant to the Gordon Baking Company to make condensed milk and it does not receive condensed milk from any plants that I operate. I do not sell sweetened condensed but do sell some unsweetened condensed which is made at Canastota.

I was allowed a handling charge of 23¢ a hundred pounds in my manufacturing plants in my accounting of the pool on the milk I diverted from my own plant, from Indian Castle and elsewhere. I was allowed a hauling charge but I don't know how much. I do not take those amounts out of my settlement. I pay them separately.

Indian Castle is possibly forty or fifty miles from Canastota.

I don't know whether in transporting my milk from Indian
462 Castle to Canastota I pass a manufacturing plant of the Dairymen's League. There is a manufacturing plant of the Dairymen's League at Vernon, New York. The milk from Indian Castle passes that plant in going to Canastota.

We diverted milk from our northern plants to other plants for manufacture after September 1st, 1938, but we didn't get paid for it. We diverted milk from our manufacturing plant at Canton that we didn't receive pay for. In moving milk from one plant where we had manufacturing machinery to another plant, we were allowed no trucking or transportation; they didn't pay me for it. Canton is about a hundred and twenty-five miles from Canastota. I transported possibly ten or fifteen tanks in the month of September from Canton to Canastota for manufacturing purposes. That is about two to three hundred cans per tank, whatever the tank is. It runs from two to three hundred thousand cans of milk altogether.

When we made settlement in the pool with the Administrator we ettled at manufacturing price for that which we used for manu- acture. I don't know whether we settled for the milk that we trans- orted from Canton to Canastota on a manufactured price. We idn't make any claim for transporting and for station charges. Ve saw that we made a mistake so we didn't ask for it. We made mistake doing it because that wasn't allowed from one manufac- iring plant to another, so what is the use of making claims. We ust let the transportation go and reported the milk in whatever class e used it for. I don't know just what we used it for. As I say, e made cream. Some we stored and some we shipped. We didn't ake any butter in the early part. We started making it in October. We accounted for that. We are making butter now; not much.

Cross-examination by Mr. SCHULZ:

I am the President and General Manager of Queensboro arms Company.

I should say roughly possibly sixty per cent of our milk would fluid during the short season of production. During the surplus ason of production, it is actually two-thirds manufactured and e-third fluid.

As General Manager of my Company I am acquainted with the umber of routes that I operate in the Metropolitan Milk Market ea. My company operates about thirty-six routes selling fluid ilk to stores. I should say we serve an average of fifty to sixty tops." or stores to a route.

Before the Federal Order went into effect, during the months of ly and August we were receiving wholesale from our customers nerally prices per quart of from six cents up. When the Federal rder went into effect every party raised the wholesale price to nine d three-quarters. The price of nine and three-quarters cents ob- ined generally throughout the market for a period of two or three eeks because we got the price. If it did not obtain we couldn't t the price, but, as I say, it weakened in about two weeks.

In the Metropolitan Milk Marketing area some regions have more mpetition than others in the wholesale business. It usually starts the Bronx and finishes in Brooklyn. The Bronx is the hot-spot. he lower east side is the same. It is pretty near all over the same. he trouble is you have got four or five milk men in each store. hat is where the trouble is. The temperature is up and down. very day there are different prices. Each store patronizes four or e different companies. That is the general rule throughout the Metropolitan Milk Marketing area.

After the general stabilization of prices in the New York Metropolitan Milk Marketing area following the adoption of e Federal Order, the price broke generally throughout that area thin two or three weeks.

Q. Mr. Miller, do you know which company started cutting prices st after September 1, 1938?

Mr. PRATT. That is objected to as calling for a conclusion. (Objection overruled.)

A. The first one to start cutting prices was Manchester Farms. It is a handler. It is much smaller than our company. I really cannot tell you whether there were any other companies that began at the same time as Manchester. I know it started with Manchester and then it broke down. Our company is in active competition with Manchester, along side of him, throughout all the routes that we operate. It is not true of everyone of our thirty-six wholesale routes, but there are two in the Bronx and some in Queens, where we cover. We do not cover lower Manhattan or Brooklyn, and I should say possibly eight or ten routes.

Manchester Farms initiated the price cut in the Bronx. I can only tell the Court what happened about our own business after the price cut was started by Manchester Farms. We gradually came down to his price. We had to cut because we would lose the trade. Our competitors followed suit. There have been successive declines in prices generally throughout the marketing area since the Manchester Company initiated the price cut. Those declines in prices were caused by taking trade one from another. Where there are four or five dealers in a store, where the storekeeper is trying to break the price, one day he was starting with me and the next day starting with another one until they get that price down. What actually happened was that the storekeepers, having gotten
465 a lower price from one dealer, then went to other dealers and demanded the same lower price.

In New York City now the competitive situation is a bad situation, very bad in the milk business. By bad in the milk business I mean the price just broke in selling stuff at low prices.

Storage cream costs a little bit more than fresh cream because we have to put it in tins and take it to storage and then we have to pay for storage, trucking and the other expenses of taking it out.

The cost of making powdered milk per pound, figuring the box and liners and other expenses I think will be close to three-quarters of a cent a pound. In computing that cost, that includes actually the freight, there is about twenty-five cents freight, and you figure the box and liners and I should say one-half cent, and one-quarter cent freight, and it is actually about three-quarters of a cent a pound including the freight. I think condensed milk per forty-quart can will cost a little more than the powder. Including freight it may stand around seventy-five cents for a can of forty quarts. That includes freight to New York City. I really cannot tell you just what operations are involved in arriving at the cost just stated. I cannot tell you just the right figures. I said I presume. There are numerous operations in arriving at the cost for just one can of condensed milk. We figure our cost about seventy-five cents per can. That cost includes coal and freight, cleaning cans. The freight is about thirty-eight cents or so.

Before the Federal Order was entered I appeared at the hearings. I think I was there once. The distributors were opposed to the entry of the order. After the Federal Order was adopted and promulgated my company signed a voluntary marketing agreement. My
466 reason for signing it was to stabilize the market. After the order was entered we desired to show our voluntary compliance with the order and for that reason signed this agreement.

Cross examination by Mr. WALLACH:

There has been chiseling in the milk business before September 1st and as long as I can remember. I remember 1929 chiseling. Before September 1st and during the year 1938 I would get reports from our outside men that milk was sold by milk dealers to grocery stores at as low as two for seven cents a quart, sometimes lower than that. Since September 1st, 1938, the lowest price that I know of milk being sold to stores is around eight to eight and one-half cents per quart. That is about the lowest.

I saw Mr. Gaynor once before the middle of September. As I say, he was with the Commissioner at our plant at Canton. That was some time in July. I saw him after September 1st. It was possibly in the middle of September or so.

The first time that I purchased any milk from this Worcester plant of which Mr. All was the Secretary was, I think, about the end of September. There was no conversation between me and Mr. Gaynor at his home in the middle of September in connection with the purchase of any milk from Worcester. I didn't know the location of the Worcester plant before the time that I purchased milk from it at the end of September and had never purchased any milk from it prior to the end of September.

Mr. Gaynor called us up one day and asked me if I could handle the milk of the Worcester plant and I told him yes. Mr. Gaynor called me up, I think, just the day before he shipped milk from there.

467 My company has made payments into the pool in the months of October, November, and December. We paid for September I think about thirty-two thousand dollars besides these administrative fees. And then we paid in November for October milk, I think, twenty odd thousand and we paid in December for November milk around twelve thousand dollars. I really cannot tell you the dates, but I know we paid every month.

Cross examination by Mr. SCHOENECK:

I took milk from Holland Patent in July. That was surplus milk. I presume Queens Farms was getting the balance of his milk. We are called up and if he has too much milk I buy it. I have mentioned quite a few other plants from which we take surplus milk of that sort. Clinton is our own plant. All the plants I gave the names of are our own plants. I suppose the milk of the Onativia plant was surplus, as he called me up to ask if I could use it. The milk from

the Poland Cooperative is the milk that remains in these cooperatives after they fill their contracts with other dealers.

Redirect examination by Mr. PRATT:

Distress milk is a tank of milk that arrives in New York City and finds no home.

My company bought surplus milk in the country every day last summer. You may call it distress milk. When the milk goes to the city and comes back to the country you cannot use it any more. You cannot use it in the city if you have no room for it; we are not manufacturing anything in the city. I think you are wrong in stating that my company had tanks lined up outside of its doors waiting to get on its platform and sell it at distress prices during the summer of 1938. I bought surplus milk as low as one dollar
468 a hundred if they had no room for it, and if I could buy for my price I would buy it. I always bought it at my price if they wanted to sell it to me. I am not forcing them. We have a plant in New York to take care of milk.

I do not think we sold any bottle milk at less than eight cents in New York since September 1st. We do not have any contracts for the sale of milk in New York City as low as six and one-half cents. We have a low priced contract with the state for fluid milk but they are in doubt about the price when the Federal Order came in. We demanded a higher price. It will be settled, but there is no six and one-half cents. Before the Federal Order came in we sold at any price. There was no price fixed. So far as I know we pay the price under the Federal Order. At the time we signed this order we understood that this Federal Order would stablize prices in the country. As to the price in New York City, we thought the milkmen would have enough brains to get a price for the milk.

Q. And you say you laid low on chiseling in your concern for a few days, is that right?

A. A few weeks.

We don't know where this nine and three-quarters cents retail price was fixed. We followed what others started to charge.

I attended a meeting in the Hotel Pennsylvania, but I don't remember the dealers talking any prices. I don't think I was present at a meeting where Mr. Harmon was present. I was to so many meetings. I was at the Hotel Pennsylvania meeting before we signed the contract. I was there at that meeting. It was in the evening. There were quite a few federal men there. I really don't know their names. I saw Mr. Mather and he spoke there that evening. I saw Mr. E. Manning Gaynor and he spoke there. I think Mr. Sadler was there. I saw Mr. Kenneth F. Fee and Mr. Wellington
469 Griffith, the referendum agent.

I really don't remember what Mr. Mather was talking about. I know there was reference to buying milk, but I don't remember. We were not told what price we would have to obtain from storekeepers and I don't think that was discussed that night.

don't think I attended a meeting where the nine and three-quarter
t price was discussed: I don't remember what was said at that
ting in the Pennsylvania Hotel that night. The federal men
e there and they were talking about this order. They were not
ing about the retail price of milk in the wholesale trade in New
rk City. There was no time to talk price of milk. They laid the
down and they went away and we went away. I don't remember
o first told me the price had gone up to nine and three-quarters
ts. I heard from our drivers on the routes that Manchester was
one that initiated this price-cutting drive. They told me Man-
ster was the first dealer in Brooklyn and Queens and the Bronx
t started price cutting. It was the drivers from the Bronx that
me Manchester was the first. I could send you over their names.
I can't tell you now the names of anyone. I would have to look
up.

presume our drivers reported to me that we were losing business
Dover Farms. I could give you all the information from our
ks. Mr. Louis Berman takes care of the routes and the drivers
he could give you all the information you want. I personally
ed to some of the drivers about Manchester Farms. We have
e a few routes in the Bronx. I know them only by number. Mr.
man takes care of them. We have records of everyone that took
ice and what price they took.

s soon as the prices lowered we went back and took some of the
le back. It will show in the book when we started taking some-
body else's trade. It was the latter part of September, about
two or three weeks after the order went into effect.

Q. Did Berman report how many cases of trade had been
eled by you?

. I believe so.

. How many cases did you chisel?

. We have got them marked down.

do not recall any particular date on which the price of milk broke
ew York City to two quarts for seven cents in glass, but it may
happened.

The following evidence was given over objection that it is irrele-
and too remote.)

was at a meeting at the Pennsylvania Hotel in 1937 when the
ers and milk producers representatives met to discuss operating
r the Rogers-Allen law. I don't remember whether the sale of
quarts of milk for seven cents by Eisenberg and his various
panies were discussed. I know he was selling cheap milk.

heard of the sale of milk at two quarts for seven cents in glass
t after the control board went out. The control board went out
he 31st day of March, 1937. It was just fighting one with an-
r, and I don't say this price just happened in the month of April;
bly it happened in June. I didn't see it myself, two quarts
even, but I just heard the rumor.

I was present at a general meeting when all these dealers, Borden's, Sheffield, Dairymen's League, and the independent dealers met at the Commodore Hotel to form a bargaining agency under the Rogers-Allen law.

The cost of a quart of milk to a handler, such as the Queensboro Company, assuming that the first cost of milk is two dollars and forty-five cents per hundred pounds, the price fixed under the order, is over nine cents a quart on 3.5 butterfat milk when delivered to a store in New York City. I cannot give you a figure on the fraction.

471 Assuming the butter fat content to be four percent, the cost may jump up close to nine and a half cents or so. (Objection to the foregoing on the ground that it is irrelevant because the Order does not fix resale prices was overruled.)

In delivering milk to stores in the wholesale trade in New York, I employ union drivers. There has been a union rule in force among the milk drivers in New York City, since September 1st, 1938, which limits the number of cases which can be delivered by one driver. The rule is 95 cases for a route man, and if it is over 95 cases he has got to have a helper. With a helper you are allowed to sell as high as 135, but for anything over 95 you must have a helper. The majority of market deliveries in the wholesale business in New York City are made by union drivers. As far as I know, Borden's employs union drivers. Assuming that I deliver more than two cases to a customer, then my route would have as many as 50 or 60 stops. In the industry a delivery is called a stop. Instead of speaking of so many customers we say so many stops.

After September 1, 1938, the market was only stablized a few weeks. It is not any better than it was a year ago, when there was no order, and I think it is worse lately. The last week or so, it got still worse.

It costs more to deliver a quart of milk in a paper container than it does in glass. It actually costs about one cent more. The paper costs more than one cent, but the loss of the glass offsets it. Milk which is sold in paper containers must bring an additional cent if it is to compete with glass, from the standpoint of the cost to the handler.

Recross examination by Mr. SCHILZ:

I have been a handler in the milk business for twenty-nine years.

I operate about thirty-six wholesale routes in New York City.

472 When the Federal Order went into effect on September first, prices were stabilized generally throughout the market in the wholesale business for a period of two or three weeks. Conditions in the market just now are worse than they were a year ago. The cost of milk is high, and the selling prices cheap. There is no present stabilization in the market.

In my judgment the principal cause of that lack of stabilization is this trial. Most of the milkmen feel that they won't have to pay any money to the Administrator.

Recross examination by Mr. SCHOENECK:

elieve we make from eight and one-half to nine pounds of ered milk out of a hundred pounds of skim milk.

e difference in cost between fluid milk in glass containers and in paper containers is about one cent a quart. That figure l change according to the quantity of paper containers that used. It would not change according to the quality of paper vas used because this paper is controlled by one concern which he paper containers, and with a bigger quantity you may get a cheaper, but I should say the lowest you could work on was ent, and the quality is about the same.

n not familiar with the operations of the Norwood Creameries. here when their representative testified on the stand the other ut I don't know who he is. I heard it testified that they operate utter factory all the year around. I have operated my butter y very little. We make it just as we need it, we may work a week or twice a week, or twice a month; just the amount of we need. A plant engaged in making butter the year round lower cost per pound than one that is having these occasional operations.

Redirect examination by Mr. PRATT:

I sell in competition with Sam Adler, Adler's Creamery. k he operates under the name of Samuel Adler Milk Company. so operates the Philco Milk Company. I don't know whether dler sold milk at less than nine and three-quarter cents. I know Number 10 East 112th Street is in New York City. Possibly milk around that territory in September. I did not see signs windows of stores in that vicinity about the middle of Sep- r advertising milk for retail at nine cents a quart. I do not or those signs. You see, I don't go out to see the trade. Pos- my drivers reported to me that milk was being sold in stores ne cents a quart in the month of September, but I cannot ber.

Re-cross examination by Mr. SCHOENECK:

retail grocery trade has used "leaders". They do it is a new opening. They may sell some things lower. It may help in tores to bring people into the store in anticipation that they uy other things. The storekeeper's profit on milk is too big m to do this. The milk keeps them up today. Milk may be s a leader on different occasions. I really cannot tell you.

Redirect examination by Mr. PRATT:

se storekeepers, in buying from three or four different dealers, the dealers one against another to get kick-backs, and conces- such as free ice and other things.

ERSKINE M. HARMON was called as a witness on behalf of the defendants.

Direct examination by Mr. PRATT:

I reside in Washington, D. C. I have a home there. I have
474 stayed at different hotels in New York. The last night that I stayed in New York I stayed at the Victoria Hotel. During my stay in New York my time has been about evenly placed between the Commodore and the Victoria.

My appointment as Administrator of Order Number 27 was made in writing by Secretary Wallace. I was also appointed Administrator of Official Order Number 126 issued by the Commissioner of Agriculture and Markets of the State of New York. That appointment is in writing and on file. I took up my duties as Administrator on September first, 1938.

I opened an office for the carrying out of my agency for the Federal Government and for the Commissioner of Agriculture of New York. We were in the Commodore Hotel for about ten days or two weeks and after that at number 95 Madison Avenue. That period of ten days or two weeks was from September first to September twelfth or thirteenth, I cannot give you the exact date. I had no official accommodations at the Commodore on the thirty-first of August. I was registered there as an individual on the thirty-first of August. I think I had Room No. 538, but I cannot be sure. I think Mr. Wellington J. Griffith was in room 1900, but I cannot be sure of that. I set up a temporary office there on September first, I think it was in room 1900. Mr. Wellington J. Griffith was there at the Commodore Hotel part of the time and I was there part of the time on that day.

Mr. Wellington J. Griffith was not associated with me in connection with Administering these two orders. He was not present in that office every day. He answered none of the correspondence addressed to me, except that there may have been correspondence directed to me regarding the Marketing Agreement which may have been turned over to him to sign, because I was not a party to the Marketing Agreement. Mr. Griffith does not still have an office in the office maintained by me as Administrator. He never was
475 permanently located in New York. On September first he was there at my office at the Commodore Hotel. He was working there part of the time but he is not working in my office now. I do not remember him being in the office for the last couple of months. He may have been there a few times after October first, in fact I think he was. I think he is now located in the Dairy Section, Washington, D. C.

In September 1938 I made a public speech in Syracuse, New York, concerning Order No. 27. I do not remember speaking at any other place that month. In October I spoke upstate in the School of Agriculture, Canton, New York. I do not remember other places now, but there may have been. Since that time I have spoken in other places

upstate, at the last Farm Bureau meeting in Buffalo and at a Farm Bureau meeting in Cattaraugus County and at a Farm Bureau meeting in Norwich and at a meeting in Canastota. I don't remember the name of the man who sponsored the meeting in Canastota. At those meetings I did not discuss the question of withholding milk from dealers who declined to sign the marketing contract. With reference to the signing of these agreements by dealers I simply answered questions that people asked me as to whom they should see to sign the agreement. I told them. Some of these queries were over the telephone. I do not remember any questions being asked at meetings about signing the marketing agreements. I have no recollection of saying anything at Canton, New York, in words or substance to the effect that certain dealers were reluctant to sign these marketing agreements. I am very sure I said nothing of that sort.

I did not send Wellington J. Griffith up to Edward, which is near Canton, and did not know of his going up there. I never called the head of Edwards Company, the Edwards man, on the long distance telephone with reference to the Marketing Agreement. I am very sure of that. To my knowledge Mr. Griffith never called from
476 my office on that subject. I never consciously permitted Mr. Griffith to use my office telephone in connection with obtaining signatures from dealers or advising the withholding, or threatening to withhold, milk from those dealers. Telephone calls between my office and the Metropolitan Producers Bargaining Agency were made on that telephone. If the calls were initiated in our office they were paid for by me as Administrator. I made some of those calls myself. I remember one or two conversations with Mr. Baldwin, at the Bargaining Agency. Only when they called up and asked who had complied with the order, and who had not, was there anything in connection with the receiving of moneys paid in or out of the producer settlement fund which required my talking with Mr. Baldwin. By "complied" I mean where they made reports and made the payments called for in the Order. I don't know of any calls to the Bargaining Agency initiated in my office before the tenth of October 1938 when the first reports were to be filed. I have no recollection of advising the Metropolitan Producers Bargaining Agency between the first and tenth of September of the names of dealers who had not signed this proposed marketing agreement. I am very sure that I did not. I don't know whether Mr. Griffith used the telephone at my office for that purpose or not. I do not think he made any such calls from our office. I don't remember any calls to the Bargaining Agency between September first and October ten, 1938.

Before September first, 1938, I worked in the Dairy Section, Washington, D. C., and had since the latter part of May 1934. I was never assigned to work with the Metropolitan Co-operative Milk Producers Bargaining Agency. I did work with that organization in the formation or drawing up of a proposed marketing agreement and order. It was over a period of time extending from efforts to get

together on a voluntary marketing agreement, beginning a year
477 ago last fall. I was associated with this matter throughout the fall months of 1937 starting with I think November. (The following evidence was given over objection on the ground of irrelevancy.) I think it is about right to say that altogether I spent about nine days in Syracuse between November, 1937 and February, 1938. Part of that time I stayed at the Onondaga Hotel; I am not sure whether I ever stayed at the Syracuse Hotel or not but I think I did, part of the time. The office of the Metropolitan Co-operative Bargaining Agency was also at the Hotel Onondaga at that time. Mr. Baldwin, the executive secretary, had his office there.

I had some part in the preparation of the proposed marketing agreement and order which was first filed with the Secretary. I did not draft that proposed agreement or any part of it. I furnished part of the information from which it was drafted. My job was that of field man for the Dairy Section, or Marketing Specialist, in the northeastern states, and this, as one of the proposed marketing agreements and orders, was one on which it was my duty to consult with various state agencies, handlers, producers, and producer groups, to learn as much as I could about the situation in the market, in order to be able to convey that information to the economists and the attorneys in charge of the work of preparing the agreement.
478 I carried out my duties in this connection to the best of my ability. With reference to the formulation of the proposed agreement and order, I consulted with all of the various agencies involved, including people connected with the State Department at Albany. I was in constant touch with the Department at Albany from May 1934 right on up till now.

When I was in Syracuse in November 1937, in connection with a proposed voluntary agreement, all I did was answer questions as to how the pooling plan could be carried out and how the order and plan could be drafted to be workable. I cannot give you the names of all the persons to whom I gave such explanation. Among them was Mr. Bardon, president of the Saquoit Valley Cooperative, who I think is also treasurer of the Bargaining Agency, and Mr. Childs of the Amsterdam Cooperative. Mr. Childs expressed himself as interested in obtaining a pool plan and was one of the group to which my explanations were addressed. I also met Mr. Frank Lent, one of the attorneys for the Dairymen's League at Syracuse, and I explained some of the details of a pooling plan to him. (At this point the plaintiff objected to the entire line of testimony as irrelevant to the issues in the case. Objection overruled.)

Mr. Lent did not prepare the proposed voluntary marketing agreement. It is my understanding that Mr. Lloyd Anderson, an attorney at Binghamton, New York, did most of the work. Mr. Anderson told me this himself.

I do not think I was in the offices of the Dairymen's League during November and December 1937. I first went to the League's office about 1928 or 1929, and I have been there possibly half a dozen times

since. It is part of my duty as a government marketing expert to keep in touch with the cooperatives in the northeastern
479 states, both large and small. The United Farmers of New England considers itself a large cooperative.

Q. Is that similar to the Dairymen's League in that it is both a producer's agent in the country and a distributor selling in competition with its customers, in the City?

A. It is, yes.

Their country headquarters are at Morrisville, Vermont, and their city headquarters, Boston, Massachusettes. That cooperative has a membership of approximately 2,000 producers. It is the largest milk distributing cooperative that I know of other than the Dairymen's League, and it has been actively engaged as a distributor or handler of milk in the city, in competition with other distributors and dealers, at least since 1934, and I think since about 1918.

It is a distinct organization from the New England Milk Producers Association, but they work closely together in their pooling plan, that is, under the federal order.

There was a federal order adopted for the Boston area. I worked in the Boston area in connection with the promulgation of that order. I worked in the Boston area along with the rest of the Northeast from the summer of 1934 until I became Market Administrator for New York. I cannot say how long I worked in connection with the promulgation of the order for the Boston marketing area.

There are two or three plants which are approved for both the New York and Boston markets. These plants are the Milton Co-Operative and the Richmond Co-Operative in Vermont. Milk from these plants can go to either market but I do not know to whom it is sold. Cream is regularly shipped from the New York production area to Boston. Large quantities of cream have been shipped to Boston from this area since September 1, 1938. So far as I know, all the milk from which that cream was made was reported to me as administrator of Order No. 27.

480 So far as I know I received reports during the month of September 1938 from all handlers, showing the total amount of milk handled out of the marketing area as well as in the marketing area. I required handlers to furnish that information for September milk. The manner of reporting milk for the months of October and November was not changed. There was a change in the type of report form on December first, but there was no change in the requirements so far as the use of the milk and receipts were concerned.

I do not have a separate list of the approved plants of the various handlers who signed the marketing agreements. On September first I had a list of all the approved plants in the area, and I still have that list. Since September first there have been some withdrawals, but I do not know how many. We get a list of withdrawals every month from the health authorities. I don't remember who withdrew plants. I have no records prior to September first.

In administering Order No. 27 I have received reports from substantially all handlers in the marketing area. The handler himself computes his net pool obligation on the report form and it is verified by our accountants. In verifying, we compute the handler's net pool obligation by checking his figures and seeing whether or not they are right. If we find that he has made a mistake we take our figures so that the amount ultimately is based on the computation that we make. In making that computation in the case of dealers who sell milk in other marketing areas we use the figures concerning the milk sold outside in arriving at the net pool obligation as required by the terms of the order. Assuming that a handler reports 1,000 pounds of milk, all of which is fluid, and 13% goes to New
481 Jersey and 87% to New York City, such handler would be obliged to account to the market administrator at the Class I price for 87% of the milk. The handler would account to its producers for the other 13% at whatever price they agreed on with their producer.

As market administrator I have mailed out a pamphlet identical with defendants' Exhibit No. 9 for identification, a pamphlet issued by the Department of Agriculture, Dairy Section, bearing the words, "Market Administrator, Metropolitan Marketing Area, 95 Madison Avenue, New York." It was published by the Dairy Section and was mailed from our office. (Defendants' Exhibit No. 9 for Identification was offered and received in evidence.)

Q. I call your attention to a statement on page 14 of that pamphlet which states, "Handlers are required to pay the uniform pool or blended price calculated by the market administrator to all producers delivering milk during any one month, unless the handler has received milk and sold it as Class I milk outside the marketing area; in such an instance the handler is required to pay the uniform price to the producer for that part of the milk received which is equal to the proportion of his milk to which the minimum prices are applicable"—that is, in our case of this "X Company" where 87% of the milk was used in the metropolitan area he would pay the uniform price; is that the way you construe the order and administer it?

A. That is right.

Q. Then I call your attention to the remainder of the statement: "For the remainder of that producer's milk the handler may pay such price as he sees fit, but is required to furnish the producer with a statement of the percentage of the producer's milk paid for
482 at the uniform price"—is that the way you administered the order; that is, that you allow the dealer to pay such price as he sees fit, but he must tell the producer how much of his milk was under the order and how much he paid for as he sees fit; is that right?

A. Yes, sir.

Q. And that is the manner in which you administer that order; is that right?

A. That is right.

Q. Well, let us put the rest of it; I will re-read it: "Handlers are required to pay the uniform pool or blended price calculated by the market administrator to all producers delivering milk during any month unless the handler has received milk and sold it as Class 1 milk outside the marketing area. In such an instance the handler is required to pay the uniform price to each producer for that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable." I now ask you if as market administrator you have required cooperative handlers to pay to producers delivering to such cooperative handlers the uniform price as to the portion of their milk which was sold within the marketing area?

A. No; and the Order itself does not require it.

Q. And have you required proprietary handlers to pay their producers this full uniform price as to the quantities of milk bought by those handlers and sold within the marketing area?

A. We have attempted to do so.

For the month of September, I billed the Jetter Dairy Company for whatever sum was due to the producer settlement fund. The Jetter Dairy Company paid the amount of its obligation. We billed them for the difference between their utilization value and the average utilization value for the entire market. The Jetter Dairy
483 Company was billed at the base rate fixed in the Order for their Class I milk and Class II milk, credited with the uniform price required to be paid to producers, and requested to pay the difference to the Market Administrator. The endorsement on the back of defendants' Exhibit No. 10 for Identification, which is a photostatic copy of a check issued by the Jetter Dairy Company, is our endorsement. (Defendants' Exhibit No. 10 for Identification was then received in evidence.)

Q. Mr. Harmon, the reports of these quantities of milk sold out of the market give the names of the markets in which the milk was sold, other than the metropolitan area, and the amount sold in each market?

A. They do.

Q. And you have those reports filed by the Dairymen's League showing the total amount of milk reported, classifying the milk in other markets?

A. No; not as to—you mean the total for all markets?

Q. I mean reports they filed showing the amounts of milk in each class sold in each market including the marketing area.

A. No.

I am not familiar with Exhibit No. 11 for identification. (Defendants' Exhibits 11 and 12 for identification purporting to be a statement of the Dairymen's League Cooperative Association, dated October 25, 1938, signed Fred H. Sexauer, President, were received in evidence.)

I don't know whether the figure stated in Exhibit 11 as the amount of milk handled by the League in the Marketing Area conforms to the amount stated in Exhibit 11 for the month of September 1938. I have my figures here.

484 I have a statement here of the total amount of milk reported by the Dairymen's League as having been used in Class I in the Marketing Area in the month of September 1938. (Mr. Schoeneck objected to the use of the document unless it was offered in evidence. The entire sheets showing amount of Class I fluid milk reported by the Dairymen's League Cooperative Association as having been used in Class I in the Marketing Area during the month of September 1938, was received in evidence and marked defendants' Exhibit No. 13.)

I supervised the preparation of the figures contained in Exhibit 13, which were compared with the original reports filed with me by the Dairymen's League.

The reports as to the markets which I received only covered New York approved plants. I have reports from all of Dairymen's League Cooperative approved plants. I understand that Dairymen's League Cooperative Association own quite a lot of other plants that are not approved for New York City. I was not able overnight to obtain the list of plants which were withdrawn from New York City approval from and after September 1, 1938, but I will be glad to get those just as quickly as possible and submit them to you.

I have no information in my report which would explain the discrepancy or difference in the figures in Exhibit No. 11 which is a statement of the Dairymen's League, and which statement in Exhibit 11 states that milk used in II-A fluid cream, in the Marketing Area, aggregated 21,556,562 pounds, and the figures in my statement, Exhibit 13, which shows that the Dairymen's League reported in II-A fluid cream, 20,681,381 pounds.

485 I have no reports in my possession from the Dairymen's League showing the disposition of the nine million pounds of Class II-A milk, the difference between the figures in Exhibit 11, which shows 4,806,923 pounds unpriced Class II-A and the figures in Exhibit 13 which shows 13 million odd pounds of fluid cream sold outside the Marketing Area. The only answer that I could have there is that a lot of their plants, or at least I understand that a lot of their plants are not New York approved. I cannot answer where I got this information because there are so many sources of information, but I have heard it all over the milk shed for the last ten years. I have been in the milk shed ten years, more or less.

As to Exhibit 13, the second item which is Class I unpriced milk for September, 11,594,755 pounds, we should have, and I think we have, market reports showing a statement of the market in which the unpriced milk was sold by the Dairymen's League.

(The witness was asked to furnish a statement of the market in which the unpriced milk was sold by the Dairymen's League, but there was objection to the question on the ground that it called for confidential information and the ruling thereon was reserved.)

WALTER KOHN, called as a witness in behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I am an attorney and counselor at law, and have been admitted to practice in New York State since 1903. I have a law office in the City of New York, and represent one or more handlers of milk who come within the provisions of Order No. 27.

I am acquainted with Mr. Erskine Harmon, the Administrator of that Order, and have seen him at his offices in New York City.

486 On November 15, 1938, I went to Mr. Harmon's office in New York City, and had a conversation with him. In the conversation with Mr. Harmon, I told him that one of the concerns I represented wanted to test out the question of the legality of Order No. 27 and he stated that it would have to be taken up with his counsel; that his counsel was not in New York at the time, but as soon as he returned to New York, he would call me and an appointment could be arranged with him.

Subsequent to that conversation, I had a conversation with Mr. Mather who sits at the counsel table for the Government. He called me on the phone and told me he could see me the following day, that is November 17, 1938, at his office. I went to Mr. Mather's office on that day. Mr. Mather's office was one of the offices of the Administrator, but was diagonally opposite Mr. Harmon's office. The offices of the Administrator are at 95 Madison Avenue, New York City. I had with me Mr. Lieberman and a Mr. Blum, and Mr. Treat was there. Mr. Blum, whose first name was Joseph, was connected with the handler known as Cooperdale, which is a fairly large wholesale distributor in Brooklyn. All these men with me were connected with Cooperdale which is a proprietory handler.

I saw the same Mr. Treat there that is sitting in the court room here, but I do not know his first name. At the meeting, I was told that he was Secretary to the Metropolitan Bargaining Agency, and he was introduced to me in that capacity. I would rather not testify to the conversation because when I came in, I had met Mr. Mather for the first time, and I told him that I wasn't coming down there to get any admission from him, and that anything that was said between us would be without prejudice to either, and would not be used by either one of us against the other. Mr. Mather stated that that was perfectly satisfactory, and under these circumstances

487 I feel that I am not at liberty to state the conversation. I did not ask my clients if they objected to me disclosing what was said. I do not know whether they would object, or not. There was nothing said between Mr. Mather and myself about disclosing the conversation in anybody else's law suit.

I have not asked Mr. Mather today if he would consent that I might testify as to what was said at that time, but I told him today

that I intended, if asked, to make that statement as to the conversation that we had had.

(When the witness was asked as to what Mr. Mather replied to that, there was an objection as to the relevancy of this line of evidence. The court ruled that it would hear the evidence and reserve decision on the relevancy.)

This was the conversation. I said, "Mr. Mather, I represent these gentlemen, the Cooperdale, and we would like to test out the question—I would like to test it out as they did in Boston. I have my petition ready for filing with the Secretary of Agriculture, and following the precedent set down in Boston, I would like to know if you will begin the action, because I can't begin the action until after there is a hearing on my petition." He replied that the Department of Justice took care of that, "but I can tell you now that that won't be for quite some time." Then Mr. Treat said, "It won't take very long you will get no milk." I said, "Well, Mr. Mather, that was one of the things that I wanted to speak to you about because we received word from the Cooperative that was supplying us with milk that if we tested out this question or went to court, they would stop giving us milk." Mr. Treat said, "That's right." Then I said, "Mr. Mather, would you stand by and permit a thing like this to be done, merely because we wanted to test out the question to see whether we had—whether legally it was good, or not." He said, "Not only would I stand by, but I would stand up and cheer." Mr. Mather said that, and that is practically all that was said at that
488 conversation. We were there for about half an hour, and there was quite a lot of conversation, but I am only giving you the substance of it. Yes, there was a great deal that was spoken on the subject of the ability of my client to pay, or discrimination under the Order.

(At this point objection was made to the witness stating what was said on that subject, and the court ordered the evidence received and reserved ruling on the objection.)

We said that we understood that the Dairymen's League had been paying the producers right around our own producers approximately 30 cents less than we were compelled to pay, and that eventually it would force us out of business, that the Dairymen's League had a tremendous advantage. They stated they had a perfect right to do that because the payment was made to the Cooperative, and if the Dairymen's League could arrange that the Market Administrator had nothing to do with that particular phase of the situation. We asked for permission to consult further, that is myself and the two clients. We went out, discussed the matter, and came back and told Mr. Mather that we would pay the Market Administrator for that month. I said to Mr. Mather that I would like to do what had been done up in Boston, to pay the amount of the difference that the Market Administrator wanted, to pay that into court, or to pay it to the Market Administrator in escrow. Mr. Mather said that they would allow no escrow, and that there was no action that could be

brought for quite a time and that it couldn't be paid in court, and that it would have to be paid to the Market Administrator. When I came back, I said that we would pay it, but would pay it under a written protest, and we served a written protest with the Chairman.

Mr. Treat said something about having one hundred Minute Men up there that could go around, and that would dry up the milk of anybody that was going to interfere with the Order.

(The witness was asked if he believed Mr. Treat had one
488 hundred Men up there, and the court sustained an objection.
The witness was also asked what prompted him to make the payment under protest that day, and the court sustained an objection to that question.)

Cross-examination by Mr. WALLACH:

I represent a number of milk handlers in the Metropolitan Area. But so far as this Order No. 27 and 126, I represent only Cooperdale. Mr. Blum asked me to go to see Mr. Harmon or his representative. I was subpoenaed here today, and received a subpoena fee. I received $15.50. I have testified to my conversation with Mr. Mather. It is true. I told Mr. Pratt before he subpoenaed me what I was going to say here today. I may say I spoke to Mr. Mather and told Mr. Mather that I didn't want to testify and Mr. Mather told me that I might say it. Before I came here, I had an agreement with Mr. Mather that anything we said was to be a secret. I told you just what was said. I said, "Let us be gentlemen, let us talk openly, as anything you say will be without prejudice, anything that I say will be without prejudice, and neither of us will use anything that is said against the other." And I said, "Do you want to put that in writing?" And he said, "No, I will take your word." I did not consider that to mean that the agreement we had only applied to a court room. I thought it would apply as broad as the language in which it was couched. Mr. Pratt wrote and asked me whether I would wire him if I would come to court, and I wrote him back and told him that I couldn't because of this stipulation that we had made. I told Mr. Pratt here in the court room what I said to Mr. Mather, and what Mr. Mather said to me. I told him that before I testified.

Q. Now, did you violate that confidence or didn't you?

A. I thought I was doing just what was right. When I came into the court room, I walked over to Mr. Mather and told him that I would like to have a word with him. He said he was busy then, and would see me later.

490 I waited until he got through, and then I spoke to him.

I don't think I would like to see the order declared unconstitutional. I remember when price-fixing was in effect. At that time, I wanted to see price-fixing declared unconstitutional. When it wasn't declared unconstitutional, I always worked toward having the law repealed. I wouldn't go so far as saying that I don't like any law that regulates the milk industry.

At the outset, and after I had been in to see Mr. Harmon, I was opposed to the Order, and I knew that Mr. Pratt was litigating up here, and I wrote Mr. Pratt asking for a copy of this complaint and received it from him. I would like to see this Order worked out. Mr. Pratt had learned that I had a conversation with Mr. Mather on November 17, because I wrote it to him.

Q. And did you tell him the substance of the conversation?

A. Yes, sir.

Q. Well, then, you did violate the confidence that you had with Mr. Mather right after you spoke with him?

A. I don't think so.

Q. Well, you just said yes, didn't you, Mr. Kohn? Now you just said after you spoke to Mr. Mather you communicated that fact to Mr. Pratt, is that correct?

A. Yes, sir; that is correct. Here in the court room.

Q. Now, did you tell Mr. Pratt the substance of that conversation?

A. I did.

Q. Then you did violate that confidence that you had with Mr. Mather about anything that was said on that day, is that correct?

A. I still don't think I violated any confidence, because I wasn't used——

I have the petition with me that I prepared which I spoke about in my conversation with Mr. Mather, and will show it to you.

I said that I wrote a letter to Mr. Pratt after I had a conversation with Mr. Mather. I have the letter here, and can refresh my recollection from it. I would not like to see this Order declared unconstitutional at this time, but when I wrote this letter to
491 Mr. Pratt on November 19, I wanted to see it declared unconstitutional. (There was an objection to the witness, stating why he had changed his mind, and the objection was overruled.

Q. What caused you to change your mind between November 19 and today, Mr. Kohn?

A. My clients have always been law-abiding people and they like to see if this law is constitutional and will be carried out and can—and the thing can be made effective. They would have no objection to it being tried out.

My clients were law abiding on November 19, as well as now, and went to try to get permission to have the question ruled upon, but the consequences were too serious for them.

As a lawyer who has been in the practice for thirty-five odd years, I believed that I needed permission from Mr. Mather or Mr. Harmon to test out this Order, and in the way in which the thing is worked out, I still believe that. Under the Order we filed our petition for a review. We could not begin an action until there had been a hearing, and a decision on that petition, except on the possible theory that the delay in having the hearing had been dragged out so long as to preclude us from having the hearing. Having read very carefully the entire Boston case, I had hoped that the Market Administra-

tor could be induced to begin the same kind of an action as had been brought in Boston and that in that action the matter could be determined.

I brought up with Mr. Mather the matter of a petition before the Secretary, and the reason for that was to prevent any penalties from being enforced, pending the failure to make the payment. I did not believe at that time that Mr. Mather or Mr. Harmon could have held up the hearing before the Secretary of Agriculture as long as they pleased, but we had to make the payment of the 25th, and if we didn't make the payment there would be penalties, so I filed a petition and hoped that they would begin the action immediately. I filed the petition in the office of the Secretary of Agriculture, and also in the office of the Commissioner of Agriculture of New York, and also with Mr. Harmon.

492 I did not have a conversation with Mr. Harmon on the same day I did with Mr. Mather. I talked with Mr. Harmon two days before that.

In the conversation with Mr. Harmon I told him that my people, Cooperdale, could not continue to make the payments because the Dairymen's League was paying approximately 30 cents. Present at that conversation were Mr. Harmon, Mr. Blum, Mr. Lieberman and myself. Mr. Mather was not present. When I wrote to Mr. Pratt on November 19 and stated that I had a long conversation with the Market Administrator here in New York and with his attorney, Mr. Mather, the statement was true because I had a conversation with each one. In the letter which I wrote to Mr. Pratt, I stated that "while this conversation was going on, a representative of the Bargaining Agency went to the Cooperative, which had been supplying milk, told him of the proceedings w[illegible]re taking." I meant that that was a separate conversation bet[illegible] Mr. Mather and myself on one occasion and Mr. Harmon and myself on another. I took it that the various conversations we had constituted really a conference because it had been carried on over a period of at least two days. I spoke to other people down there, and included these other conversations as part of this general conference.

(Plaintiff moved to exclude the evidence of the witness pertaining to his conversations with Mr. Mather as being irrelevant. The court denied the motion.)

Cross-examination by Mr. SCHOENECK:

I read the record of the Boston milk litigation on appeal. I did not follow the case as it went along—only after the decision. I followed it at least that close. From what I read in the record, I reached the conclusion that in Boston the handlers were paying into court the difference between the uniform price and the pool obligation.

When the interests of my clients came to my attention, I felt it would be better to have the money paid in the court, rather
493 than to have it paid over to the Market Administrator. The reason for that was because if I paid it into court I would

be able to recover it back if the law was declared unconstitutional. The petition was the first step in order to avoid penalties. I made that petition because of the principle in the law that allowed any person who was dissatisfied with the Order to appeal to the Secretary for a review and a modification of the Order.

I was familiar with the provisions of the Marketing Act which provided that a dissatisfied handler could appeal to the Secretary of Agriculture. (The witness was asked if there was a remedy provided in the Act for anybody who felt aggrieved. There was an objection to the question, but the court overruled the objection.)

There was not entirely a remedy. It only covered one phase of it. The Act left uncovered the phase that if we paid the money to the Administrator and then the law was declared unconstitutional, we might face a situation in which, it spite of the fact that the law was unconstitutional, we couldn't get it back.

I said that my clients would like to see how this Order might work out. (Over objection, the witness was permitted to testify that he would like to see the order tried out now.)

This petition was filed about the 20th day of November, and since that time my clients have continued business and have been doing business under the Orders and regulations of the Department, that is, under Order 27 and under Order 126. My clients have instructed me that at this particular time they have no interest in the prosecution of this petition or any form of litigation which tests either the constitutionality of the Act, or the validity of the Order, but that is without giving up any of their rights. I would like to have it understood because the payments which have been made were under the same protests. They stand on their legal rights.

There was nothing in the Act that said anything about escrow. I was still trying to find some method by which I could make it
494 easier for my client to get his money back in the event the law was held unconstitutional, and still show that my client wanted to do the right thing.

When I read the reports I reached the conclusion that, generally speaking, the New York Order and the Boston Order were very much alike. I don't think the Boston Order provided that payments could be made into court or into escrow. "By Boston Order," I mean the Secretary of Agriculture's Order.

I don't know anything about the size of the plant at Cooperdale, or the amount of milk handled. It is set forth in the petition. I don't know whether during this period the Dairymen's League took some of our milk to help us out of an undue surplus condition.

Cross examination by Mr. MATHER:

On the fifteenth, I told Mr. Harmon that I had a plant for testing the Order, and he said that he preferred that I talk with his attorneys from Washington. On the day in question, you called me and said you were the attorney from Washington.

I told you I had a plan for testing the constitutionality and you invited me to come down. Mr. Blum and Mr. Lieberman came with me to the office of the Market Administrator. Mr. Treat was already there. Mr. Blum and Mr. Lieberman may have conversed with Mr. Treat before I came in and introduced myself, but I didn't. I don't recall you specifically inviting Mr. Treat to sit in the conference.

We all went into the office together, and I told you I had my check, but didn't want to pay it, and I said I wondered if suit might not be brought along the same lines as the Boston suit, and the money paid in escrow in court. You told me you had no authority to consent to such an agreement, but that the matter would have to be referred to the Department of Justice. We conversed further about the constitutionality of the Act and Order and the litigation in
495 Boston, and about the provisions of the Order and the milk supply of Cooperdale Dairy.

I told you I had gotten word from our Cooperative that if we tried to test the question that the milk would be dried up, and we wouldn't get any milk. You said that you would stand up and cheer. I don't remember you telling me that, in your opinion as an attorney, if a milk producer didn't desire to take his milk to a dealer because a dealer was not complying with the Order, that he had a perfect right to take his milk to any dealer he wanted to.

I recall in substance that after considerable discussion I turned to you and said that we could probably settle this matter, and you said there was nothing you could do about it. You left the office and Mr. Lieberman, Mr. Treat, and myself stayed in there and talked, and when you returned to the office I stated that we had agreed to pay under the same protest that had been filed the month before.

Mr. Lieberman never informed me of any other conversations that you two had had concerning the Order and the steps that it would be necessary for Mr. Lieberman's various corporations to take in order to comply with the Order.

Cross-examination by Mr. Cook:

I went to the administrator's office on the 15th of November, and talked with Mr. Harmon. I did not notify him that my company would not comply with the provisions of the Order. The conversation was whether we couldn't arrange to deposit the differential with him in some way. That was on the 17th. He advised me that he couldn't pass on that, and that the matter would have to be passed on by counsel, by Mr. Mather, and possibly another. I never said that we were not going to pay into the fund for the month of November. I said that we were going to pay, but that we would like to pay in some way to protect our interests.

496 Cooperdale got its supply of milk from Lafayette Co-operative, located at Lafayette-Onativia. It was between the 15th and 17th that we got word from the Co-operative that unless we paid into the fund they would withhold the milk. The word came by

telegram from Lafayette Co-operative, and signed by an officer of the Corporation. In substance, the telegram stated that if we proceeded to test the Order or didn't live up to the Order that they would stop delivering milk to us. I don't know how they knew we were contemplating testing the Order. We had no communication with Lafayette at all. We were not in default at the time and have never been. We had paid in September and October.

The milk wasn't withheld. We paid in December, too. No milk had been withheld.

In my conversation with Mr. Treat he said that the one hundred Minute Men would see that we didn't get any milk if we didn't live up to the Order. He didn't say how or in what manner they would see to it that we didn't get any milk.

Redirect examination by Mr. PRATT:

The Cooperdale Milk Company has its own milk receiving plant, and owns the stock of the Onativia plant where this milk comes from.

(At this point counsel introduced in evidence the correspondence between Mr. Kohn and himself, consisting of four letters which were marked defendants' Exhibits 14–A to 14–D, inclusive. When the witness was asked if a statement which he had detailed concerning drying up the milk of the Cooperdale Milk Company had any connection with his payment into the pool, an objection was sustained.)

497 AARON H. RUBENFELD, called as a witness in behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I live in New Rochelle, New York, and have been engaged in the milk business since 1920. I am connected with and am the largest stockholder in the following named proprietary milk dealer and handler corporations: Dellwood Dairy Company, Slate Hill Milk and Cream Co., Middletown Milk & Cream Company, and Public Farms Products, Inc. Some of these companies are processing companies.

The Dellwood Company has a receiving plant at Fort Edward, N. Y., and at Kyserike, N. Y. The Middletown Milk & Cream Company has one plant at Slate Hill, N. Y. The Slate Hill Milk & Cream Co. has one plant at Slate Hill, N. Y. The Public Farms Company has no plant but is engaged in business in New York City as a wholesale distributor of milk.

The Dellwood Company sells some milk at wholesale but doesn't operate any wholesale routes. It operates retail routes in New York City and sells some wholesale milk off its retail routes. It has over 100 retail routes. I don't know whether or not the Dellwood Company is one of the largest companies in New York outside of Borden and Sheffield but perhaps it is one of the five largest retailers.

I signed an affidavit in this particular case against Jetter Dairy Company and I assume that I am familiar with the milk business in New York City but being familiar with the milk business in New

York City doesn't mean that I have to know what other businesses are. I don't have the slightest idea about how many retail routes the Evans Dairy Company has. I know nothing about anybody else's business except my own.

Public Farms Products has seven wholesale routes and sells in the County of Bronx, New York City. Middletown and Slate
498 Hill Cream Company operate and sell their milk in New Jersey and are approved for that State.

In paying our patrons of these three operating companies which have three milk receiving stations we do not pay the same price or the same base price to all patrons of those three companies. For instance, in the Slate Hill Company case we pay a different base price than we do at Fort Edward. Approximately all of the milk at the Fort Edward plant is sold in the marketing area as defined by the order and we pay substantially the uniform price.

Middletown Milk & Cream Company sells approximately 40% of its milk in the marketing area and 60% outside of the marketing area. For the milk sold in the marketing area we have paid pursuant to Order No. 27. For milk sold outside of the marketing area we negotiated with producers and paid accordingly. The 60% referred to as outside was sold in New Jersey. There is no marketing order in New Jersey.

The amount we pay for milk in this marketing area consists of two payments, one to our producers and one to the pool, if our pool obligation is larger than the uniform price. As to the other 60% of our milk which is sold in New Jersey we pay only once, the amount we pay the producers.

In paying off at the Middletown plant in September, October, and November, 1938, we paid one blended price, that is, a price arrived at by blending the uniform price for 40% with the negotiated price for the other 60%. In September the blended price was $2.15 for milk testing 3.5 butterfat. Not all of that milk was used in Class I. I couldn't tell you without consulting our records whether, assuming that we paid for it at the prices fixed by Order No. 27, our price would have been more than $2.15.

We negotiated a flat price regardless of whether it was used as Class I or not for milk which went from the Middletown plant
499 to New Jersey. After we knew the price that we had to pay into the pool we took that into consideration and arrived at a flat price for all the milk.

We negotiated this flat price of $2.15 with the committee of our producers. The negotiations were had at Slate Hill. Not all the milk which went to New Jersey was shipped in fluid form but some of it was cream.

I am familiar with the milk control price fixed by the State of New Jersey for fluid milk sold there. The price is not set at the 200-mile zone on the same basis as the order price but is set f. o. b. plant. That plant can be in the city. There are no freight differentials set in connection with New Jersey prices. I know of plants where milk

is delivered direct to the city by producers in Jersey and the price at the plant in New Jersey is $2.76 per cwt. for milk testing 3.5. There are no freight differentials. There are no plants located in New Jersey, which are as much as 150 miles from the city. Middletown is located about 90 miles from Newark but we are not transporting any milk in tank trucks from Middletown.

In New Jersey we sell all of our milk to other handlers and we sell it f. o. b. our plant at Middletown. We allow the handler the cost of transportation for such milk and the cost of such transportation runs anywhere from ¾ to 1 cent a quart. Practically none of our milk is sold in cans; it is sold in bottles. It is bottled at Slate Hill and Middletown. The milk we sell is processed. The bulk of this milk goes to various localities in the State of New Jersey, such as Newark, Jersey City, Hackensack. Hackensack is about 70 miles from Middletown and Jersey City is about 80 miles therefrom.

I am not familiar with the reports made by our company to the Administrator. I think we shipped some milk and I know we shipped some cream from Fort Edward to New Jersey during September, October and November.

500 I assume that paper you show me is the statement delivered by the Dellwood Dairy Company to its patrons when payment was made for August milk in September 1938, which purports to show the amount of milk handled in various markets, for August. I also assume that the statement dated October 24 which you have shown me is the statement that was issued by the Dellwood Dairy Company showing the utilization of milk at the Fort Edward plant in September 1938.

We didn't make any changes in the manner of handling our milk ... these various milk receiving stations commencing September 1, 1938. Our operation as far as marketing milk is concerned has been going on for many years.

The milk which was receiv[illegible] at Fort Edward in August was marketed in New York; some of it up-State and I think some of it outside of the State. I think some of it was marketed in Connecticut and in New Jersey. I think there was some milk—some cream sold in Connecticut during the month of September and in New Jersey. Without consulting my records I could not say how many pounds of milk were sold up-State and out of the State in all since 1938 from the Dellwood plant at Fort Edward.

It has been the custom of the Dellwood Dairy Company for a period dating back prior to August 1938, to issue a statement every month. When producers are paid for milk, a statement goes along with the check. (An objection was made to this testimony on the ground of irrelevancy but it was overruled.)

I am President of the Dellwood Dairy Company. We have no General Manager. I think these statements were accurate statements showing the utilization of milk by the Dellwood Dairy Company. I didn't make them myself but the office made them. I have seen the statements occasionally. The statements issued prior to September 1

1938, were sent to producers with their checks to show the
501 amount of milk sold in different markets and the amount of milk manufactured into by-products. The price paid was a competitive price. Beginning with September 1, 1938, the statements are prepared from the records of the company in accordance with the utilization of the milk in the different classes under Order No. 27.

We have some of the reports that are sent out each month. I don't think that we give out statements to all producers of other companies except Dellwood. I think we have statements beginning with September 1, milk delivered beginning September 1, payments made on October 25th. I don't know exactly what the report will show.

In our transaction since September 1, I think we have shipped a small amount of milk from Fort Edward to Slate Hill and that milk was then re-shipped to New Jersey. We made no claim to the Market Administrator for a 23-cent handling allowance on that milk. We shipped milk from Kyserike to Slate Hill for separation into cream and were allowed 23 cents by the Administrator for the trucking for the months of September and October but not for the months of November and December. We made no claim during the month of November because the provisions of Order 27 do not permit that during November and December.

I think that in August, September, and October 1938, we bought milk from the Dairymen's League. This milk was bought for use in the New York market and we received the milk from various plants. We had no stated contract as to the amount of milk we purchased from the Dairymen's League.

We paid the Dairymen's League for Class I milk purchased in September, the price based on Order No. 27 plus the handling and delivery charges and plus butter fat. I don't remember what we paid in September, but for November and December we paid $3.10 cwt. delivered at Yonkers. The butter fat for that milk varied from 3.8 to 4%. We paid on butter fat content between 3.8 and 4.

I do not inspect the detailed statements that come in from the Dairymen's League. I think we can produce the statements
502 received from the Dairymen's League for milk for the months of September, October, and November and will have them sent up.

I don't know how much milk we were buying each day from the Dairymen's League in August. In September it varied from day to day. We would get one tank of milk one day with approximately 200 40-quart cans in a tank and the next day we may order two tanks; the third day we may not want any. Dellwood Dairy is the only one of our companies which buys from Dairymen's League and the milk so purchased is delivered to us at Yonkers and New York City. Our milk from Fort Edward also goes to Yonkers.

Since September 1 we did not increase our sales in wholesale delivered trade in New York City. Our business decreased. We lost

business to other companies since September 1st. I do not know any particular company that we lost to.

I do not remember that I signed any affidavit in which I accused anyone in particular of starting chiseling. I did sign an affidavit in the office of Mr. Schilz. Mr. Schilz asked me to come down and make the affidavit if I had anything to state. I met him at the office of the Administrator at 95 Madison Avenue. He asked me to come down and to talk with him. I met Mr. Schilz at the Administrator's office a day or two before I made the affidavit. We had a conference about some other matters pertaining to the milk industry.

Mr. Sklar is the attorney for the Dellwood Dairy Company (objection was made to the question calling for this information on the ground of irrelevancy but the same was overruled). He is also attorney for the other companies of which I am the principal stockholder. I am the President of these other companies also. Our companies are managed by different department heads.

Dellwood Dairy Company is a member of the Distributors Bargaining Agency. There are about twenty members altogether but I do not know all of them. As a matter of fact, the Borden subsidiaries and National Dairy subsidiaries are not members.
503 Sheffield Farms Co. is a member and the Borden Farm Products Company is a member. Laudington Milk Company is a member but I don't know where it buys its supplies. Gold Medal Farms is a member and was a member when we first organized under the Rogers-Allen law, resigned, and then became a member again. I don't know whether they became members the second time after a meeting of the producers was called up North.

It is my experience in the milk business that certain periods of the year provide more milk than other periods. There is a period during the year known as the flush period when there is a great surplus of milk. May and June are the two greatest production months. July is usually not a short month. July production depends a great deal on weather conditions. Some years it is more than enough and other years production shrinks rapidly and may be just enough to get around.

There is some shrinkage in August. I would say that November and December are the two shortest months of the year. August is not quite as short as November and December. I think the production in August is as much as the production in October or approximately so. Production in August 1938 was about normal, probably a little bit above normal. I don't think there was any great deal of difference in August and September 1938, but my recollection is that September was slightly above August. I don't remember offhand whether the production in October was higher than in August. I don't know whether the milk we shipped from the Dellwood Dairy Company to the Middletown plant was sold in fluid form or not. Dellwood Dairy sold it to the Slate Hill Milk & Cream Co. and I don't think the milk went out in fluid form. When we ship milk from Fort Edward to Slate Hill it is shipped by glass-lined tank

ucks. These tank trucks held from 150 40-qt. cans to 350 40-qt.
ans. It is customary to ship four trucks to avoid shifting the load.
When the milk arrives at Slate Hill from Fort Edward we empty
it into a storage tank. We have four storage tanks and they
04 have a capacity of 3,000 gallons or 300 40-qt. cans. Those
tanks are thermos-type stainless steel tanks and they are of a
ype which hold the milk at the temperature at which it is received
the tank. The milk which is chilled down to 33 or 35 degrees
an be kept for several days but we have never practiced holding
that long.

We were received approximately 500 40-qt. cans daily from pro-
ucers who delivered to the Slate Hill plant in September 1938.
We have storage facilities to carry 700 additional cans of milk daily
that plant. I don't actually operate the plant myself and am not
ntirely familiar with the manner of operation. There are no health
estrictions which prevent the mingling of milk from Fort Edward
ith milk from Slate Hill. I don't know what was our custom in
eptember when we were processing and bottling milk for the New
ersey fluid market, to differentiate between the Fort Edward milk
nd Slate Hill milk.

We have a plant manager who has charge of directing when the
ipments of milk shall be made each day. He executes the orders
they come from the customers. It is not our custom to call the
reamery at Slate Hill, N. Y., on the telephone every day. I call
em at times. I do not call them to determine the amount of milk
storage there from Fort Edward and other places. I call them to
nd out things pertaining to business in general. I do not do it
any specific intervals.

I make inquiry as to the amount of milk on hand and the amount
f milk which customers are ordering to be shipped out of Slate Hill.
ur plant manager is not under instructions to call me at different
mes. I don't necessarily find out when it is necessary to ship milk
rom Fort Edward to Slate Hill. Others in the corporation handle
me of these mattters. I don't regularly have anything to do with
e shifting of milk supplies but when I do find out that milk should
e sent from Fort Edward down to Middletown or Slate Hill I call
p and find out or the manager calls me and we send supplies from
Fort Edward or from some other source.

05 I call Fort Edwards at times to find out how much milk
there is there, but the amount of milk that was shipped from
ort Edward to Slate Hill during the months of September and
ctober was insignificant.

We ship from Middletown to Slate Hill and vice versa. We manu-
acture milk at Slate Hill but we do not manufacture it at Middle-
own. During September, October, and November we shipped milk
rom Middletown to Slate Hill for manufacturing and some of the
ilk shipped from Middletown to Slate Hill was reshipped to New
ersey for fluid consumption.

I do not have the figure available and cannot tell you the approximate amount of milk shipped daily during the month of September from Middletown to Slate Hill.

We received approximately 600 cans in September from patrons delivering to Middletown.

We sell Grade A and Grade B milk and Vitamin D ..ade B milk. Approximately 65% of our business in New York City is in the retail trade. It is what we call house-to-house delivery in the industry. In September 1938, we sold our milk at retail to consumers in New York, that is Grade B milk, at 13¾ per quart (there was an objection on the ground of irrelevancy to the witness testifying as to the prices at which he sold the milk at retail but the court overruled the objection). The Grade B milk is the substantial sale.

We sell hundreds of cases of Grade A milk daily. We received 16¾¢ per quart for such milk. (There was an objection on the ground of irrelevancy to the witness stating what price his company received for this milk but the court overruled the objection.)

We do not sell any retail milk at all in New Jersey. All milk sold in New Jersey is sold to other dealers and subdealers.

There is a particular kind of cap which goes on the milk bottled at our plants at Slate Hill for the New Jersey trade. All milk is labeled in accordance with the regulations of different health
506 departments and different municipalities. The caps are made in accordance with regulations. It has a designation of Grade B or Grade A but it varies and the wording of the cap varies.

We purchase some milk from producers in New Jersey. The milk is delivered to Slate Hill. It is bought at Slate Hill.

The plants of the Middletown and Slate Hill Companies are both at Slate Hill. These two plants are about a city block from each other. Middletown is a Grade A plant and Slate Hill Milk & Cream Company is a Grade B plant. The milk shipped from the Middletown plant to the Slate Hill plant is sold to the Slate Hill plant as Grade B milk. That is surplus milk that we have in the Grade A plant and is sold as Grade B milk. The Middletown Company pays its producers for Grade A milk for the amount that is actually sold as Grade A milk. Middletown Milk & Cream Co. pays for the Grade B milk. There is some Grade B milk that is transferred from Middletown Milk & Cream Co. to the Slate Hill Company plant for separating purposes. It is separated and the cream is sent back to the Middletown Company.

You cannot handle Grade A milk or Grade A cream in Grade B plants. Wherefore, it has to become Grade B milk or cream after it is transferred to the Slate Hill plant. It is processed and bottled at the Grade B plant for Middletown and is shipped physically to the customers in New Jersey. All municipalities have regulations against the handling of Grade A and Grade B milk in one plant.

The State of New Jersey Milk Control Board does not fix the prices to be paid to producers for milk bought at a New York plant—I mean bought and delivered to a New York plant. The milk which

e purchase from producers residing in New Jersey is subject to rder No. 27 if the milk is sold within the marketing area. If it n't it is not subject.

The milk bought in New Jersey is about 2% of the total milk ceived at the Slate Hill plant. I wouldn't say only 8 or 10 cans day. I think you will find our daily receipts at the Slate Hill plant during September, October, and November in the reports.

07 (At this point a paper dated September 15 was marked Defendants' Exhibit 15 for identification.)

(Defendants' Exhibit 15 for identification entitled "Utilization of ilk at the Dellwood Dairy Company for August 1938" was received evidence as Defendants' Exhibit 15.)

I have an original statement of which copies were delivered to roducers of the Dellwood Dairy Co., and which statement was dated ctober 24, 1938.

(This statement produced by the witness was offered in evidence Exhibit 16. The court received the statement which concerned eptember milk over an objection as to relevancy. The said paper entitled "Statement to producers, Dellwood Dairy Company," ted October 24, 1938—"September milk.")

(A copy of a statement of the Dellwood Dairy Company to its trons dated November 25, 1938, was received in evidence and arked Defendants' Exhibit 17. A copy of a statement of the Dellood Dairy Company to its patrons dated December 23, 1938, was ceived in evidence as Defendants' Exhibit 18.)

I have with me copies of the reports which my several companies ndered to the market administrator for purchases of milk in September, October, and November 1938. (The witness produced the pers.)

At this point Yonkers report was marked Defendants' Exhibit 19 r identification; Kyserike report was marked Defendants' Exhibit -A for identification; Fort Edward report was marked Defendants' xhibit 19–B for identification. Exhibits 19, 19–A, and 19–B for entification were received in evidence as Defendants' Exhibit 19, 19–A, and 19–B over objection of plaintiffs.

8 Three papers were marked, respectively, Defendants' Exhibits 20, 20–A, and 20–B for identification. Thereupon Exhibits 20, -A, and 20–B for identification, over objection of plaintiffs, were ceived in evidence as Defendants' Exhibits number 20 (being for e month of October, other description same as Exhibit 19), number -A (being reports of Dellwood Dairy for the month of October, her description same as Exhibit 19–A), and Exhibit 20–B (being r the month of October, other description same as Exhibit 19–B).

At this point Defendant offered in evidence and the court, over jection of plaintiffs, received in evidence Defendants' Exhibits 21, -A, and 21–B, being reports of the Dellwood Dairy Company to e market administrator covering the month of November 1938.

Two papers were marked Defendants' Exhibits 22 and 22–A, respecvely, for identification. The court then received in evidence, over

objection of plaintiffs, Defendants' Exhibits 22 and 22–A for identification as Defendants' Exhibits 22 and 22–A, which purport to be reports of Slate Hill Milk & Cream Co., Inc., for September 1938 to the market administrator.

Two papers were marked Defendants' Exhibits 23 and 23–A. The court, over objection of plaintiffs, received in evidence said Exhibits so marked for identification as Defendants' Exhibits 23 and 23–A which Exhibits purport to be reports of Slate Hill Co. for the month of October.

Two papers were marked Defendants' Exhibits 24 and 24–A for identification. Over objection of plaintiffs, the papers, purporting to be reports of the Slate Hill Company for November 1938, were received in evidence as Defendants' Exhibits 24 and 24–A.

Reports of the Middletown Milk & Cream Co., Inc., were marked for identification, September Nos. 25 and 25–A, October Nos. 26 and 26–A, and November Nos. 27 and 27–A. Over objection said reports were received in evidence as Defendants' Exhibits 25 and 25–A, 26 and 26–A, 27 and 27–A.

509. Copy of claim of Dellwood, October, was marked Defendants' Exhibit 28 for identification. Copies of claims of Middletown Company, September and October, were marked Defendants' Exhibits 29 and 30 for identification. The copy of the Dellwood Company claim for the month of October 1938, was offered, and over objection of plaintiffs, was received in evidence as Defendants' Exhibit No. 28. Exhibits 29 and 30 for identification, being copies of claims of Middletown Company filed with administrator for September and October were, over objection of plaintiffs, received in evidence as Defendants' Exhibits 29 and 30.

Copies of statements furnished to producers who delivered milk to the Slate Hill Milk & Cream Co. for the months of September, October and November 1938, were marked Defendants' Exhibits 31, 32 and 33 for identification. Over objection of plaintiffs the papers were received in evidence as Defendants' Exhibits 31, 32 and 33.

Similar statements for Middletown, same months, were marked Defendants' Exhibits 34, 35, and 36 for identification. Over objection of plaintiffs, the statements were received in evidence as Defendants' Exhibits 34, 35, and 36.

My attention has been called to Exhibit 22–A which is our report for September covering the Slate Hill Milk & Cream Company and which shows total receipts of milk from producers, 1,203,862 pounds. Test 3.707. That was milk we received from producers delivering to our plant.

My attention has been called to the statement of 1,167,773 lbs. of milk received from other plants. I thing that 480,165 pounds of that milk was received from Dairyland Milk Company, Fraser, N. Y., and 687,608 pounds of it was received from Grover Farms, Grover, Pa. The Grover Farms milk and the Dairyland Milk Company milk

was approved for New Jersey. We wouldn't handle it unless it was.

510 The Class I unpriced milk, 1,144,803 pounds—is less than the intake from our producers. The base price that we paid for this 1,144,803 pounds of unpriced milk is stated on the reports which go out to the farmers with the checks which I turned over to you. (There was objection to this line of testimony on the ground of irrelevancy but the court overruled the objection.) The price was $2.38 per cwt. for milk testing 3.5 butterfat. That is the price which we paid our producers for milk which we purchased from them. Only a very small fraction of this milk was used in the New York Metropolitan Area. I cannot tell you whether this particular milk was intermingled in the tanks in which we handled our milk at Slate Hill.

I gave no instructions to our foreman in charge of the Slate Hill plant that milk received from Fraser, N. Y., should be separated or sent to New Jersey or to New York or to any particular place.

With reference to the 480,165 pounds of milk reported on Exhibit 22-A as having been purchased from the Dairyland Milk Company of Fraser, N. Y., in September, 1938, the price that we paid Fraser is the price that we negotiated. (There was an objection to this line of testimony but the court overruled the objection.)

We did not report any of that milk as having been used in the marketing area. It was not used in the marketing area.

With reference to the 687,608 pounds of milk from Grover Farms, Pa., we did not report that milk to the administrator. We don't pay to the administrator for milk that we buy from another handler. It is up to the other handler to report to the market administrator. It is easy to determine where that milk was sold. Ninety-nine and a fraction percent of that milk went to New Jersey and only less than one-half of 1 percent went into the marketing area. I do not care to disclose the price we paid for this Grover Farms milk. Come to think of it and with reference to the milk from the Slate Hill plant we are using milk that goes to the marketing area from this particular company only to the extent of a small amount of milk that

511 is used for the manufacture of chocolate drink. That is the only milk used for the marketing area. There is no milk as fluid going into the marketing area from this particular company.

I didn't say that we were manufacturing all the milk purchased from our producers. Milk coming in from producers is received in the early morning hours. Milk coming from far away is received at a different time of the day. Milk that was received in the morning from producers is cooled by passing it through a cooler. It is not necessarily piped into a storage tank and it doesn't necessarily go through a cooler. We can let such milk go immediately to the pasteurizer in our plant and then cool it and bottle it. We hold all milk sometimes. We don't ship any fluid milk from this plant (Slate Hill)

to New York City. We do not ship any fluid milk into the marketing area at all except just small amounts for chocolate drink.

In this report for September I reported the milk purchased from producers as having been sold outside the marketing area or practically all of it. The report itself shows.

Since adjournment of court last evening I talked to one of my associates and am informed, with reference to the milk received at Slate Hill from producers and other dealers, that the operation varied from day to day. Sometimes the milk is intermingled and other times it is kept separate. The source from which the milk comes does not enter into it except as to the freshness of it. If we had milk held over in a tank for 36 hours we would not mix fresh milk with it. You can still mix it and cool it.

My attention has been called to Exhibit 28, Schedule A, a statement that between Oct. 21 and Oct. 31, 1938, certain milk, 104,550 lbs., was shipped to Goshen, N. Y. To the best of my knowledge we made claim for 23¢ "receiving allowance" on that milk amounting to $240.47 and made claim for trucking that milk fifty miles, $20.93. To the best of my knowledge these claims were allowed and we received payment for them. The milk referred in this statement was classified as No. III-D and it was milk sold to the operator of the milk-receiving station to which it was shipped. This milk was used in the manufacture of cream cheese. It was not sold in the marketing area. (It was conceded that Goshen, N. Y., was not in the marketing area.)

We received a payment of approximately 34¢ in plant-receiv-
512 ing charges and in freight on such milk.

I do not have the schedule prices announced by the administrator for III-D milk price for October. The plant to which that milk was shipped to the best of my knowledge is not approved by the New York City Health Department.

On Exhibit 28, there is a claim made for milk shipped to the Slate Hill Milk & Cream Company, Slate Hill, New York, October 1 to October 31, 1938, on the total of 522,325 pounds of milk. The claim amounts to $1,201.75. To the best of my knowledge, we received payment for that amount, and we received a payment of $558.89 for freight for a distance of 42 miles on that milk. That milk came from Kyserike, New York. The freight rate from Kyserike to Slate Hill Milk & Cream Company, Middletown, is based in accordance with the order. There are no railroad facilities from Kyserike to Slate Hill, it has to be trucked, and what we charged was for the actual mileage between the two points based on the order. I do not know the actual cost of transportation between those two points.

For the month of October, I think the McBride Trucking Company of Goshen drew that milk for us. I have never acquainted myself with the freight rate between Kyserike and Middletown, New York.

If you will refer to the reports filed with the market administrator, you will find the total intake at the Kyserike plant. I don't know

to Goshen, some to Slate Hill for separating, from which cream was shipped to the ice-cream manufacturers, and also for powdered cream, and part of it was probably shipped in fluid form. I don't know offhand how much milk we took in there during the month. Referring to Exhibit 28 and the milk we purchased at the Kyserike plant in Class III, we did get 23 cents a cwt. I don't know whether it came back from the same money we paid in, or from some other fund. (There was objection to this testimony on the ground that it is irrelevant and that the order speaks for itself, but the court overruled the objection.)

513 Slate Hill Milk & Cream Company and Middletown Milk & Cream Company are two distinct operations. 99½% of the milk from Slate Hill is shipped out of the marketing area in fluid form and otherwise and for that milk, the price is not based on the marketing order at all. It was not identical with the uniform price. We paid for November 2.38 for 3.5 milk.

We have a freight differential of 8 cents at Middletown. We have no location differential outside the marketing area. Our plant at Slate Hill Milk & Cream Company is approved, and shipped milk to New York City, and as to any milk received at that plant sold within the marketing area, we have a plus differential of 8 cents allowed for freight, that is within the 81 to 90 mile zone, and because it is 110 miles nearer to New York than the 200-mile zone, we add 8 cents on to the price, and because it is in Middletown we give a location differential of 20 cents also on milk going into the marketing area.

Now as to the fraction of 1 per cent that we received in Slate Hill in November for which we were obligated to pay the market price, the location differential is 25 cents. We are not allowed 28 cents by the administrator when we make accounting into the pool. We add 8 cents for freight differential, and we add 25 cents, as I understand it, and we are allowed 20 cents by the administrator. When we make settlement for that milk, our base price is a uniform price—the price of whatever the milk was utilized for. The price we pay our producers for milk sold in the marketing area is the uniform price, subject to differentials. The uniform price was $2.10 for November.

In making a settlement to the pool for Slate Hill, we were allowed under the provisions of Article VI, Section 8, to deduct 20 cents per cwt. for all net pool milk received from producers at that plant. The allowance we got back from the pool was 20 cents. That was to be added to the 2.10 uniform price on milk shipped to marketing area. On account of the location differential, we paid 5 cents. In addition there was an 8-cent freight differential. Referring to the milk sold in the marketing area, the price paid to producers

514 by Slate Hill for December was the uniform price of $2.10, plus 25 cents, plus 8 cents.

I cannot answer "yes" or "no" to your question as to whether for the small fraction of milk we sold in the marketing area in the month of November, paid for in December, we paid the same price we paid

for milk sold out of the marketing area, $2.38 per cwt. Exhibit No. 36 states the price of $2.38 as being paid to our patrons and $2.38 is correct for all the milk received, whether it was in the marketing area or out.

Referring to Exhibit 15, a statement to the producers of the Dellwood Dairy Company concerning the disposition of milk in August, and to Exhibit No. 16, I explain the change in our operations at Fort Edward in September, from August, in this way: During the spring and summer months, we sell a lot of cream, not fluid milk, but cream to ice cream manufacturers in Connecticut. Beginning with September, that contract is cancelled; it does not run beyond September and that is the reason for the drop-off in outside sales. The first answer I gave you about the cream sales out of Fort Edward is correct. There has been some change in the shipments of Kyserike milk. That milk, prior to September 1st, was shipped to Slate Hill. Since that date, part of it has been shipped to Yonkers in fluid form and part of it to Slate Hill for separating. We had no separator at Kyserike prior to September 1. All our operations as you see them now have been going on many years. There has been no change in the plant; part of it from Kyserike is going to Yonkers and part to Slate Hill, where before it all went to Slate Hill. I didn't say we installed anything at Kyserike since September 1.

Whatever is in the report, Exhibit No. 25-A, must be correct, although I did not prepare the report.

(Objection was made to the witness being asked about the reports but the court overruled the objection.)

The report does not state that more than a million and three-quarters pounds was transmitted from the Slate Hill Com-
515 pany to the Middletown Company. My testimony yesterday was correct. We cannot take milk from the Slate Hill plant to the Middletown Company. This amount of milk which says receipts of handlers from plants of other handlers is milk that Middletown borrows from Slate Hill, and the Slate Hill plant processes, pasteurizes, and bottles it for the Middletown Company and the handling charge is paid for it. This particular volume of milk was received originally from producers or handlers, sold to the Middletown plant, and processed for the Middletown Company at a price and became the property of the Middletown Company. That milk you have just referred to is sold in New Jersey.

The milk that was reported as IV-A did not go to Goshen. The milk that went to Goshen as III-D was sold at the gross cost of III-D milk, plus 5 cents per cwt.—f. o. b. Goshen. For that particular month we received $1.061 at Goshen. The III-D price varies from month to month. For that month, we received in addition from the market administrator 33 cents more in round figures for handling and trucking—a gross turnover of 38 cents per cwt., approximately. I don't know exactly what amounts were paid for delivering that milk. I would think the trucking was paid at about what we received from the administrator.

When we paid the producers, we paid an average price that was
esignated by these exhibits in evidence. As to your question whether
e sold this milk in New Jersey in competition with milk in that
tate which was under the New Jersey Price Control Laws, I cannot
ive you a "yes" or "no" answer. There is more than one kind of
ompetition in the state of New Jersey. There are many deals in
lew Jersey under which handlers buy milk right in the state of
lew Jersey where the price is fixed. I know of many deals made
utside of the price that is set up. I would say that those deals are
ade because of cheaper milk coming from all over the city. I
ould not agree that it is because of milk coming from Slate Hill.
here is no base price for the milk we sold in New Jersey. We sell
bottled milk there. We do not sell raw milk in New Jersey.
16 (At this point, the witness was asked to state what price
per bottle he got for Grade B milk sold in New Jersey.
laintiffs objected to the question and the witness himself also ob-
cted to answering the question because he believed it would be
rejudicial to his interest to reveal that price. The court overruled
bjection to the question.)
The price we sell milk at varies. We have all sorts of dealers.
depends on the volume and on conditions.
In the month of September, we were selling the quantity of milk
our Slate Hill and Middletown plants for resale in New Jersey,
own in the report there. That milk was being sold in bottles
steurized, bottled and capped in one of our plants at Slate Hill.
he prices per bottle that we sold this milk for varied. I could not
ll you off-hand the range of the prices.
I signed an affidavit verified November 30, 1938, to be used in this
se. You have shown me that affidavit and called my attention to
atements therein contained, and I made the statement contained in
at affidavit that we were one of the largest independent dealers in
is market doing business amounting to about $2,000,000 annually;
at I was acquainted with the history of competition in the New
ork City marketing area and that it is a market in which the keenest
mpetition exists. The statements I made in the affidavit were true.
is also true that keen competition exists in the New Jersey market,
here we operate on a large scale. I am not as well acquainted with
e competition in New Jersey as I am with the competition in New
ork.
You called my attention to the statement in the affidavit where I
fer to certain small dealers buying on a preferred basis and where
state that the small operators buying on a basis of such a blend
price are able to undersell in the wholesale and retail market.
17 That relates to the New York market. As I understand, the
Milk Control Law of New Jersey fixes prices to be paid to pro-
icers for milk bought in the State of New Jersey. It has no juris-
ction over milk bought outside of New Jersey.
(At this point, the witness was asked if it was not true that milk
ught outside of New Jersey, free from restrictions of those price-

fixing laws, could not undersell the dealers who have to pay those prices. To this question, there was an objection and the Court sustained the objection.)

We have not, since September 1, based the prices which we paid for milk and which milk was sold in New Jersey under any price fixing order anywhere. We accept prices agreed upon mutually between producers and our Company. I do not negotiate personally the price to producers, but one of the members of the firms has had meetings at Slate Hill with producers, at which it was discussed.

The average price which we paid to the Middletown producers of $2.38 for all the milk received at that plant was 5 cents less than the uniform price which I, a little while ago, agreed was the price we should have paid for the fraction of 1% of the milk sold in the marketing area.

I am acquainted with some of our customers in New Jersey. I know a great many of them by reputation.

These dealers in New Jersey are not known as peddlers but as licensed subdealers that may be called by other names but actually they are sublicensed to do business.

In our business in New Jersey, we do not exactly base the price which we ask for our milk on prices charged by our competitors in selling to subdealers. I do not keep in touch exactly with
518 prices asked by our competitors in supplying those subdealers.

The New Jersey representative of our company takes care of the Jersey business. This New Jersey representative fixes the price which our company sells for in New Jersey and our company receives the money. I do not handle the bills myself. I have no knowledge as to the range of prices that we get for bottled milk f. o. b. Slate Hill for New Jersey milk. There are various prices that milk is sold at to New Jersey dealers. I cannot tell you the price. I would have to refer to records. The prices do not change from month to month, prices prevailing in September probably prevail at the present time. There is a great deal of difference between the price at which we sell our Middletown milk to these New Jersey dealers and the price at which we sell storekeepers in New York in the same period of time but the price we charge to these New Jersey dealers is less because there is a great difference in selling milk to a dealer f. o. b. plant and to a storekeeper in New York.

There is a price-fixing order in effect in New Jersey fixing the price from dealer to subdealer, from subdealer and dealers to stores and consumers. There is no price-fixing order between dealer and dealer.

Cross-examination by Mr. McCarthy:

The companies with which I am associated are known in the trade as independents. My companies are not subsidiaries of either Borden's or the National Dairies.

On direct examination I spoke about diverting milk from Goshen, New York, and stated that I received $1.01 per cwt. for that milk

and is the price we have to account to the producers for. All the money that comes to us for this milk is 23 cents handling charge, a payment for transportation and a 5-cent profit. I am familiar with the effect upon the market of diverting that milk to Goshen
519 and the effect of the diversion of that milk from Kyserike to Goshen is to keep that milk from the fluid-milk market in the marketing area. In other words, if there was no provision in the order that we could take this milk and sell it to a cream-cheese manufacturer, that milk would have to come into New York City and compete with the fluid-milk market in New York City and this cream-cheese manufacturer could buy milk or cream from some western source. More fluid milk thrown on the New York City market results in lowering the price to producers.

If there was no provision under the order to classify milk in the different classes in which it is utilized and having to pay $2.45 per cwt., only such milk as we could sell in the fluid form would be accepted from producers. We could not handle any milk beyond that.

You have shown me an affidavit that I excuted on November 30, 1938.

(The affidavit was marked "Plaintiff's Exhibit B" for identification. Without objection, the affidavit was received in evidence and marked "Plaintiff's Exhibit B." It was conceded that the witness would testify according to the affidavit. The following excerpt from the affidavit was then read to the witness:

"The larger distributors of the marketing area frequently carry substantial surplus milk, sometimes as much as 50%, in order not to deprive their producers of a regular and continuous market. Many of the smaller competing units make it a practice to buy their fluid milk requirements from day to day and are able in many instances to buy their requirements on the basis of the blend price, that is the average between the price for Class I and the prices for the lower classifications composed of the surplus paid for by the larger distributors. Consequently the smaller operators buying on the basis of such a blend price are able to underseli in the wholesale and retail market. This very rapidly reduces and depresses the prices which can be paid to the farmer. Many of these smaller units market substantially all of their milk fluid form and therefore carry no burden and make no allowance for surplus.

"On September 1, 1938, the order was put into effect. All handlers were required under the order to pay the Class I prices for all the fluid milk and the prices for all other classes of milk according to their uses. This, of course, tended to stabilize the market. This salutary condition continued for approximately three or four weeks after the promulgation of the order. However, beginning about October 1st, there was an indication that milk was being sold in
520 this market substantially below cost. In the last few weeks a downward spiral occurred in this market which was caused principally by milk going into channels where it is sold substantially

below cost. This condition is necessarily resulting in loss to all handlers.

"Milk is now being sold to stores at prices as low as eight cents per quart. The results have developed a method of distribution known as the 'peddler type.' In this type of distribution an individual or group of individuals sometimes operating as a family proposition, simply hire a truck or trucks from day to day and solicit business at any price they can get. They do not have nor do they carry any of the burdens or obligations of the established milk distributor. This 'peddler type' of distribution does not meet the high standards established by the labor union and generally does not pay any Social Security taxes or compensation insurance. In the case of my company, all of these obligations must be met and under our contract with the labor union we are required to pay fixed minimum wages and to comply with high standards of working hours and conditions.

"The Dairymen's League and its subsidiaries distribute milk in the Metropolitan Marketing Area. I do not think that the Dairymen's League and its subsidiaries are responsible for the cause of the breakdown in this market. In this highly competitive market their competition is no different from the competition of other distributors. They are naturally attempting, as every other distributor is, to protect their own business."

By Mr. McCarthy:

Q. Is that still your opinion, Mr. Rubenfeld?

A. Absolutely.

Since the date of the affidavit there has been a further decline in prices in the New York metropolitan area. The chief reason for the decline is because of the court proceedings which are going on here, many of the distributors believing that they will not have to pay the order prices for milk, and therefore they are gambling on what the outcome will be and selling milk at a low cost.

Redirect examination by Mr. Pratt:

We only ship to the New York market the amount of milk we can market as fluid milk in our own business. We had contracts for ice cream manufacturers outside the state. When we came back in September, there was not fully 48% of our milk sold in the marketing area. The 48% shown in the report was up-state and out of the state and outside the metropolitan market. With reference to this
521 milk which was diverted to the cheese factory at Goshen, if I had to ship that milk from Kyserike, New York, and sold it in New York as fluid milk at a loss, the chances are I would not have shipped it to New York. I would have refused to take milk from the producer. I still agree with the statement that I made in the affidavit to the effect that in the last few weeks a downward spiral occurred in this market which was caused principally by milk going into channels where it is sold substantially below cost, and this condition necessarily results in loss to all handlers. We sell fluid milk in New York City at a loss now, and that loss is greater today than

when the affidavit was made. I believe that this lawsuit is responsible for the present breakdown in prices, and that some dealers to a great extent are under the impression that after the lawsuit is over they will not have to pay into the pool and are therefore gambling on the future.

(The last sentence was stricken out as not being responsive.)

I would not know whether the dealers have capital in their banks or not.

I don't think we sustained a loss in the sale of our fluid milk in New York in the month of September. My best recollection is that we sustained a loss on our wholesale operations, store milk, in October. We sell approximately 1,000 cases of milk per day in the store trade. In October, I think our losses were approximately one-half cent per quart, about 6 cents a case, or about $60 a day. I haven't any figures for November, but I assume that the loss will be greater for November than it was in October. We operated our New Jersey business at a profit.

Our manufacturing operation is not a separate operation in our company. It is combined. In this combined operation, we also have our fluid business. We did not lose money as part of our combined operation. The company which distributes milk to stores is a separate company by itself—the Public Farms Products Company.

522 Including New Jersey operations, we made a profit on our combined operations, our company and company business outside of the Public Farms Product Company for those three months.

I would not know whether we made a profit on our manufacturing operations. There is no separate corporation for manufacturing. We usually try to sell all of our products at a profit and that includes manufactured products.

We did not refuse milk of any producers because we had a surplus prior to the operation of Order No. 27. My statement to the effect that but for this 23-cent handling charge rebate, we could not take that milk is correct because prior to September 1, 1938, we were not required to pay $2.45. I paid competitive prices for milk. We could still manufacture the milk in our own plants and had the manufacturing facilities over at Slate Hill but we did not have to pay $2.45. Since September 1, 1938, we did not pay $2.45 for any milk we manufactured at Slate Hill.

It is not any more difficult to ship milk from Kyserike to Slate Hill than it is to Goshen. I couldn't handle the milk and manufacture it if I had to pay $2.45 for it. I know of no milk under this Order #27 that calls for the payment of $2.45 in manufactured form.

I was buying milk from Gover, Pennsylvania, and from Frazer, New York, prior to September 1, 1938. We had surplus milk at all times. We always carried surplus milk. I do not think that the amount of the money I got under the order was a rebate. Unless we could sell the milk in the manufactured form so as to make a profit, we would have to discontinue buying from other dealers or

producers. I did not say I always operated at a profit but that we tried to sell our products at a profit. At times, we were able
523 to sell at a profit and at other times, we were not able to.

The growth of the Dellwood Company does not exactly mean that we were always paying a profit on our operations.

I have stated that "I do not think that the Dairymen's League and its subsidiaries are responsible for the cause of the breakdown in this market," but I have not talked with the Dairymen's League about what part they had in the breakdown of the market. I do not take charge of our wholesale operations directly, but I do get reports frequently from the wholesale department and I am advised frequently what the market conditions are and the cause of the breakdown, and in this particular instance, I was informed that the Dairymen's League was not a contributor to the breakdown of the market since September 1st. Over a period of several years, we have increased our wholesale business by securing customers who formerly sold to our competitors.

It has not been our practice to instruct our men, when some other dealer buys the good will, to go out and take some of the business which is being transferred by underselling or giving free milk.

I did not learn last year that the Jetter Dairy Company purchased certain routes from the Highland Dairy. Mr. Arthur Jetter never called me up about any customers or anything pertaining to customers. He did not call me up and tell me that I had taken a fifteen-case customer from him or that he just bought that customer or bought the route from Highland Dairy. I never spoke to Mr. Jetter more than twice and that was not over the telephone. I never spoke to him about any customer which he said our company had taken.

I have not made any personal inquiry as to whether the League has given any free milk. I do not know that the Dairymen's League, from information we received from the wholesale department was not responsible for the breakdown of prices since September 1.
524 The head of our wholesale department told me that. His name is Mr. Popper and he is employed by Public Farms Products and is the General Manager of that corporation and Vice President. Mr. Popper informed me to that effect.

Recross examination by Mr. McCARTHY:

Assuming that we could sell this milk at Goshen at the III–D price of $1.01 and a few mills plus 5 cents, we could not handle this milk, transport it to the Goshen plant, and account for it in the pool at the III–D price without sustaining a loss on those operations if we did not receive market-service payments, because the transportation alone is more than 5 cents a hundred without taking into consideration the cost of operating the plant. We purchased at the Class I price of $2.45 to meet our fluid requirements. If we were not able to transport this milk to the Goshen plant or some other plant and receive payment from the pool to compensate us for the cost of doing that, we could not possibly handle it.

I testified that, prior to the time this order went into effect, we also diverted some milk from time to time. We bought milk mostly on a competitive price, on the blend price rather than the classified price and in that blend we included Class I milk and also this manufacturing milk. Prior to September 1, we did not ship or sell any milk to Goshen. We diverted it to other plants, sold the cream out of the marketing area and out of the state. I think our statement to producers for the Dellwood Company for the month of August would show our method of buying and selling.

If every handler in the New York City market would comply with the order and pay the required price for milk going into the various classes, my opinion is that the market would stabilize.

525 Redirect examination by Mr. PRATT:

I do not think that if one handler or a group of handlers had a competitive advantage over all other groups, that would stabilize the market.

ERSKINE M. HARMON, recalled as a witness on behalf of the defendants, testified as follows:

(At this point, the Court received in evidence over the objection of counsel for defendants made upon the ground of irrelevancy the following described exhibits with the understanding that the exhibits be received as the several statements made by Mr. Harmon as administrator.)

(Computation of the uniform price, New York Milk Marketing Area, signed by E. M. Harmon, Market Administrator received in evidence as Defendants' Exhibit No. 37.)

(Analysis of milk utilization, New York markets, September and October 1938, dated December 27, 1938, and signed by E. M. Harmon, Market Administrator, received in evidence as Defendants' Exhibit No. 38.)

(Statement dated October 14, 1938, entitled, "Uniform Producer Price of $1.87 for September Milk is Announced," consisting of two pages, received in evidence as Defendant's exhibit No. 39.)

(Statement dated November 14, 1938, entitled: "Uniform Producer Price of $1.91 for October Milk is Announced," consisting of two pages received in evidence as Defendants' Exhibit No. 40.)

(Statement dated December 14, 1938, entitled "November Milk Price under New York Order," consisting of one page received in evidence as Defendants' Exhibit No. 41.)

(Statement entitled "Classification of Milk Reported as Received from Producers by Sussex Milk & Cream Company, Inc.," received in evidence as Defendants' Exhibit No. 42.)

526 (Statement entitled "Classification of Milk Reported as Received from Producers by Sheffield Farms Company, Inc.," received in evidence as Defendants Exhibit No. 43.)

(Statement entitled "Breakstone Brothers, Inc., Total Milk Reported as Sold in all Classes and Muller Dairies, Inc., Total Milk

Reported as sold in all Classes," received in evidence as Defendants' Exhibit No. 44.)

(Statement entited "Classification of Milk Reported as Received from Producers by Borden Company, Inc.," received in evidence as Defendants' Exhibit No. 45.)

(Statement of payments to Dairymen's League under Sections 5 and 6 of Article 7 for milk received during September, October, and November 1938, received in evidence as Defendants' Exhibit No. 46.)

(Statement entitled "Approximate disposition of unpriced Class I and Class 2–A milk reported as received from producers by Keystone Dairy," received in evidence as Defendants' Exhibit No. 47.)

(Statement entitled "Approximate disposition of unpriced Class I and Class 2–A milk reported as received from producers by Sussex Milk & Cream Company," received in evidence as Defendants' Exhibit No. 48.)

(Statement entitled "Approximate disposition of unpriced Class I and Class 2–A milk reported as received from producers by Dairymen's League Cooperative Association," received in evidence as Defendants' Exhibit No. 49.)

(Statement entitled "Approximate disposition of unpriced Class I and Class 2–A milk reported as received from producers by Dellwood Dairy," received in evidence as Defendants' Exhibit No. 50.)

(Statement entitled "Approximate disposition of unpriced Class I and Class 2–A milk reported as received from producers by Sheffield Farms Company, Inc.," received in evidence as Defendants' Exhibit No. 51.)

527 (Statement entitled, "Approximate disposition of unpriced Class I and Class 2-A milk reported as received from producers by Borden Company Manufacturing Products Division," received in evidence as Defendants' Exhibit No. 52.)

(Statement entitled, "Country Milk Plants reported by authorized health authorities in the New York metropolitan milk marketing area as having been excluded from approved list by months since September 1, 1938," received in evidence as Defendants' Exhibit No. 53.)

I am the appointing power in my office as administrator with reference to employing auditors or other employees. I have personally employed various members of my staff and have about 85 or 87 on my staff. I have about 40 field auditors who are in the field practically all the time auditing the records of the plants. I have no one attached to my staff who physically inspects the disposition made of the milk at the plants. When the statements have been rendered in the form of reports to me, our field auditors go to plants and check both the shipping and the receiving plant records. Up until now, we have relied on the records kept by the plant owners for our information in this respect. I have no assistant working for me. Besides the auditors, I have a staff of about 12 or 15 accountants whose job it is to check the records, compute the pool and do other statistical work. We have a group of ten or 12 whose job is to help bookkeepers

in making out their reports and be responsible for those collections. In addition to our secretarial and stenographic help, we have two young men who operate the printing machines and other machines in the office.

Mr. Bert Miller works for us. He is the chief of the field service division. I have known him about four years. I have no recollection of meeting Mr. Miller in the Bargaining Agency Office in the month of November 1937, when I was there in connection with the proposed marketing agreement.

528 I know that Mr. Miller was connected with the Bargaining Agency for a time. I don't know that he was in 1937. I knew Mr. Miller prior to the date of the New York State Milk Control. He was in charge of the New York office. I did not know him prior to the New York Control.

529 I testified the other day that Mr. Lloyd Anderson, of Binghamton, did the major part of drafting the first milk marketing agreement.

I know Mr. Allan Miller and in 1937 I think he was employed by the Dairymen's League but I am not sure. I have been told that Allan Miller is the son of the General Counsel for the Dairymen's League. I understand he is an attorney.

I don't recall Mr. Allan Miller as having been at the Bargaining Agency Directors' Meeting in Syracuse when I was in Syracuse. I would not say that he was not there. I am quite sure I never heard Allan Miller make any statement to those assembled at any such meeting that he had spent three months' time in the preparation of the proposed agreement. I do not remember of ever doing any work with Allan Miller on a proposed marketing agreement in the Dairymen's League offices or elsewhere.

Q. Did you ever do any work on a proposed marketing agreement with any attorney of the Dairymen's League either at its offices or elsewhere?

(This question was objected to and overruled.)

A. I testified last week, or the early part of this week, rather, that Mr. Frank Lent sat in at the meeting in Syracuse. I am quite sure that I never did any work on a proposed marketing agreement with the Dairymen's League at their offices or elsewhere when I was working just with those attorneys.

I estimate that I was present at meetings in Syracuse where Mr. Lloyd Anderson was present possibly four or five times. I have no recollection of him discussing any other marketing agreement than the one he worked on.

(There was no cross-examination.)

(At this point and during a discussion of the case between counsel for the parties in the presence of the Court, the defendants admitted the allegations of Paragraphs 1, 2, 3, 4, and 9 of the amended complaint of the intervening plaintiff, Dairymen's League and with the consent of all parties, Paragraph 5 of such complaint was stricken.)

530 LAURENCE L. CLOUGH, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I reside in Elsmere, New York. I am employed by the State of New York as a milk account examiner, Division of Milk Control, and Administrator of the Niagara Frontier Milk Marketing Area. A milk marketing order, numbered 127, was issued by H. V. Noyes, as Commissioner of Agriculture of the State of New York, covering the so-called Niagara Frontier Milk Marketing Area. I believe the order was signed September 19th and became effective October 1, 1938. Pursuant to that order I was appointed Marketing Administrator of the Niagara Frontier Milk Marketing Area and have acted as administrator since October 1, 1938. (Defendants offered in evidence a copy of Official Order No. 127, issued by the Commissioner of Agriculture of the State of New York. Plaintiffs object on grounds of immateriality to issues of this case and that there is a wide difference between the territories regulated under the different orders. Objection sustained with leave to reserve the right to change the ruling and receive the evidence later on if it seems desirable to do so.)

JAMES A. CONBOY, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I reside at 773 Fifth Avenue, Troy, New York. I am employed by the State of New York as Supervisor, Licensing Division of Milk Control. As supervisor I have custody of records of applications for licenses. I have applications for licenses for the several companies named in the subpoena. (Defendants offer in evidence
531 applications for milk dealer's license for 1938–39 from Dairymen's League Cooperative, Inc., Beakes Dairy Company, Cloverleaf Creamery Co., Delancey Milk and Cream Co., Inwood Farms, Inc., Miller's White Farms, Inc., Model Dairy Co., Inc., formerly Hauk & Schmidt, Ferndale-Nelson Creamery, Inc., and Sacks Dairy, Inc., the companies named after the first, claimed to be subsidiaries of the Dairymen's League. Plaintiffs object on grounds of irrelevancy and applications contain financial statements which are confidential, and there is no proof that the companies named are subsidiaries of the Dairymen's League. Objection sustained.) I have an application of the Dairymen's League Cooperative Association for 1938–1939 bearing the date of February 21, 1938.

At this point, the following concession was offered by Mr. Lent.

"Mr. LENT. If your Honor please, the Dairymen's League offers this concession in reference to the testimony now being adduced by Mr. Conboy:

"The Dairymen's League Cooperative, Inc., and its subsidiaries, Model Dairy Company, Inc., Beakes Dairy Company and Delancey Milk and Cream Company, Inc., of which it owns all the stock, were, as of April 1, 1938, duly licensed by the Division of Milk Control

of the Department of Agriculture and Markets of the State of New York to distribute milk in the various parts of the City of New York, and, as to the Model Dairy Company, Inc., and Delancey Milk and Cream Company, Inc., in certain towns in Nassau County; that as of September 1, 1938, all the milk distributing operations of such subsidiaries were taken over by the Dairymen's League Cooperative Association, Inc.; that the daily average volumes of such companies for the highest month of the twelve months preceding April 1, 1938, as stated in their applications to such department for said license, were as follows:

"Dairymen's League Cooperative Association, Inc., 2,529,747 pounds; Model Dairy Company, Inc., 298,285 pounds; Beakes Dairy Company, 71,969 pounds; Delancey Milk and Cream Company, Inc., 202,655 pounds; that the amount so stated for the Dairymen's League Cooperative Association, Inc., covered its entire operations throughout the milk shed, of which its New York City distribution operations were a minor part.

"The reason for the transfer of the business was to save license fees, New York City taxes, State franchise taxes, which reasons had been contemplated for some time, and this was brought to a head as of September 1st by the additional reasons that by this transfer of business it enabled the League to make only one report to the Marketing Administrator instead of four covering the City operations, thus saving a great deal of bookkeeping expense."

532 (Defendants concede the above statement as evidence, but do not concede its accuracy.)

The license covers the period from April 1st to March 31st. There will be a new license year coming April 1, 1939. During the period of the milk control I had something to do with the licensing of stores or storekeepers in New York City. (Government moves testimony of this witness be stricken, together with stipulations relating to it, on the ground it is irrelevant. Motion denied.)

GLEN BULLOCK, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I reside in Edwards, St. Lawrence County. I am president of the Farm Milk Receiving Station located at Edwards. I have been president of that station for about three years and delivered milk to that station before I became president. The Edwards Dairy Co-operative runs this plant. The board of directors and I have had charge of the sales of milk since September 1, 1938. I believe our milk tested 4.025 for the last part of the year and has tested above 3.5 since September 1. We manufacture our milk into cream and sell the skim milk to an Italian cheese factory located at Heuvelton, New York. The skim milk is sold to Aelio Brothers. I know of only one plant owned by them. This fall we had an offer from Queensboro for our skim milk. I believe the offer was made by Sam Miller. We have received 25 cents per cwt. f. o. b. plant for skim milk;

they commenced taking it about the first of November 1938 and promised to pay 25 cents per cwt. until Easter. (Govern-
533 ment objects to testimony on grounds that it is immaterial, irrelevant, incompetent, not binding, and not within the issues here. Overruled. Plaintiffs move to strike evidence on the grounds that it is immaterial, irrelevant, and incompetent, after the order was issued circumstances were different. Motion denied.)

The Queensboro offer made by Mr. Miller was for twenty cents per cwt.; f. o. b. plant. They offered to take the skim milk from about October 1938 to April 1939. (Government objects on the ground that the price of skim milk is not a proper issue in this case; if it is, the price he may have received for skim milk in some isolated transaction, under some peculiar circumstances, without showing anything further, is no evidence whatever of the value of skim milk, and that even if price were material offers are not admissible. Objection overruled.)

In other years we have sold skim milk in Edwards.

Q. For how many years, to your knowledge?

A. Oh, we have sold it over the winter, butterfat tests run so high, we run cream, in the fall skim milk.

Cross examination by Mr. McCarthy:

An Italian cheese factory purchases the skim milk from us. They have some operations in New York too, their branch office. They take it down to sell down there. I believe they make kind of a part skim cheese. I do not know how many factories of that kind there are in the milk shed. I don't know just how many factories there are, but I think Mr. Wiseman makes up some of that stuff and there is one other, Rock Boutin, a cousin of Aeolio, has a plant that makes up part cheese, Tapiola, or some name like that. There is not much demand for skim milk for this particular type of cheese after Easter. They cater to this market—Italian trade—up to Easter time, then it drops off, in April. We have sold skim milk to skim milk dealers and to a plant in Utica at different times.

534 Cross examination by Mr. Schoeneck:

In August and October the milk fat went as fluid milk. Then the content of the milk improved from 3.45 to 4.44 at one time, and we figured we could get more money by selling it as cream and selling the skim the other part of the year. That is why we shifted from selling as fluid milk or cream.

(Statement dated December 21, 1938, of the Dairymen's League to its producers, was received in evidence and marked Defendants' Exhibit 54.)

Jay C. Treat was called as a witness in behalf of the defendants.

Direct examination by Mr. Pratt:

I reside in Honeoye Falls, New York. I am secretary, also a director, of the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. I signed defendants' Exhibit 4 for identification as

the Commodore Hotel in New York City, where the Bargaining Agency had rooms. I do not remember whether the certificate of incorporation was given to some attorney for the Dairymen's League. (Defendants' Exhibit 4 for identification received in evidence as Defendants' Exhibit No. 4. Objection on grounds of irrelevancy. Overruled.)

Defendants' Exhibit 55 for identification is a compilation of all the milk receiving stations in the New York milk shed, prepared by the State and Federal Agriculture Extension Service. (Defendants' Exhibit 55 for identification received over Government's objection on grounds of irrelevancy.)

(Defendants' Exhibit 56 for identification is the so-called Ernst & Ernst report. Received in evidence as Defendants' Exhibit No. 56.)

Homer S. Rolfe is president of the Metropolitan Bargaining Agency. He is also a director of the Sheffield Producers Cooperative Association. I was made secretary of the Bargaining Agency at the same meeting at which Mr. Rolfe was made president, at a meeting in 1937.

535 Mr. George R. Fitts was one of the first directors of the Bargaining Agency. He was connected with the Dairymen's League. I do not know whether he is connected with the Dairymen's League now. He is not a director of the Bargaining Agency now.

Mr. L. A. Chapin is a director of the Dairymen's League, and he is a director of the Bargaining Agency.

Mr. Fred H. Sexauer is president of the Dairymen's League and is a director of the Bargaining Agency.

Mr. Coulter was elected as a director of the Bargaining Agency when Mr. Fitts ceased to be a director. He is a director of the Dairymen's League. (Government objects to entire line of testimony on the ground of irrelevancy. Overruled.)

Mr. Kenneth Shaul and Mr. Alfred J. Williams are directors of the Bargaining Agency and of the Sheffield Producers Cooperative. Mr. Shaul is secretary of the Sheffield Producers Cooperative and Mr. Williams is treasurer.

A meeting was held at the Hotel Martin in Utica, New York, prior to the formation of the Bargaining Agency. I have the minutes of that meeting though I was not secretary at that time. (Minutes of meeting in Hotel Martin and of organization meeting of Bargaining Agency offered in evidence. Received in evidence as Defendants' Exhibits Nos. 60 and 61, with the understanding that purpose is to show concerted plan by Bargaining Agency and Dairymen's League and other cooperatives coincident with Rogers-Allen bill and continuing down to and including the promulgation and adoption of the order. (Government objects on grounds of immaterially and irrelevancy. Objection overruled.)

A meeting of the directors of the Bargaining Agency was held at the Hotel Commodore, New York City, June 7, 1937. (Plaintiffs object on grounds of immateriality and irrelevancy. Objection over-

ruled.) Officers were not elected at that meeting; they were elected at a meeting held at the Hotel Martin in Utica, New York, June 8, 1937. I was secretary of that meeting. I prepared the
536 minutes from the stenographer's notes.

During the summer and early fall of 1937 meetings were held by the board of directors and body of delegates to discuss prices to be charged for milk and action was taken by the board of directors and body of delegates relative to prices. (Government objects to entire line of questions relating to meetings of the Bargaining Agency on the ground that it is wholly irrelevant to the issues of the case. Objection overruled.) As secretary, I kept a record of those meetings.

I do not remember that any meetings were held in the fall of 1937 at which a proposed federal marketing agreement, under the provisions of the Agricultural Adjustment Act, was discussed. I do not remember that Mr. Harmon was present at any of those meetings. The first I remember of Mr. Harmon's attendance at our meetings was after the order was voted on.

During a part of the year 1937 I lived at the Onondaga Hotel, Syracuse, New York, where the Bargaining Agency maintained offices. As far as I know they did not maintain other offices. I don't remember seeing Mr. Harmon in those offices in 1937. I did see Mr. Harmon in the hotel prior to the voting on the order in 1938. I do not remember seeing an employee of the Dairy Section of the Department of Agriculture at the Bargaining Agency offices in the City of Syracuse in 1937. I do not remember seeing a man who came to the Agency from Boston.

I have made entries in the minutes of meetings of the
537 Bargaining Agency relating to proposed equalization or pooling under a federal marketing agreement and order. I have the minute book of the Bargaining Agency containing the record of meetings of the Bargaining Agency from June 7, 1937, down to December 6, 1938, the date of the annual meeting of that year. The minutes of the meeting of December 6, 1938, include the president's address, the reports of the officers, the report of the Treasurer particularly, for the period ended December 6, 1938.

The minutes contain resolutions passed, from time to time, authorizing expenditures of money. I wrote up the minutes with the assistance of a stenographer; we had a stenographer take them at the meeting and then I directed the taking of the minutes and wrote them.

I have never seen defendants' Exhibit 58 for Identification before; it did not come to my attention. Defendants' Exhibit 59 for Identification, was issued by the Bargaining Agency. (Defdt.'s Exs. 58 and 59 offered in evidence. Government objected on grounds of irrelevancy and immateriality. Objections overruled. Received in evidence as Defendants' Exhibits Nos. 58 and 59.)

Mr. Charles H. Baldwin has charge of the printing of various pamphlets, statements, and publicity for the Bargaining Agency. He is the executive secretary of the Bargaining Agency.

(The witness J. C. Treat temporarily withdrawn.)

538 EDWARD MANNING GAYNOR, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I reside in Leonardsville, New York. I am assistant director of milk control of the Department of Agriculture of the State of New York. I have held that position since the first of the year. I was director of milk publicity in the same department from July 1, 1938. From August 17, 1937, to July 1, 1938, I was assistant to the Commissioner of Agriculture, State of New York. In that position I had some contact with the Metropolitan Milk Producers Bargaining Agency. I know some of the officers of the Bargaining Agency, but I am not sure that I know all the directors.

(Government objects to entire line of evidence on the ground it is irrelevant. Objection overruled. Exception.)

I received a copy of a tentative proposed marketing agreement from someone in the Bargaining Agency in October or November of 1937. I do not know whether I have a copy of it now. I don't remember whether I discussed such a proposed marketing agreement with individual directors of the Bargaining Agency. I did not attend any discussions with directors of the Bargaining Agency relative to a proposed milk marketing agreement. Prior to the meetings in Oneida, I did not have discussions with the officers of the Bargaining Agency relative to a proposed milk marketing agreement. I received the first draft of a proposed Federal Marketing Agreement either from the Bargaining Agency or from our own Department, I am not sure which. I did receive a proposed milk marketing agreement from someone connected with the Bargaining Agency. I believe it was sent to me sometime in November or December of 1937. I received a copy

539 of the proposed marketing agreement which was filed at Washington, D. C., and on which hearings were held. The copy was sent to me from our own department in Albany.

I attended the hearings on the proposed marketing agreement with the Commissioner of Agriculture. I did not assist in the promulgation or formulation of Order 126. I acted as contact man between the Commissioner and the Union and the producers in the North Country. I am well acquainted with many producers and dealers. When I speak of producers I mean all types of producers including cooperatives and non-cooperatives.

As contact man for the Commissioner I introduced him to a great many producers and I introduced [illegible] to some of the Union heads and some of the heads of the Dairymen's League whom he didn't know—local men in certain territories. I don't believe I did anything to bring about the promulgation of the Federal and State Marketing Order. I did not do anything in connection with

the proposed referendum and poll on Order No. 27, issued by the Secretary of Agriculture, and Official Order No. 126, put in form by the Commissioner, after they had been put in form. After the order was adopted I did nothing to advocate its approval by producers.

After the vote was taken, I had no part in procuring milk marketing agreements to be signed. I never talked with any dealer or dealer's representative and asked that dealer or dealer's representative to sign the milk marketing agreement. I did not talk to any representative of Queens Farms concerning the milk marketing agreement, or the signing of it. I did not talk to Alex Eisenberg about signing a milk marketing agreement, and I did not talk to Mr. Sam Miller of Queensboro Farms, Incorporated, regarding the signing of a milk marketing agreement by that company. I discussed
540 the order with Mr. Sam Miller at my home in Leonardsville, but I did not interpret the order. Mr. Miller made the appointment with me.

I talked with the Bargaining Agency many times between September 1 and September 10. Those calls were usually made in connection with surplus milk. In many cases dealers would not accept milk because they had enough. The milk they would not accept would have gone to the New York market and been sold for whatever price would be given for it.

I talked with Mr. Ralph Norton concerning Manchester Dairy. A rumor was circulated that Manchesters' financial rating wasn't good. Mr. Norton and I thought it should be checked. Mr. Norton went to New York with a representative from our department, checked Manchester's financial records and found the rating to be perfect. As far as I know, Manchester milk was not withheld at any time.

I have never talked with anybody about withholding milk from Mr. Eisenberg. I did not tell Mr. Eisenberg that he would get his milk if he went over to the Administrator's office and signed up. No one ever told him that over my telephone.

Between September 1 and 15, 1938, I talked with Mr. Griffith at the Commodore Hotel in New York City. (It was stipulated that Mr. Griffith was referendum agent and after finishing that job he remained in New York City as an employee of the Dairy Section to endeavor to get handlers to sign the marketing agreement.) I talked with Mr. Griffith every three or four days during that period. I was never in Mr. Griffith's office at the Hotel Commodore.

I made a speech at a meeting of the Bargaining Agency in
541 Syracuse, in September of 1938.

Q. In that speech did you say in words or substance, "Don't think about your dealer for a minute; call me up and I will tell you where to take your milk and after you withhold your milk for several days, your dealer will sign"?

A. No.

A. Nothing about that, no. I said if you cannot find a market and your dealer doesn't have that market, let me know. You would be very, very foolish to give him the milk when you can divert the milk and get two dollars forty-five cents, plus twenty-three cents, plus two cents f. o. b. at the station, and if your dealer won't take it call me up and I will try to find a market for it.

There were some instances where I directed that milk be sent to some other source when the dealer wouldn't take it. I don't remember just how many instances there were like that, but in September there were over seven million nine hundred pounds. I am not sure of the dates, but I have notes at home that will show the dates. My principal activity between September 1 and September 20, 1938, had nothing to do with the signing of the marketing agreement (taking care of milk because the dealers had not signed the agreement), but I did take care of a lot of milk between the first and twentieth.

I know of one instance where a dealer signed an agreement to pay the price and the milk was no longer diverted. I did not discuss the question of Manchester milk with Ralph Norton in connection with the signing of this marketing agreement. I have never talked with Red Rock, New York. I have not talked with anyone connected with Queens Farms regarding the signing of any agreement. In the latter part of September and in October I was using the
542 telephone ten to fifteen hours a day in order to take care of the milk. Sometimes my telephone started ringing about four o'clock in the morning and has been going at twelve o'clock at night. I do not remember whether it was as busy as that during any time from September 1 to September 20, 1938, but I cannot remember all the telephone calls I place. I called Queens Farms but I do not recall having called Queens Farms to talk to Dan Kotcher. The only time I remember having talked with Dan Kotcher was when he came up to my house to see me within the last six weeks. I do not know whether he signed a marketing agreement.

Mr. Griffith has sent me lists of non-signers and free-thinkers who have finally signed the marketing agreement. I did not use such lists in connection with my activities as publicity director of the Department of Agriculture and Markets.

I have talked with Mr. Burt Miller of the Market Administrator's office. Any business I had with Mr. Miller was in connection with the order and it was about milk. I have studied the order and have requested opinions from various people as to whether it was fair and workable. I am familiar with the terms of the order. There is nothing connected with my work as milk publicity director that has to do with the administration of the order by Mr. Harmon and Mr. Miller or any other employee.

I have received some copies of the Bargaining Agency News.

Q. Did you see the article in Vol. 2, No. 2 which reads "An orchid to Eddie Gaynor of Leonardsville who is doing some mighty fine

work in assisting the groups working for the success of the Federal Order"?

A. Yes. That is silly.

I read the article headed "Pressure is put on milk dealers. Syracuse, New York. October 13 * * *", in which it was stated that 1,300 hundred cans of milk had been diverted from a New York dealer who had failed to file his first monthly report of milk sales.

I had nothing to do with the diversion of that milk. I know
543 that the milk was diverted from the plant at Andover. Mr. Alex Eisenberg takes that milk. I have never talked on the telephone to the persons who operate the Andover Creamery. I don't know them. The plant is owned by Eisenberg and there is a cooperative which is a member of the Bargaining Agency that supplies the plant at Andover.

I have made arrangements between Sept. 1, 1938, and the present time with various companies about taking over milk which has been diverted from other dealers. I made arrangements with Queensboro to take diverted milk. I called them on the telephone and told them there were so many tanks of milk from such and such a place and asked if they would take it. In every case Queensboro said "yes." I made arrangements with the Dairymen's League to take diverted milk. The arrangements were made in the same way. Once I made arrangements with Sheffield to take diverted cream. I called Sheffield's and asked them to furnish their plants, plant facilities, to take diverted milk, and they told me the plant was closing that day and they couldn't handle it. That was the plant down in Delaware County, the condensed plant. It was the Worcester milk. That was the only time I ever asked Sheffield to furnish their plant facilities to take diverted milk.

Where milk was diverted, I made arrangements, from day to day, for temporary diversions from these different dealers. In the case of Hoffman and Dudo in the north, it has been going on for weeks. If you take Cannonsville, that has been diverting weeks and months. Breakstone got the Cannonsville milk before it was diverted, but they wouldn't pay the butterfat price because they didn't need that kind of milk. The butterfat content was too high. I never went into the freight differential at Cannonsville. The freight differential works out to leave milk without a market because it costs more to ship milk from certain places to the New York market, and the
additional cost is greater than the amount of differential
544 allowed. That, combined with a high butterfat content, would operate to keep milk out of the New York market. (Plaintiffs object on the ground that it calls for a conclusion. Overruled.)

Milk at Edwards sometimes runs four percent but not generally. Where milk runs 3.7 or over that is a factor affecting the marketing of the milk.

Q. You know, do you not, that milk of Rock Royal, one of the defendants in this case, runs four percent, don't you?

I diverted milk for Hoffman and Dudo because they asked me to. As far as I know they had no market; the milk was just going into New York to "sell if you can."

Breakstone Company was buying the Cannonsville milk. The Breakstone Company is a subsidiary of National Dairy. They first entered the fluid milk market sometime in 1938. The advent of Breakstone Company as a wholesaler of fluid milk was discussed by almost every branch of the milk industry.

Q. You have heard that discussed in connection with the alleged break-down in milk prices in New York City during the summer, haven't you?

(Objected to as hearsay. Overruled.)

Q. What is your answer?

A. Had I heard?

Q. Yes.

A. Yes; everybody did.

The Department had an investigation of the prices at which milk was sold in New York City in the year 1938. The investigation was started sometime in the summer of 1938. I received the first reports from the investigators and started proceedings about November of 1938. I do not know whether reports were being made in July and August of 1938.

I met Charles H. Baldwin, executive secretary, of the Bargaining Agency in July or August of 1938. I did not talk with
545 him about milk dealers who did not sign the marketing agreement. When I called the Bargaining Agency I talked with Mr. Treat, if he was there, or with Mr. Rolfe. I did not discuss marketing agreements with Mr. Treat. Mr Treat told me about the hundred Minute Men and what he proposed to do with them, but I did not pay much attention.

NILS B. SWENSON, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I reside at Hacketstown, New Jersey. I am a farmer and secretary of the New Jersey Milk Control Board. I have charge of the administration of the office, keep a record of the meetings of the Board—practically executive secretary's duties.

The Board, as now constituted, was created July 1, 1935. It has exercised some jurisdiction over prices paid for milk in New Jersey and various parts of the business. I was a member of the original Board from May 23, 1933 until June 30, 1935, and I was a field man for the Control Board from April 1, 1936 to November 15, 1937. I was made secretary of the Board on May 16, 1938, and was not officially connected with the Board from November 16, 1937, until that time. As Secretary of the Board I have custody of the records showing the various orders that have been put in effect. I have had occasion to be familiar with the orders of the Board which have been in effect, from time to time, since 1935.

I produce milk and sell it to the Fort Murray Dairy Company, which sells milk in competition with dealers purchasing from the Middletown Milk & Cream Company and Slate Hill Milk & Cream Company. (Defdt.'s Ex. 62, State Milk Control Law of the State of New Jersey, offered in evidence. Plaintiffs object on the grounds of immateriality, irrelevancy and incompetency. Objection overruled. Defdt.'s Ex. 62 received in evidence.)

546 The documents in defendants' exhibit 63 for identification are true copies of the Jersey price fixing orders issued by the New Jersey Milk Control Board in effect since September 1, 1938. Some of the orders refer to regulations other than prices. The exhibit contains all of the Milk Control price orders that have been in effect since September 1, 1938. (Defdt.'s Ex. 63, A to M, offered in evidence. Government objects on the ground that the documents offered are entirely immaterial. Objections overruled. Defdt.'s Ex. 63, A. to M. received.)

(At this point there was an objection to the entire line of testimony on the grounds that it was irrelevant, immaterial and incompetent. Objection overruled.)

New Jersey is divided into five marketing areas. Area 1 is South Jersey, except along the Shore. Area 2 is the South Jersey Shore area. Area 3 is the North Jersey Shore area. Area 4 is the area taking in the most populous counties, around Newark. Area 5 is a rural area. The retail prices in areas 2, 3, and 4 are the same, and the retail prices in areas 1 and 5 are the same. The retail prices for milk delivered to the door-step in areas 2, 3, and 4 is 14 cents; for milk delivered from stores to consumer, it is 13 cents, and for milk delivered from dealers to stores, it is 12 cents for Grade B milk. In districts 1 and 5, the door-step price is 13 cents; stores to consumers, 12 cents; and dealers to stores, 11 cents.

We have the following kinds of dealers in these districts: Producer dealers who produce their own milk and sell to the consumer, and who may or may not buy from other producers; dealers who buy all their milk from producers and sell direct to consumers, and dealers who buy from producers and sell to sub-dealers, The sub-dealers are those who buy from the processors and sell direct to the consumers.

Throughout New Jersey, the price fixed for Class I, Grade B, milk is 2.76 per cwt. This milk has a butter fat content of 3.5. There

547 are no freight differentials in New Jersey. Some of the Milk produced in New Jersey is shipped to the New York metropolitan area. Sheffield Farms, Sussex Milk & Cream Company, Foremost Dairy and Waldron & Sons have New Jersey plants and ship milk to the metropolitan area. The Sussex Milk & Cream Company is a subsidiary of the Borden Company. I have reports filed with the Board showing the disposition of milk purchased in New Jersey.

If a plant purchases milk from producers in New Jersey, a part of which is sold in New Jersey and a part of which is shipped, there is an order of the Board which requires that a dealer selling more

ilk in the State than he purchases in the State is required to pay
e New Jersey price of that milk he buys in the State, regardless
f where it goes.

Q. Well, for instance, assuming that Sheffield Farms purchased 500
ns of milk in New Jersey plants and sold 1,000 cans, would you say
at Sheffields would be obliged to pay New Jersey producers the full
rice for the 500 cans purchased there?

A. Well, if a dealer buy Grade A milk in the State and the price
n what he pays is determined on his Grade A sales in the State—if
e buys Grade A milk—if he buys Grade B milk in the State and sells
rade B milk in the State, the price he pays would be determined on
e Grade B sales. But two grades are not taken together.

(Objection by plaintiff to entire line of testimony overruled.)

By an arrangement with their producers, it has been the custom for
ealers who purchase in New Jersey and also deal in the metropolitan
rea, to pay a blended price to New Jersey Producers. The arrange-
ent is made by contract and a copy of the contract was filed with
e Board. The contract was in effect from September 1 to Janu-
y 1. I had no official notice that the Sheffield Company posted
otices on milk-receiving stations at Hamburg, New Jersey, and
Johnsonburg, New Jersey, to the effect that the company would
close those plants January 1. (Plaintiff objects on grounds
of incompetence, immateriality, and irrelevancy. Objection
verruled.

JAY C. TREAT, recalled as a witness on behalf of the defendants,
stified as follows:

Direct examination by Mr. PRATT:

The Bargaining Agency publishes a newspaper known as the "Milk
roducers Market News." It is not distributed to all members of the
gency, only to those who request it. Mr. V. R. Tompkins edits and
as charge of the distribution of the paper. He sends them wherever
ey are requested. Two different milk-receiving stations have re-
ived bundles of the papers. As far as I know, the Bargaining
gency has no mailing list made up by Mr. Baldwin. My cooperative
as a list of its own producers, and when publicity is sent out, I take
e publicity and envelopes over to our office and have them addressed.
ther cooperatives have their names handled, I think, in the same
ay. We do not turn any list over to the Bargaining Agency.

I am an officer of a local collecting cooperative known as the Cone-
us Milk Producers Cooperative Association. Caccioppio & Sons
wns the plant. Caccioppo & Sons own the plant known as Grand-
iew, and Grandview Dairy operates it. My Cooperative was formed
1934, to prevent shippers from losing their milk market. (Gov't
bjects to evidence as being immaterial and too remote. Question
ithdrawn.) The Conesus Cooperative has 550 to 575 members. We
ive Mr. Tompkins a list of the members who request the "Milk
roducers Market News" and he sends the papers. I do not know
ow many copies of the paper are published each month. (Mr.

549 Cooke conceded about 9,000 copies are mailed out each month. He did not know how many are distributed at milk stations.) About 40,000 to 50,000 copies of a booklet entitled "Mr. Dairyman, save this booklet," were distributed throughout the milk shed about April 28, 1939. It was prepared by different people working with the Bargaining Agency. Letters signed by Charles H. Baldwin (Exhibits 23 AA to 23 II, inclusive, to the stipulation) were sent to producers throughout the New York Milk Shed.

I submitted the original minutes of the Bargaining Agency to an Assistant Attorney General. I did not submit the minutes to Mr. Lent. I delivered them only to the Attorney General's Assistant in the office building at Syracuse. They were not rewritten. The minutes of the meeting of May 29th, that I produced in court, were turned over to me when I was elected. Mr. Anderson turned over the minutes of meetings of the Bargaining Agency to Miss Stevenson, and when I was elected Secretary, Miss Stevenson turned the minutes over to me. I have kept them under lock and key. I cannot recollect that Mr. Anderson turned the minutes of any meeting over to me. I received them only through the office. Miss Stevenson takes the minutes, opens the mail, and is the Secretary of the Bargaining Agency active in the office.

As far as I know, Mr. Anderson has not acted as secretary at any meeting since I was elected. He took minutes for himself at several meeting, but the only person who acted as acting secretary was Dr. Shaul, who acted in my absence. I do not have the original minutes of the meetings of May 14 and May 25.

Cross examination by Mr. COOKE:

I don't recall that Mr. Anderson has ever given me anything in the way of minutes. The minutes, as prepared and in their
550 present form, were turned over to me by the office of the Bargaining Agency through the office help.

The following stipulations were made in Chambers subject to the right to object on grounds of relevancy and materiality:

It is stipulated by all the parties that the Dairymen's League through the Farm Conference Board, composed of farm organizations actively sponsored and supported in 1937 the Rogers-Allen Bill, and the Dairymen's League is the only milk member of the Farm Conference Board.

(Government objects on the ground it is immaterial. Objection overruled.)

It is stipulated by all the parties that Mr. Allen Miller, one of the attorneys of the Dairymen's League presented to the Lawyers' Committee of the Bargaining Agency a draft of a proposed marketing agreement, about November 1937, and that Lawyers' Committee consisted of Mr. Henry S. Manley, Mr. Frank Lent, Mr. Edmund Cooke, and Mr. Lloyd Anderson.

(Government objects on the grounds that it is irrelevant and immaterial. Objection overruled and the stipulation was received.)

It is further stipulated that—

On October 25th at a meeting of the Board of Directors of the argaining Agency, on motion of Mr. Lynn E. Maynard, a Lawyers' ommittee consisting of Messrs. Lent, Anderson, and Cooke, was ppointed to prepare a plan for surplus control and equalization. his committee was afterwards joined by Mr. Henry S. Manley, who ame attorney for the Sheffield Producers Cooperative, which was nember of the Agency and it was to this committee that Mr. Miller esented the draft of the agreement referred to in the last preceding pulation.

This motion was seconded by Mr. E. C. Bardin, and Mr. Ralph rton, directors of the Metropolitan Cooperative Milk Producers rgaining Agency, Inc.

(Objection by all plaintiffs on the grounds that it is irrelevant d immaterial. Objection overruled. Stipulation received.)

It is further stipulated—

Defendants offer in evidence so much of the minutes of the barining Agency for July 20th, 1937, contained on page 4 of said minutes, as states:

"Remarks of Mr. George W. Lamb, of the Springfield Bank, relevant to the great progress made in cooperative marketing. . Harmon of the United States Department of Agriculture spoke the assistance the Federal Government was ready to give and ted that there was already a law on the statute books at Washton which was a permissive law and could be used when wanted. congratulated us on the progress we had made and sincerely ed that we achieved our goal."

JAY C. TREAT, recalled as a witness on behalf of the defendants.

Redirect examination by Mr. PRATT:

Special News Bulletin of the Bargaining Agency, dated August 1938, off red in evidence. Government objects on the ground t it is immaterial. Objection overruled. Received in evidence Defendants Exhibit 66.)

n Exhibit 59 there is a statement of all cooperatives who were mbers of the Bargaining Agency on December 6, 1938, with a few eptions. The Boonville Cooperative was not in there on Decem- 6, 1938, but that was corrected. What is shown on Exhibit No. is substantially a list of members as of August 1938. (Statent showing totals of cooperatives received and withdrawn from ency from June 7, 1938, to January 6, 1939, offered in evidence. vernment objects on grounds of incompetency and irrelevancy. erruled. Received as Defendants Ex. 67 in evidence.)

RICHARD STACEY, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I live in Utica, New York. I am vice-president of the Empire Milk Trucking Company. I have charge of the operations of that company in trucking milk to the metropolitan area. We have
552 about 60 trucks. With the exception of about five, they are tank trucks. The tank trucks carry from 150 to 320 40-quart cans. The company is a member of the Milk Transport Association which includes about 50% of the milk tanks that are licensed.

I am familiar with some of the rates charged and the fair and reasonable charges for transporting milk by tank truck in the New York milk shed and know something about the railroad freight rates. I have examined Order No. 27 and am familiar with the freight differentials contained therein.

Solsville is 575 miles to Long Island or Brooklyn, round trip, or 277 miles each way. Mr. Harmon places Solsville in the 231-240 mile freight zone. The railroad terminal from Solsville, Oriskany Falls, and Bridgewater is Weehawken, New Jersey, and it is on the New York, Ontario & Western Railroad.

I have been in the trucking business since September 1934. On a few occasions my company hauled milk from Bridgewater, New York, to Maspeth, Long Island, by tank trucks of the Jetter Dairy Company; we do not haul to Long Island by truck. We have transported milk from the Jetter Company plant at Solsville to New York City and New York City to Maspeth, Long Island, and from the Oriskany Falls Plant of the Jetter Dairy Company to Maspeth, Long Island.

There is no standard charge for trucking milk various distances in the New York milk zone or milk shed. My company follows the rates of the Interstate Commerce Commission only as affects interstate commerce. There are competing companies transporting milk from the vicinity of Bridgewater and Oriskany Falls, New York. (Plaintiffs' objection on grounds of immateriality overruled.) The Milk Transportation Company, operated by George Beals, transports milk from that area to the metropolitan area. Mr. James F. Burke of Vernon, New York, hauls for the Dairymen's League.
553 Most of the hauling done by my company is for independent dealers. My company charges 30 cents for ten gallons in hauling milk from Solsville and Oriskany Falls, New York, to Maspeth, Long Island. The transportation charge is the same for the entire New York City area. Our charges are substantially the same as the charges of other companies for hauling under similar conditions. (Government objects on grounds that witness is not qualified as an expert and testimony is hearsay. Overruled.) We charge twenty-five cents per ten-gallon can for drawing milk 200 miles. I do not know the usual and customary charge for transporting milk from Weehawken, New Jersey, to Maspeth, Long Island, as we have never

rformed that specific service. (Government moves to strike out tire line of testimony on the grounds that the witness is not quali-d and that it is immaterial and irrelevant and has no bearing on e issues in this case. Motion denied.)

Defendants offered in evidence Bargaining Agency News release newspapers, dated February 7, 1938, entitled "Drafting Milk Mar-ting Order for New York." Plaintiffs objected on the grounds that was immaterial and irrelevant. Objections overruled. Received evidence, marked Defendants' Exhibit No. 67.

Defendants offered in evidence Bargaining Agency News release newspapers, dated April 5, 1938. Plaintiffs objected on the ounds that it was immaterial and irrelevant. Objections overruled. eceived in evidence, marked Defendants' Exhibit 67–A.

Defendants offered in evidence Bargaining Agency release to news-pers, dated April 7, 1938. Plaintiffs objected on the grounds that was immaterial and irrelevant. Objections overruled. Received evidence as Defendants' Exhibit 67–B.

Defendants offered in evidence release of the Bargaining Agency, ted Syracuse, March 28, 1938, to which was attached a list of news-pers to which the release was to be mailed. Plaintiffs objected on the grounds that it was irrelevant and immaterial. Objections overruled. Received in evidence as Defendants' Exhibit 67–C.

Defendants offered in evidence a letter, dated July 11, 1938, Charles H. Baldwin, Metropolitan Bargaining Agency, signed by orge C. Lee, associate editor of the Dairymen's League News, to ich was attached a story for the "News," dated July 20, 1938. aintiffs objected on the grounds that no foundation was laid; im-oper, immaterial, and irrelevant; no proof that the article was e result of the correspondence. Objections to the article overruled; the letter, sustained. Letter marked Defendants' Exhibit 67–D Identification; article received in evidence, marked Defendants' hibit 67–E.

Defendants offered in evidence copy of a booklet containing in-rmation on the Sheffield Producers Cooperative Association, pre-red at the request of Federal and State Officials, for September 38. Plaintiffs object on the grounds that it is immaterial and elevant. Objections overruled. Received, marked Defendants' hibit 68.

Defendants offered in evidence copies of claims by the Queens-boro Farm Products, Inc., for market service under Article VII, section 6, paragraph 2, of the marketing agreement. Re-ceived, marked Defendants' Exhibits 69 and 70.

Defendants offered in evidence statement consisting of six sheets pplied by the Queensboro Farm Products, Inc., showing quantities milk diverted to the Queensboro plant at Canastota for September, tober and November 1938. Plaintiffs object on the grounds of elevancy and immateriality. Objections overruled. Received, rked Defendants' Exhibits 71 through 71–E, inclusive.

PERCY W. DAKE, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I reside in Saratoga Springs, New York. I am in the milk business. In the month of September 1938, I was handling the sale of milk from various plants in the New York production area. I was selling milk to Alex Eisenberg and some of the corporations which he controls. I talked with Mr. E. Manning Gaynor in September about the sales to Eisenberg; I believe there were one or two personal talks and some over the telephone. In the early part of September I went to Leonardville with my brother to talk to Mr. Gaynor. He called me up and asked me to come over with my brother. Mr. Treat was present. (Plaintiffs object on grounds of irrelevancy and immateriality. Objection overruled.)

Mr. Gaynor and Mr. Treat informed me that they had made arrangements to have all of our milk transferred to the Dairymen's League plant at Massena, I mean the milk from Plattsburg and Chateaugay. Approximately 1500 40-quart cans of milk were being produced daily in Plattsburg and Chateaugay. I had not made a request to have the milk of those two plants sold to the Dairymen's League and delivered to the Dairymen's League plants. I told them

we had certain existing contracts which would interfere with
556 such an arrangement and we had manufacturing facilities of
our own which we thought were adequate to take care of the supply in case we wanted to have all this milk manufactured. I also told them we thought the producers would not be contented to have their milk go to the Dairymen's League because they had withdrawn from the Dairymen's League, to some extent, to establish an independent outlet.

Chateaugay is about 50 miles from Massena and Plattsburg is about 90 miles away. It was pointed out that under the order, by diverting that way, the cooperatives would get the full order price and we would get out full commission, and it should make a very satisfactory arrangement from their viewpoint.

The Plattsburg plant is owned by the Clinton County Dairymen's Cooperative Association, Inc. I assisted some of the officials of that cooperative in preparing an application for cooperative payments, as provided by Order 27. The application was not filed with the Administrator at that time but was filed subsequently. It was pointed out that under the order it would naturally follow that the cooperative would get the five cents; that was the general understanding in the conversation. (Government moves to strike answers on the grounds that witness cannot testify as to who made statements. Motion denied.)

We do not divert that milk to the Dairymen's League at Massena. It was suggested that the separators at Chateaugay be removed so as to make it a fluid plant. That was suggested by Mr. Gaynor.

Several days later, Mr. Gaynor called me up in regard to the Eisenberg contract. He said that they were arranging to divert Eisenberg's milk. Mr. Gaynor had charge of this arrangement. He told me that Eisenberg had not signed the milk marketing agreement and that they were arranging to divert his milk to other plants. I told him we would go along with him and divert the milk from Plattsburg if we were notified. At Mr. Gaynor's request, we withheld milk (at Plattsburg) from Eisenburg for about two or
557 three days. That milk was resold as fluid milk to some other buyer.

In October, I talked with Mr. Gaynor again concerning Eisenberg. Mr. Gaynor had notified us on the phone that Eisenberg had signed the agreement and we resumed shipping to Eisenberg. The calls were made by Mr. Gaynor from Leonardsville to Saratoga. (Government moves to strike all the testimony of this witness on the ground that no marketing agreement was signed; nothing in the pleadings sets forth anything about threats—coercion—in connection with the signing of the marketing agreement; Mr. Gaynor was not shown to have authority to engage in any of the alleged activities. Motion denied.) I had three different conversations with Mr. Gaynor. The last one was in October. There were two telephone conversations, and I called at Mr. Gaynor's home at his request.

The Plattsburg Cooperative was not allowed five cents, or any amount, as a cooperative.

Over objection, defendant Jetters Dairy Company, Inc., was granted permission to amend answers to conform to evidence of witness Dake. Plaintiffs moved to strike all evidence of witness. Motion denied. Defendants' Exhibit 72, carbon copy of a letter dated December 20, 1938, from Clinton County Dairymen's Cooperative Association to Market Administrator, and defendants' Exhibit 73, original letter dated December 23, 1938, from Mr. Harmon to Clinton County Cooperative Association, Inc., received in evidence.

Cross examination by Mr. WALLACH:

The correct name of the Plattsburg Co-op. is Clinton County Dairymen's Cooperative Association, Incorporated. I have a written contract with them to act as a business adviser. (Witness gives copy of contract to Mr. Wallach.) The contract was entered into in July, and it is still in force. I was never a broker to sell the milk of this cooperative. I had a conversation with Mr. Gaynor about the
558 diversions of milk to Massena. Mr. Gaynor told me, at his home, that they had made arrangements, after conversations with Washington, by telephone, and with Albany, to have the milk from our plants at Chateaugay and Plattsburg diverted to Massena. When I say Plattsburg I mean the Clinton County Co-op. I regard these cooperatives as a part of my own organization, in a sense; we buy the output of that co-op. We have been buying it since the cooperative started on July 9th. Nothwithstanding the fact that we buy all the milk of this cooperative I still have an agreement with them as their adviser and I am paid for my advice.

Before I commenced purchasing all of the milk of this cooperative, Eisenberg purchased it direct. I did not act as a broker when Eisenberg or one of his corporations purchased the milk directly. I never was a broker. Eisenberg entered into a contract with this cooperative before the opening of a plant on July 9th. His contract called for delivery from the date of opening until April 1, 1939.

Q. Now, didn't you just say a minute ago that you purchased milk from this Co-op. since the date of the opening of the plant?

A. That is right.

Q. Now, will you tell me how these two statements are compatible?

A. Yes. I received—the Clinton County Co-op. received a notice from the State Department that Mr. Eisenberg, or the corporation which he represented, was not duly licensed and bonded under the State Law, and we were about to open, it was necessary that we have a market, and inasmuch as we had a dealer's license, I suggested to the cooperative that temporarily we would purchase this milk in our own name and sell it to Eisenberg until the matter could be straightened out. Subsequently——

Q. And the matter has not been straightened out as yet, is that correct?

A. No.

I pay for the milk that I buy from the cooperative and sell it to Eisenberg. It is paid for by check I do not always wait until Eisenberg pays me before I pay the cooperative. I entered into my agreement with the cooperative after it was learned that Eisen-
559 berg didn't have a bond It was entered into when the cooperative started. Mr. Eisenberg's contract was entered into before we purchased. The State Department questioned whether Mr. Eisenberg was properly licensed and bonded, and when I learned Eisenberg did not have a bond, I purchased the milk for the purpose of furnishing an outlet for the Clinton County Cooperative.

I was very instrumental in the organization of the cooperative. I have known Mr. Eisenberg over a year. I am not selling cream to Eisenberg nor one of his corporations. I believe the Saratoga Cooperative has sold Eisenberg milk or cream products from time to time, and Chateaugay has a direct contract with Eisenberg Farms. I have been connected with the Chateaugay Farms Cooperative; I have a connection with them now.

In the month of September we had some trouble with payments from Eisenberg for milk which we purchased from the Clinton County Cooperative and in turn sold to Eisenberg. I talked to Mr. Gaynor about it, in October, I think. I have had numerous conversations with Mr. Gaynor. I wanted Mr. Gaynor to act as an intermediary to try to adjust the account with Eisenberg, along with several other accounts. I did not talk with Mr. Gaynor about it in September because the payment for the milk was not due at that time. The milk was paid for in the month of October. I paid the full

Q. Is it or is it not a fact that you did not pay for that milk until Mr. Eisenberg pays you, after Mr. Gaynor straightened it out for you?

A. Mr. Gaynor never straightened anything out for me.

Q. Didn't he arrange with Mr. Eisenberg to make payment?

A. The payment is not made, as yet.

Q. Did Mr. Gaynor arrange for these payments with Mr. Eisenberg?

A. He did not, not to my knowledge, at least.

I have never had control over the cooperative. I do not know whether Mr. Gaynor believed I had control of the cooperative. Early in September Mr. Gaynor asked me to have the cooperative divert the milk from Mr. Eisenberg. I explained to Mr. Gaynor that there were existing contracts. I meant the contract between Eisenberg Farms and the cooperative. It is not being operated, but it is still existing; it is still a contract.

I am paid for my advice to the cooperative pursuant to the poundage sold. We get five cents a can, providing we keep the operating cost of the plant on certain specific items in the contract at fifteen cents per hundredweight and under; and if it exceeds in cost of handling, if this exceeds fifteen cents, any portion which it exceeds that would be deducted from the commission. The Clinton County co-op. operates the plant, they simply consult with me in the mechanics of operating the plant and the general problems with which the milkman and cooperative would be confronted. I operated the Saratoga Dairy about three years ago, and an ice cream plant for a number of years. We have been in the dairy business for sixteen years. The money is not paid to me as a commission for selling milk for Eisenberg.

Cross-examination by Mr. SCHOENECK:

We own a plant at Saratoga Springs. It is not an ice cream plant; it is a skimming plant and we have manufacturing facilities for casein. Previous to July I formed a connection with the Clinton County Cooperative. My contract expired in July. Prior to that time I knew that the Secretary of Agriculture was conducting hearings throughout the State, and I knew he was asked to come into New York to help the Commissioner of Agriculture of New York to regulate the milk business. I also knew that Mr. Eisenberg had been in the milk business for a long time. I knew that Mr. Eisenberg had to have a license in order to buy milk from producers and had to give bond in order to meet the requirements and get a license. The State Department notified the Clinton County Cooperative that Mr. Eisenberg did not have a license. (Letter which Clinton Dairy Co-operative received from Kenneth F. Fee, Director, Division of Milk Control, offered in evidence as Plaintiffs' Exhibit C. Received. Plaintiffs' Exhibit D, letter sent to Chateaugay Marketing Association, signed J. A. Conboy, by Charles H. Fogg of the State

hibit C on the ground that it is not proper on cross-examination to impeach the witness. Defendants object to Exhibit D on the grounds that it is hearsay and no part of proper cross-examination. Defendants' motion denied. Exhibits received in evidence.)

We started the operations at Chateaugay in the early part of February 1938, and the organization of the Clinton County plant was started in the early spring months. We helped to organize both of them. We helped to negotiate the deal with Mr. Eisenberg. There is a contract between Eisenberg and the Clinton County Cooperative, and subsequent to its signing these letters were received. I did not ship any milk directly to Eisenberg under that contract. I did not use that contract when I was organizing the cooperatives.

There was an arrangement entered into after I learned that the contract was invalid because Eisenberg was not licensed to do busines in the State. I bought the milk in my name. I sold some of the milk to Eisenberg and some of it to independent dealers. As far as I know, Eisenberg had not put up his bond with the State of New York when I sold him the milk. My date of payment to the Clinton Producers was on the 14th and 28th of the month following delivery. The check has always been out on time. I paid for that milk on the utilization basis. Eisenberg had not, in all cases, paid me for the milk before I paid the producers.

We send out one check just before the 14th and one just before the 28th, payable to the Clinton County Cooperative. There might be some other checks in between there. We do not send the firm's check to the producers. The producers of these various coop-
562 eratives are paid in various ways. Sometimes we sent what they call a special Federal Bank draft drawn through the Federal Bank. It is payable at the bank at Plattsburg. (Defendants object to production of checks as being improper. The Court made no ruling, but continued the proceedings and instructed the witness to produce the checks and reports requested by plaintiffs.)

Mr. Dougherty of New York City is a former chief of the Country Milk Inspection Division and is now a broker. We sell some of our milk, that is, some of the Clinton Cooperative milk, through him. Mr. Dougherty receives a commission for the sale of milk, and the commission is charged against the Clinton Cooperative. I buy milk from the Clinton Cooperative and take title to that milk and after I take title, Mr. Dougherty sells the milk for me as broker. During the month of September, I charged the Clinton Cooperative $197.42, which was paid for Mr. Dougherty's commission for brokerage services. (The witness was shown a document purporting to be taken from the records of the Department of Agriculture and Markets.)

Q. Does that refresh your recollection as to whether or not you owed the Co-ops. $1,102.07 for September milk as late as the 28th day of November, this year; that is my question?

A. It refreshes my recollection that there was a change in the figures, necessitated by circumstances.

Q. Now, who determined that a change of figures was necessary?

A. When it was shown that the full—the order price plus 23 cents plant handling on which these figures were predicated—

On the order price plus 23 cents plant handling. When it was determined that those prices were not obtainable from the Bagden Milk Company and that the Bagden Milk Company at the present time still contests that bill and has not paid it to date, when Eisenberg's Farm has not paid their bill in September to date, when the Municipal Farms still owe us substantial sums of money for this period, it became evident that the full order price plus 23 cents, which was not in the order, was not obtainable from the trade.

563 Q. I see.

A. And that necessitated a change in these figures, and at that time a new——

Q. (Interrupting) Now, wait a minute. Wait, I haven't heard about Bagden. This milk, as I understand it, you bought and took title to; didn't you?

A. Right.

Q. And then you sold some of it to Bagden?

A. That is right.

Q. And Bagden didn't pay you?

A. That is right.

Q. And Eisenberg didn't pay you?

A. That is right.

Q. And then, because Eisenberg didn't pay you and Bagden didn't pay you, then you felt justified in changing the figures which represented the amount which was to be paid to the producers; is that it?

A. We were authorized as agents by the Cooperative to make these sales and make the full return to the Cooperative for the receipts.

There was an arrangement with the cooperative by which we were to buy the milk from the cooperatives—producers—and sell the

564 milk as agents. The arrangement was made before I started buying the milk. It was made when it became advisable for us to sell the milk in our own name. We were to handle it in our own name and turn over the full value of the milk, deducting all expenses therefrom, and turn over the net receipts to the cooperatives even through that didn't yield to producers the order price.

Cross examination by Mr. COOKE:

I entered into the contract with the Clinton County Cooperative Association in July of 1938, I believe. We negotiated a contract with the Chateaugay Cooperative before that. That was a service contract. Before that the Clinton County Cooperative had been sending some milk, as individuals, not as a cooperative, to the Chateaugay unit, and previous to that, these same individuals, who were not as yet organized, had sent milk to our plant at Saratoga. In November of 1937 we began to get milk from these two groups as individuals. It was taken to Saratoga. At the Clinton County Cooperative, milk was received as a cooperative after the plant was opened on July 9th.

I have acted as an adviser at both the Plattsburg and Chateaugay plants. I entered into the contract at Plattsburg around July. The one at Chateaugay was entered into as an agreement which was filed at the hearing with the Commissioner in Albany when we made application for a license. The board of directors directed the president of the cooperative to sign the contract, but through a technical delay he never did sign that contract. We have done business for some six months.

We bought and sold some of the milk when it seemed to be to the best advantage of the cooperative, with the understanding that the full return for that milk, net return, would be turned over to the cooperative. In some cases it proved advisable for us to handle the milk in our own name—in the name of P. W. and C. V. Dake.

565 We did not act as brokers. Part of the time the milk was handled under the name of Dake Brothers and part of the time it was handled under the name of someone else. Where the sales were made direct, the returns were made direct. We did not charge a commission or brokerage on those sales. Our compensation was not for handling. We did get compensation on all the milk handled through the plants at Chateaugay and Clinton.

We took title to the Clinton milk. We did not sell the Clinton milk to Mr. Eisenberg in New York; there was an original contract entered into between the directors of the Co-op. and Mr. Eisenberg. That was after we were acting in the capacity as business advisers to the cooperative. I was acting in the capacity of adviser to the cooperative when the contract was signed with Mr. Eisenberg.

In April 1938, I sold some milk to the Bagden Milk Company. The terms of the contract provided for a sliding scale—so much over Sheffield; i. e., Sheffield was taken as the base price, the prices to be paid for the various months were based entirely upon the Sheffield price, plus a certain handling charge. I was acting as the business adviser of the Chateaugay Company and advised them to enter into that contract. There was no specific provision in either of these contracts between Chateaugay and Eisenberg and Clinton and Bagden that in the event of the adoption or promulgation of a Federal or State order prices for milk to the producer should be governed by the Federal or State order. It was agreed that conditions beyond our control would be sufficient to govern, and we thought that this would protect us in the event that there was a Federal order.

The discussion of a Federal order was general throughout the milk shed in April of 1938, and I had read a great deal about a proposed Federal and State order. No provision whatsoever beyond this allusion to conditions beyond my control was made in the contract because my attorney agreed with the attorney of Mr. Bagden

566 that that was all that was necessary. It is not true that as soon as the order had been passed I had difficulty with both of these contracts. After the order was put into force in September,

then there were serious difficulties with Mr. Bagden in regard to his milk.

Q. Did most of your difficulty with Mr. Bagden arise over the fact that no provision had explicitly been madeoin your contract for the payment of the prices provided for in the Federal and State order?

A. Well, on September 1st, we did take further provision.

The contract that I had with Bagden was drawn between ourselves and Bagden and assigned by Dake Brothers to the Chateaugay Co-operative. Mr. Bagden was not a party to the assignment though he was aware of the assignment.

Some time in September, I had some difficulty with Mr. Eisenberg and with Bagden in regard to prices; they refused to pay me the prices provided for in the Federal and State order. I first discovered that I was going to have some difficulty or some argument with Mr. Bagden and Mr. Eisenberg in regard to prices on their failure to pay, on the fourteenth of September, for the previous week's milk, as was provided for in the contract.

I knew when the referendum was held on the Federal and State order and knew that the Federal order was promulgated by the Secretary of Agriculture and the State order by the Commissioner of Agriculture and Markets of the State of New York some time in the latter part of August 1938. As business adviser to these two cooperatives I took the matter up with them at considerable length. I realized that the contracts that were in effect at that time might be effected seriously by the provisions of both of these orders, and that situation was discussed. At first, I was not considerably disturbed about the contracts, but later, it developed that I was
567 and I took some steps to find out what my rights might be both under the Federal and the State orders, with regard to these two cor acts. I first approached Mr. Harmon in the Hotel Commodore in New York City on the first day of September. I also took up the matter as to the status of the contracts with the State Department of Agriculture and Markets.

I talked with Mr. Gaynor and Mr. Kniffen in the State Department of Agriculture and Markets. The first meeting I ever had with Mr. Gaynor was in Utica sometime after the first of January 1938 in connection with the sale of milk which we were making in New York. I also had a meeting with Mr. Gaynor at the Hotel Utica the latter part of August 1938. My recollection is that he called me up and wanted to have a talk with me; I don't think I called Mr. Gaynor myself—I don't think I had any occasion to. My brother and I then went to the Hotel Utica.

Our conversation at the hotel concerned what our attitude was in regard to the Federal order. I saw Mr. Gaynor next about September 7, at his home. I believe he called me up and asked me to come over. I am not just sure the date of the next time I saw him, but I think I met him with you (Mr. Cooke) at the Hotel Utica. My brother and I were present at that time.

At that time I don't think there was any discussion concerning the diversion of milk in any way at all. We had a conference that lasted several hours there that afternoon. It had to do with the determination of the Bagden status. I believe that meeting was in October.

I saw Mr. Gaynor again after that at his home. My brother was with me. On that occasion, I believe I requested an interview with him. I don't think there was anyone present at that particular meeting, but Mr. Gaynor, my brother and myself.

568 In November Mr. Eisenberg and I appeared at Mr. Gaynor's home in Leonardsville. I never did go to Mr. Gaynor's house in Leonardsville and take Mr. Bagden along with me. My brother did go and take Mr. Bagden; as a matter of fact, my brother and I were in quite frequent communication with Mr. Gaynor during the months of September and October, requesting his advice in regard to the difficulties we were in with Eisenberg and with the Bagden Dairy and in regard to many other problems. I frequently sought Mr. Gaynor's advice in regard to those problems. I did not make the statement yesterday that I had never been at Mr. Gaynor's house in Leonardsville but once.

Cross examination by Mr. WALLACH:

In the action against Bagden for goods sold and delivered, he sued Dake Brothers and we have sued him. Dake Brothers are the plaintiffs in the action against Bagden for milk purchased by Bagden from Dake Brothers.

I said a little while ago that I assigned to the Chateaugay Cooperative the contract we had with Bagden for the purchase and sale of milk. Bagden did not necessarily owe that money to the cooperative—he continued to pay us for the milk under the arrangement, though, as a matter of fact, the cooperative and not Dake Brothers was the owner of the claim against Bagden. The cooperative was not the owner of the claim for all of the milk; some of the milk was sent out of the Plattsburg cooperative because Chateaugay did not have sufficient milk to fill the contract after they assumed it. Chateaugay authorized us, as agents, to make the collections. I am suing as a party plaintiff.

Redirect examination by Mr. PRATT:

We have paid Chateaugay for that milk.

In the latter part of August, just before the orders went into effect, I had a talk with Mr. Gaynor at Utica. At that time
569 the main discussion was along the lines of what we would do in regard to compliance with the order. We told them that we had supported the order from the beginning, that we had encouraged our producers to vote for it, and that we would give it every assistance possible. I stated then that I would not sign a marketing agreement, and I did not sign it. The matter of signing the agreement was discussed and I stated that I would not sign a marketing agreement.

I went to New York on the first of September and saw Mr. Harmon. I discussed with him our status and showed him a letter which I had written to all my customers at the suggestion of my attorney. I wrote a letter to Bagden, a copy of which I have here. (At this point over objection defendants offered a proposed amendment to their pleadings. Objection overruled. Amendment allowed. The Government then moved to strike all the testimony of Dake dealing with alleged coercion exercised by any persons requiring him to sign a marketing agreement on the ground that there was no paragraph in the original bill or of the proposed amendment that covered it. Motion denied. Further objection on the ground that there was no showing of any authority by any such persons to act on behalf of the Secretary of Agriculture, nor any complaint or evidence that any of the milk of any of the defendants was 570 diverted or any threats made that it would be diverted. On consideration of this objection, the Court reserved decision on the admission of this amendment.)

In my conversation with Mr. Harmon the question of what would happen to a dealer who did not pay the order prices was brought up and Mr. Harmon said, "That comes under our department." I went to New York to see Mr. Harmon because we wanted to know our status in regard to our various contracts and we wanted him to understand that we had done under the advice of our attorney and whether it was in accord with his own views. I don't recall any specific discussion on that particular point with Mr. Gaynor. I had discussion with the attorneys for some of these dealers buying milk from me at the time I made the contracts about what would be done in case of the Federal order. I had those talks I testified to on cross examination as having been with Mr. Gaynor in October and there was further discussion about diverting or withholding milk from dealers. I did withhold milk from some dealer. That conversation was on the telephone. Mr. Gaynor called me in Saratoga. (Government objects to the entire line of testimony on grounds previously stated. Objection overruled.) On October 12, 13 and 14, I withheld some milk at Mr. Gaynor's request. That milk was withheld from Mr. Eisenberg. (Question and answer of witness stricken. Exception granted defendants.)

I had a discussion with Mr. Gaynor in reference to payment to me of the diversion charge for milk withheld from Eisenberg about October 12, 13 and 14, 1938. That talk was by telephone. (The Court points out that the objection runs to all of this testimony.) I had a talk with Mr. Gaynor on or about October 11, 1938. I diverted milk from Eisenberg and shipped it to another plant for manufacturing during sometime in October 1938. That milk was diverted from the Plattsburgh plant to the Saratoga plant. Subsequently, after that three-day period, I resumed shipment to Eisenberg. I filed a claim for such diversion under the name of Clinton County Cooperative, I think. That claim has not been paid. I do not have a copy of the claim here.

I was present at a conference when Mr. Gaynor talked with
571 Mr. Sexauer, President of the Dairymen's League. I believe that was in October. While I was there he also called Mr. Wellwood of the Sheffield Farms. I don't think he placed a call to anyone else at that particular time. Nothing was said in that conversation to me about the diversion of milk.

SAMUEL ROOTSTEIN, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I reside at 1460 Bristow Street, The Bronx, City of New York. I am employed by the Tri-boro Milk & Cream Company and the Jetter Dairy Company. I am the manager of those two companies. Mr. Arthur Jetter is the supervisor-general manager. Part of my work as a salesman and as a collector. I solicit new stores, collect accounts of ours, and adjust accounts.

The Jetter Dairy Company has milk-receiving plants to Solsville, New York, Oriskany Falls and Bridgewater, New York. The milk which is sold by the Tri-boro Milk & Cream Company is milk which comes from those plants. The milk that is sold by the Jetter Dairy Company is milk that comes from the same plants. The volume of business done by these two companies can be separated. The Tri-boro Milk & Cream Company sold approximately 850 cases of milk on the first of September, and the Jetter Dairy Company sold about 300 cases, making a total volume of 1,150 cases for the two businesses. The daily average of the Tri-boro Milk & Cream Company and Jetter Dairy Company is 900 or 950 cases now. The Tri-boro Milk & Cream Company lost some business in September. (Government objects to last statement as being a conclusion, and there is nothing to show that the company does not always lose business during the month of September. The Court agrees that it is a conclusion, but the objections are overruled.)

There was some time when we lost some business. (Government objects on the ground that the operations of the Tri-boro Milk & Cream Company have no relevancy in the case. Objection overruled.)

572 Mr. Arthur Jetter is in charge of both the Jetter Dairy Company and the Tri-boro Milk & Cream Company. I take instructions from him. (Plaintiffs object on the grounds that it is immaterial. Objection overruled.)

In the early part of September, I did lose some of the business of the Tri-boro Milk & Cream Company. (Plaintiffs object on the ground that it is immaterial. Objection overruled.) I lost some business on the fourth of September. I lost it from a customer located at 744 Fox Street. The customer's name is Max Weintraub. Prior to the fourth of September the Tri-boro Milk & Cream Company had been selling that customer thirty twelve-quart cases of milk daily. On the fourth of September we sold that customer only ten cases of milk.

There are two classes of milk, one known as advertised and one as unadvertised. The advertised brands are Sheffield's and Borden's; the unadvertised brands include Gold Medal, Niagara Milk Company, Dairymen's League, The Jetter Dairy Company, Tri-boro Milk & Cream Company, Queensboro Farm, Eisenberg Farms, and Sunnydale Farm. I went to that store to ascertain the reason for the drop from thirty cases to ten cases and saw ten cases of Dairymen's League and ten cases of Gold Medal Farm milk. (Plaintiffs object to that as immaterial. Objection overruled.)

I continued to sell milk to that store, but not the same quantity I had sold. After the fourth of September, I continued to sell that store ten cases a day. I saw Gold Medal and Dairymen's League milk there after September fourth. There was no other milk being sold in that store on September third. I was in Mr. Weintraub's store on September first and second and third and there was no milk from the Gold Medal or Dairymen's League in that store on those dates.

(Plaintiffs object. Objection overruled.)

I made some records from the books of the Tri-boro Milk & Cream Company showing changes in the sale of milk after September first.

573 I made the records in my own handwriting. The sales of the Tri-boro Milk & Cream Company have decreased constantly since September first. (Plaintiffs object on the grounds that it is irrelevant and immaterial. Objections overruled.) The Tri-boro Milk & Cream Company and Jetter Dairy Company sell 900 or 950 cases per day now. (Government objects on the ground that there is no evidence to show that it is not a customary loss of sales at this time of year. Objection overruled.) The Tri-boro Milk & Cream Company sells about 700 to 750 cases a day and the Jetter Dairy Company sells about 200 cases a day.

574 It is customary among drivers in the trade to make out delivery slips showing the street number without showing the name of the street. We can determine the name of the street because each driver has a territory to cover and they can tell by the route.

Breakstone milk is considered as unadvertised milk in the trade and the Borden Company has an unadvertised brand known as Reid's Union Dairy. The Sheffield Farms Company, Breakstone Milk, and Reid's Union Dairy are competitors of the Jetter Dairy Company and Tri-boro. I have a list of the addresses of customers lost by the Jetter Dairy Company since September.

Between September First and Fourth we charged Mr. Weintraub 9¾ cents per quart for milk. After September Fourth I charged nine cents.

Cross-examination by Mr. McCauley:

I am employed as manager, canvasser, and collector of the Tri-boro Milk & Cream Company and the Jetter Dairy Company. I have been employed in that capacity for a year and a half. Prior to that time I was a route salesman. I am not now a route salesman.

There was a time during my employment when the Jetter Dairy Company and the Tri-boro Milk & Cream Company were the sole dealers delivering milk to Weintraub at 744 Fox Street. That was for ten or twelve days prior to September 4, 1938.

Prior to the first of July 1938 I know that the Lincoln Milk & Cream Company was delivering milk to 744 Fox Street. I know that, because I happened to be checking on that stop around that time. I know that the Dairymen's League took over the business of the Lincoln Milk & Cream Company. As far as I know, when the Dairymen's League took over the Lincoln Milk & Cream Company the business that was in the store at 744 Fox Street was not Dairymen's League business. There was a time in August when the
575 business of the Dairymen's League or the Lincoln Milk & Cream Company at that stop decreased from eight cases of milk a day to three cases of milk a day. Mr. Weintraub continued to take eight cases of milk a day after the ninth of August 1938. The Tri-boro Company got the bulk of that business from that date. That was before September first. The Tri-boro company did not take the business away from either the Lincoln Milk & Cream Company or the Dairymen's League some time in the month of August 1938. After the time when Tri-boro, or Jetter, went into 744 Fox Street with five cases of milk a day, I believe the price was something like seven cents a quart. For a while the price was six cents a quart and then it dropped to five cents a quart.

After September 1, 1938, Tri-boro, or Jetter, continued to have Mr. Weintraub of 744 Fox Street as a customer. On and after September 1, 1938, about thirty cases of milk were delivered to Mr. Weintraub every day. I believe that we delivered thirty cases to Mr. Weintraub on September first. I don't know whether we delivered thirty cases on September second, but we were putting in the entire order at nine and three-quarter cents.

On August 31, 1937, we first started to deliver thirty cases a day to 744 Fox Street. It is not a fact that on September 1st we merely continued to deliver the five or six cases that we had been delivering during the month of August 1938. I did say that on or about August 9, 1938, the Jetter Dairy or the Tri-boro took over the bulk of the business at 744 Fox Street. I did not say that when we took over the bulk of the business we were delivering about five or six cases a day. In the month of August we were probably putting in anywhere from ten to fifteen cases a day. I know that the business of the Lincoln Milk & Cream Company, or Dairymen's League, was cut at that time, but I don't know what the order was cut to. I know that the order was cut in our favor.

I know we had the entire business of the store at 744 Fox
576 Street on September 1, 1938; the Lincoln Milk & Cream Company, or Dairymen's League, wasn't in there at all on that date. Everybody was out except Tri-boro. We charged 9¾ cents a quart for the milk which we were putting into this store. We con-

tinued to put all the milk in that store, until September fourth—about twenty-five to thirty cases a day. On September fifth, I cut the price to nine cents because I got a call on September fourth that the order was cut, and when I went over there I saw ten cases of Gold Medal milk and ten cases of Dairymen's League milk and ten cases of our milk. Since the fifth of September we have delivered only ten cases a day to that store.

At this point plaintiffs offered a memorandum consisting of three sheets, produced by the witness, marked Plaintiffs' Exhibit G for Identification.) The handwriting on Plaintiffs' Exhibit G for Identification is mine. I prepared those three sheets the day before yesterday. I prepared them at the offices of the Tri-boro Milk & Cream Company from my own books and records. I prepared them because I knew I was coming to this trial. I have made a notation on those sheets with respect to 744 Fox Street. (Plaintiffs' Exhibit G for Identification offered in evidence. Received.

When I was preparing to come here as a witness, I prepared Exhibit G from my own books and records, and from memory. I prepared it in order that I might refer to it for assistance in the event that I needed such assistance while testifying.

The sixth item in the first paragraph of Exhibit G is the item 744 Fox, "10 cases," included in a section which is entitled "Stops lost to Gold Medal." There is no notation of any kind at that point that any milk was lost to Dairymen's League. There is no other notation in the memorandum that refers to 744 Fox Street.

I have divided the three pages into sections—nine sections
577 in all—seven of which are entitled "Stops lost to" someone or other. I have not made a notation about milk being lost to the Dairymen's League. The sections of the memorandum are entitled, "Stops lost to Gold Medal," "Stops lost to Manchester Farms," "Stops lost to Breakstone," "Stops lost to Adler," "Stops lost to Queensboro Farms," "Stops lost to Bagden," "Stops lost to Eisenberg," "Gained from Adler," and "Cost." In the ninth section of the memorandum I have shown what it cost Tri-boro to retain customers; that is, concessions which I was forced to make in order to retain customers.

In the month of December we gave the customer at 1869 Third Avenue thirty cases of milk free in order to retain him. Sometime in November I gave the proprietor of the store at 800 Home Street, Bronx, merchandise equivalent to $30.24 in order to retain him as a customer. The merchandise was bottled milk. I gave the proprietor of the store at 1311 Brook Avenue, Bronx, twenty-five cases of milk on November 28th. I gave the proprietor of the stores at 504 East 138th Street and 572 East 138th Street twenty cases of milk and two quarts of heavy cream on October 22. All of the dates refer to 1938. Prior to September 1, 1938, we had sold for five and six cents a quart and I did give something away in 1937. Prior to September 1, 1938, I was free to sell milk at any competitive price I wanted to.

In the months of October, November, and December 1938 I was not giving cases of milk away to cover up the fact that I was selling milk cheaper than the price at which most milk dealers agreed that it should be sold if the dealer wanted to break even. I do not have a memorandum of any kind showing the business which I lost to the Dairymen's League after September 1, 1938. I am sure that I
578 have lost business to the Dairymen's League. Mr. Jetter told me to prepare the memorandum (Plaintiffs' Exhibit G); he called me on the telephone and instructed me to prepare it.

Cross examination by Mr. WALLACH:

I have lost business amounting to about 240 cases from the first of September 1938, to date. I have gained some new stops since September 1. I imagine I have gained around 40 cases. I solicited the new business. Since September 1, I have not attempted to take any business away from the Dairymen's League.

Q. In other words, since September 1st you didn't attempt to take any business away from the Dairymen's League, is that correct?

A. That is correct.

Q. That is notwithstanding, as you say, the Dairymen's League took business from you?

A. That is correct.

I would have taken business away from Gold Medal, Queensboro, and Breakstone because they took business from me.

Q. Now, tell us why you wouldn't take from Dairymen's League notwithstanding, as you say, they took business from you?

A. Because previous to that, whenever we had any trouble with Dairymen's League, that is, as far as that branch is concerned, and I went to straighten it out, I straightened out to Mr. Myer, it was always to my satisfaction, as well as his.

I went to straighten out the Fox Street account but was not successful. I would solicit business to get it away from the Dairymen's League now because I found out a few weeks ago that I couldn't come to any sort of a head with them.

Q. Well, did you try since a few weeks ago to solicit any business of the Dairymen's League?

A. I haven't.

My drivers have also solicited business. They did not have instructions not to solicit business of Hauck & Schmidt or the Dairy-
579 men's League. If they had brought in business of the Dairymen's League since September 1, 1938, it probably would have been up to me to decide whether to take that business. After I found out that I couldn't straighten out with Hauck and Schmidt I would have taken the business; before that, I would not.

Jetter Dairy and Tri-boro have seven routes. All of them are wholesale routes. There are nine regular drivers. I do not drive one of the trucks; the last time I drove a truck was about eight months ago.

I believe I know all the customers of Tri-boro and Jetter. I see all of them at some time or other. I do not take particular notice of how much milk each customer gets from any other company; I leave that to the driver. I didn't make any particular point of the customer at 744 Fox Street; it is my job to look at these route sheets every day.

I found out that Dairymen's League was delivering ten cases and Gold Medal was delivering ten cases when the driver called in and complained that he was cut on his order. I went around to see the customer and saw the ten cases from each dealer on the floor. I knew they had been delivered that morning because the driver called me and told me that. The driver called me and told me he was cut, but I didn't know who delivered them or what until I got there. I was there about eight o'clock. Grocery stores in that neighborhood open about 6:30 or a quarter of seven.

I know that customer. I have been in his store time and time again and know how he operates. He has a habit of holding milk over from day to day. I should judge he carried over three or four cases from the night before. Milk is delivered to stores by wholesalers any time from 2 o'clock in the morning to 2 or 3 o'clock
580 in the afternoon, but the grocer always gets a supply of milk on hand to be sold when he opens. (Defendants object to the answer as speculative. Objection overruled.).

When I got to the store I saw twenty cases of milk. My driver delivered his ten cases at the same time the man opened. My ten cases are usually in the ice box. It has been the driver's habit to put them in the ice box ever since he served the store. The Dairymen's League and Gold Medal drivers do not have the habit of
581 putting the milk in the ice box. Their milk was iced up, but the cases were not full of ice. All of our drivers are Union drivers.

A Union driver is permitted to deliver 135 packages on a wholesale route. We used the seven drivers on the routes in delivering the 1,150 cases of milk on September first. I was figuring the total amount of business by the welfare stations we have, which has nothing to do with the routes. We did not violate the union rules in delivering the 1,150 cases of milk. We deliver to four welfare stations. We get eight cents a quart for that milk.

I do not have charge of keeping books.

I first learned that I was going to testify that the Dairymen's League took business a way from me at Fox Street when I got on the witness stand. Mr. Pratt may have mentioned it to me, but I don't remember. I talked to Mr. Pratt about the business in the city when I got here. I asked him how this case was coming along. If he asked me about Fox Street, I probably told him; I don't remember volunteering any information. Mr. Pratt probably knew I was going to talk about Fox Street because of that affidavit—that list I gave him some time ago. We talked about it today when we went out to lunch, but I don't remember that anything was said about it before I got on the witness stand.

Cross examination by Mr. McCAULEY:

My brother Louis Rootstein was a driver on September First. He was in the employ of the Trio-boro company. He was driving Route No. 4. 744 Fox Street is on that route. My brother Louis did not call me and tell me that something had happened over at 744 Fox Street, it was a call from the office. My brother Louis is the
562 driver and he was in a position to tell me that he had lost business at that stop.

Redirect examination by Mr. PRATT:

As far as I know, the Tri-boro company first started to serve 744 Fox Street on August 31, 1937. The Lincoln Farms Company first started to serve them sometime in July or August of 1938. Eisenberg operated the Lincoln Farms before the Dairymen's League bought it. I know that the League took over Eisenberg's Lincoln Farms business. Prior to July or August of 1938 no other dealer was serving that store.

Mr. Myers is manager for Hauk & Schmidt, a branch of the Dairymen's League. I called him up to see if I could straighten out the matter of the 744 Fox Street stop with him.

The Dairymen's League took trade from the Jetter Dairy or Tri-boro company at 452 East 146th Street. (Plaintiffs objected to the question as not proper redirect examination. Overruled.) The business at that stop was lost during September or October—somewhere around October. We were selling 11 to 13 cases a day to that stop. Since we lost that business we have been selling only five cases a day to that stop. Sales of milk in August are practically the same as in September in New York City—sometimes more. Sheffield's and Borden's advertised brands were being sold to the Fox Street stop, but I understood they referred to unadvertised milk when they asked me about other dealers.

Cross-examination by Mr. McCAULEY:

In the City of New York, sales of milk are practically the same in August and September—sometimes more in August. In certain
583 sections of New York, when the children do not go to school it reflects in rather a large way in sales of milk, and, in certain sections of New York, the Summer week-ends reflect themselves in a decline of business in the sale of milk, but our business is not affected.

Our milk is bottled at Maspeth, Long Island, by the Freeman Dairy. I do not know whether Freeman Dairy buys milk from the Dairymen's League. (Defendants condeded Freeman Dairy buys milk from the Dairymen's League.)

In Plaintiffs' Exhibit G, I do not have an entry of any kind which indicates that I lost business to the Dairymen's League from the customer at 146th Street.

(At this point defendants offered in evidence statements of market service payments to the Borden Company and the Sheffield Farms Company for September, October, and November, and to the Dairy-

men's League for November; to the Sheffield Condensed Milk Company for September, October, and November, and Sheffield Producers Cooperative Association. (Government objects on the ground it is irrelevant and immaterial. Objection overruled. Received in evidence, marked Defendants' Exhibit No. 77.)

Defendants offered in evidence a stipulation and agreed statement showing the cost of transportation by tank trucks and the proportion of milk transported by railroad and by truck and also the basis for the differentials in New York. Received, marked Defendants' Exhibit No. 78.

Defendants offered in evidence the general schedules applicable to shipments of milk in tank cars by rail. Received and marked Defendants' Exhibit No. 79.

584 Defendants offered in evidence a statement showing transportation differential zones established by E. M. Harmon as Marketing Administrator on September 21, 1938, in the City of New York, as amended October 21, 1938, November 3, 1938, and December 3, 1938. Received and marked Defendants' Exhibit No. 80.

Defendants offered in evidence a statement furnished by the Dairymen's League stating the total volume of milk sold by them in fluid form in the State of New Jersey in September, October, and November 1938. Plaintiffs objected on the grounds that it was immaterial, irrelevant, and incompetent. Objections overruled. Received and marked Defendants' Exhibit No. 81.

Plaintiffs made the following concession:

(Mr. LENT.) "In answer to a request for concession by defendants' counsel, we concede as follows:

"Total number of pounds of milk by volume sold by the Dairymen's League in its own business in the metropolitan area as fluid milk, wholesale, in each of the months of September, October, and November 1938:

"September, 10,688,784 pounds; October, 11,157,060 pounds: November, 10,451,228 pounds. With this explanation:

"These figures apply to stops, that is, store, restaurant, and hotel customers regularly served by the League's established routes. In addition to this, the League also serves institutions in the marketing area during the three months in question with milk in varying amounts pursuant to short-time arrangements made by such institutions from time to time with various handlers generally pursuant to regular competitive bids. The amounts so served to such institutions were as follows:

"September, 603,365 pounds: October, 1,079,023 pounds: November, 241,192 pounds.

"In connection with this concession it is my understanding that Mr. Pratt concedes the fact that the New York public schools opened September 12, 1938."

(Defendants then conceded it is a fair statement that the
585 consumption of milk in New York City, as a whole is greater when school is open than otherwise.)

Defendants then offered in evidence a computation of the actual base cash price to producers at Solsville, Oneida County, New York, for September, October, and November. Government objects on the ground it is irrelevant. Objections overruled. Received and marked Defendants' Exhibit No. 82.

ROBERT CHARLES DUMONT, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. PRATT:

I live on a farm at Malone, New York. I am employed by Dake Brothers. I have operated the farm for eighteen years. I have been employed by Dake Brothers for about eleven months. I talked with Mr. Baldwin of the Bargaining Agency the very first part of September 1938. I talked with him over the telephone. He asked me if I could come to Syracuse; he would like to talk to me. (Plaintiffs object to the question. No foundation laid. It is irrelevant, immaterial, not binding on the Government. Objections overruled.)

I told Mr. Baldwin that it was almost impossible for me to come to Syracuse as I could not take care of the expenses. He asked me to see if the president or some of the directors of Clinton County Cooperative and Chateaugay Cooperative would come to Syracuse to a meeting being held there a few days after that. I told him I would go if I could. I attended the meeting of the Bargaining Agency and saw Mr. Harmon, Mr. Jay C. Treat, Mr. Baldwin, and Mr. Gaynor. Mr. Gaynor gave a talk. He said that if any of you fellows have any milk that anybody does not want, "Let me know and
586 I will find a place for it." (Goverment objects on the ground that it is irrelevant, immaterial, and Mr. Gaynor has no authority to act in behalf of the Secretary of Agriculture of the United States. Objection overruled.)

There was talk at that meeting about dealers' signing a marketing agreement; I don't recall that Mr. Gaynor talked about it. Mr. Gaynor said he would divert milk for anybody in distress. Nothing was said about withholding milk from anyone, as I recall. That was the day they formed the Minute Man organization. I don't recall who made the suggestion of the Minute Men; somebody made a motion or something and they called for volunteers. Mr. Rolfe was chairman of that meeting. I believe he is president of the Bargaining Agency.

Neither the Chateaugay nor Clinton County cooperative joined the Agency. After the meeting I talked with Mr. Baldwin and Mr. Treat concerning the diverting or withholding of milk. Mr. Gaynor was in the room for a short time. Mr. Baldwin said they expected there would be some trouble in getting dealers in line in getting the marketing order and signing the marketing agreement and asked me what I would do if I had the thing to do—to make dealers do things. I told him that my experience was if you wanted a milk

dealer to do anything, the only thing to do with him was to take his milk away from him. I did not have any further conversation with Mr. Baldwin at that time.

Sometime around the first of October Mr. Baldwin called me on the telephone. He wanted to know if I could come to Syracuse. I told him I could, but I was running out of money for traveling expenses. He suggested if I would come down they would pay my expenses and railroad or operation of automobile and hotel bill. I told him I would come under those arrangements. Syracuse is about
200 miles. I arrived there about 4 o'clock and I believe
587 I stayed until the next afternoon. At that time I talked with Mr. Baldwin, Mr. Treat, and another gentleman. (Government objects to the entire line of testimony and all discussions. Objections overruled.) There were three gentlemen, Mr. Baldwin, Mr. Treat, and another man there who was treasurer. Mr. Baldwin asked me if I had put in an application for a job with Mr. Harmon. I told him I had not. He asked me if I would be interested, and I told him I didn't think I would be. I asked him what the job might be an he said, "Well, we have got to have a fellow like you here, we have something that has got to be done, and I think you are the fellow that can do the job." (Government moves to strike the answer as it appears that Mr. Baldwin had no authority to act on behalf of Mr. Harmon. Court agreed that it does not bind Mr. Harmon or the Government, but allowed it to stand.) He said there were dealers who were not going along, and they wanted some men to go to a milk plant and dry it up the next morning.

I was a member of the Dairy Farmers' Organization Committee last year during the strike. I told Mr. Baldwin I guessed he had me overestimated, that I did not think I was any better than anybody else. I told him that I would not be interested in anything of that kind. He asked me if, in my opinion, a milk plant might be dried up and I told him if they wanted to dry a plant to send 75 or 100 good men down there and dry it up. I believe I was paid $20 for that trip. I was paid by a check of the Bargaining Agency. (Government moves to strike out testimony of the witness on the grounds that it is immaterial, irrelevant, none of it binding upon the Government. Motion overruled.)

Cross examination by Mr. SCHOENECK:

I don't think Commissioner Noyes was present at the meeting. I
didn't know him at that time, but I did not see him if he was.
588 When I talked with Mr. Baldwin and the others they asked me how I would bring the dealers in line, and I told them that was the way I would do it.

I am a member of the Farmers' Union of the North Country. We dried up some plants in the North Country a year ago last fall. There was a milk strike in Sheffield's plant.

When I talked with Mr. Baldwin and the others the conversation was not to make the farmers do something, it was to make the dealers do something.

Cross examination by Mr. COOKE:

My sympathies are with the producers in this market set-up.

Parts of deposition of George R. Fitts offered by the defendants copied into the record

(From 1st page of deposition:) "George R. Fitts, being duly sworn, deposes and says that he resides at No. 65 Church Street, Cortland, Cortland County, New York, and that he is and has been for many years last past a Director of Dairymen's League Cooperative Association, Inc., and for several years last past and now is acting under the supervision and general direction of the Executive Committee of said Association as Executive Assistant in general charge of all sales of milk made to dealers and stores in the metropolitan market. As such, he is familiar not only with the policies of said Association, but also is in close contact with and cognizant of the market conditions existing in the metropolitan market and the sales made by the Association through its distributing Branches in New York City.

"By far the largest part of the sale of fluid milk in the New York City market by the Association is made direct to distributors. The Association, however, does sell and distribute a considerable quantity of milk directly to stores, restaurants, etc., in said City through its Branches. It has not been the policy of the Association to make such sales through its Branches at prices below the market therefor because such a policy would have an adverse reaction upon the distributors in said City who are buying milk from the Association and which milk is sold by them to a considerable extent to stores, restaurants, etc., in said City."

589 Second Extract Offered by Defendants, from Page 5 of the deposition:

"There is a constant interplay of competition at all times between the League Branches and all dealers similarly selling milk at wholesale to stores in New York City. Jetter Dairy Co., Inc., and Tri-boro Milk & Cream Company are neither the lowest priced competition, nor the highest priced, nor are the League Branches run on a policy of either price cutting or unusually high prices. The League Branches are run by men experienced in this business because they formerly successfully conducted the businesses which the League purchased to find an outlet for its producers and these were substantial and established businesses. These men run these businesses so as to maintain their volume the same as do milk dealers, with one single and all-important exception. That is that they are now working for the farmers and consequently their underlying policy as directed by the representatives of the producers who employ them is to ob-

tain the highest reasonable return possible under existing competitive conditions.

"In many stores which are served by both the League and Jetter Dairy Company, the same conditions exist as in stores served jointly by others. There is a constant competitive conflict with price fluctuations caused by the competitors or in many cases by the storekeepers playing one competitor against the other."

The part of the deposition of George R. Fitts offered by the plaintiffs, copied into the record, being all of the 2nd page of the deposition excluding a part offered by the Defendants, all of the 3rd page, and the first paragraph of the 4th page, as follows: Beginning with the last word on the 5th line of the 2nd page of the deposition and continuing through to the end of the first paragraph of the 4th page:

"The policy of the Association, therefore, has been to obtain as high a price in its sales to stores in said City (New York City) as was advisable under current marketing conditions and as would yield the highest return to the producers for whom the Association is acting as marketing agent. It has been necessary, however, from time to time in various sections of the City in order to hold the trade to meet competitive prices by various dealers who were attempting to obtain customers away from the Association by cutting prices. At time the Association has lost severely by such price cutting. For example, during the first year alone of State Milk Control, the Association lost nearly one-quarter of its volume in New York City, because of price cutting by various dealers below the prices fixed by the State authorities.

"During the summer months of 1938 and prior to September 1st, the competitive conditions in the bottled milk trade (in glass) to
stores in New York City were very sharp and price cutting
590 was so general that in some cases milk was sold to stores as low as 5 cents per quart in glass bottles. The Association during this period was forced in many cases to meet cuts offered by competitors in order to hold its established trade.

"On the other hand, when the new Federal and State Orders took effect on September 1st, the destructive price cutting above outlined largely ceased and the price return of the Association for the first Friday in September for milk sold in glass quart bottles averaged well above 9½ cents. By the third Friday in September, price cutting, which had been started by some of the dealers in the Borough of Manhattan, had spread to Brooklyn and had started in the Bronx. The price based on similar reports to those of the first Friday showed an average reduction of about one-third of a cent per quart. This condition of price cutting by various dealers has continued so that although the price of the Association so far as obtainable is 9¾ cents a quart for milk in glass bottles to stores, the reduction necessary to hold the trade of the Association has resulted in a further lowering of the average price by the fourth Friday in November of approximately one-third of a cent for the various

branches in New York City, the highest being in Manhattan and the lowest in the Bronx.

"Any claim that the Association was engaging in any price cutting campaign in order to increase its business is shown to be fallacious because of the fact that from September 1st to November 25th, 1938, the sales of the Association through its branches in New York City of glass bottled milk in quarts suffered a loss of approximately fourteen per cent in volume.

"Information from our Statistical Department, which in turn obtained same from reports of the United States Department of Agriculture, are that although the sales of the Association to stores in New York City in September and October were sharply reduced, the sales of milk in general in New York City for September were substantially on a par with those of the preceding months of the year, except June and August which were a little higher, and the tentative figures for the month of October show that they were the highest of the year up to November 1st.

"The Association's classification has been higher than the average of the entire administrator's pool for both September and October to an extent which has caused the Association to contribute equalization payments of over $45,000 a month for each month.

"The Association is similarly situated insofar as being in the business of distributing milk to stores in New York City to the defendant Central New York Cooperative Association, Inc., and is in actual competition with said Central New York Cooperative Association, Inc., in that business. Furthermore, the Association is similarly situated to the defendants Rock Royal Co-operative Association, Inc., and Schuyler Junction New York Milkshed Co-operative, Inc., in being engaged actively in competition with such Associations in sales of milk to distributors in New York City."

591 Government agrees that the Tri-Boro and the Jetter Dairy Company are owned by the same stockholders.

Applications of Tri-boro and Jetter Dairy Company for State license admitted as defendants' Exhibits 83 and 84, subject to affidavit on behalf of Jetter Dairy Company, which all parties agreed would be received as evidence. This affidavit reads as follows:

[Title omitted.]

Affidavit of Arthur Jetter

STATE OF NEW YORK,
County of Oneida, ss;

ARTHUR JETTER, being duly sworn, deposes and says that he is President of the defendant Jetter Dairy Company, Inc.; that milk received by the Jetter Dairy Company, Inc., is principally marketed through said defendant, Jetter Dairy Company, Inc., the Triboro Milk & Cream Company, Inc., and Freeman's Dairy, Inc., of 5624 58th St., Maspeth, L. I. Deponent and Anna B. Zimmerman are the owners of more than 90% of the stock of the Jetter Dairy Company,

Inc. Deponent and said Anna Zimmerman own more than 90% of the stock of the Triboro Milk & Cream Company. Deponent and said Anna Zimmerman are son and daughter of the late Christian Jetter, who established the business now operated by the Jetter Dairy Company upwards of more than 40 years ago.

Deponent further says that he is the owner of one-half of the stock of Freeman's Dairy, Inc.; that all of the milk used by Jetter Dairy Company and Triboro is bottled and processed at the Freeman's plant at Maspeth, L. I.

Deponent farther says that the Jetter Dairy Company, Inc., does not have manufacturing equipment for manufacture of butter, milk powder, or condensed milk at any of its plants. At the Solsville plant, a cream separator is maintained for the purpose of separating milk into cream for fluid consumption. The skim milk has customarily been sold at the plant.

592 The Jetter Dairy Company, Inc., Triboro Milk & Cream Company and Freeman's Dairy, Inc., are and have been since September 1st, 1938, principally engaged in the sale of milk and cream in the Metropolitan Area as defined by Order No. 27. None of said companies is engaged in the sale of any milk outside the Marketing Area.

ARTHUR JETTER.

Sworn to before me this 28th day of January 1939.

VICTORIA J. KOWALSKI,
Notary Public, Oneida Co., N. Y.

Stipulation as to certain facts

It is stipulated that a hundredweight of milk is deemed to contain 46½ quarts of fluid milk.

It is stipulated that a 40-quart can of milk contains between 85 and 86 pounds of milk.

It is stipulated that the cost of receiving milk in a receiving station varies between 15 to 30 cents per hundredweight.

It is stipulated that the plant of Schuyler Junction Cooperative is equipped only for the receiving and handling of fluid milk and that the reports filed by the cooperative with the Market Administrator show that during the months of September, October, and November 1938 no milk was sold outside the marketing area.

It is stipulated that there is only one grade of "Grade B" milk, irrespective of butterfat content.

In connection with paragraph 62 of the Stipulation, it is agreed that, subject to the amounts being changed as a result of the filing of reports, the amount due and owing the Market Administrator by the defendant, Schuyler Junction, for the month of October is $1,377.40 and for the month of November, $751.54.

All parties rested.

3326 *Exhibit number 2 to stipulation*

State of New York Department of Agriculture and Markets, Albany, New York

OFFICIAL ORDER NO. 126

To Regulate the Handling of Milk to be Sold in the New York Metropolitan Milk-Marketing Area

Effective September 1938

3327 ORDER AND ANNOUNCEMENT OF COMMISSIONER OF AGRICULTURE AND MARKETS ANNOUNCING THE ADOPTION OF OFFICIAL ORDER NO. 126 REGULATING THE HANDLING OF MILK TO BE SOLD IN THE NEW YORK METROPOLITAN MILK-MARKETING AREA.

Whereas, the Commissioner of Agriculture and Markets does hereby find that the adoption of Official Order No. 126 to regulate the handling of milk to be sold in the New York Metropolitan Milk-Marketing Area, a copy of which order is annexed hereto and made a part hereof, is approved or favored by over seventy-five per centum of the producers of milk produced in the production area for such marketing area as evidenced by a referendum conducted by the undersigned Commissioner concurrently with a referendum conducted by the Secretary of Agriculture of the United States on his Order No. 27 which is similar and complementary to Official Order No. 126, and

Whereas, the undersigned Commissioner of Agriculture and Markets does hereby find from testimony given at a hearing held jointly by the Secretary of Agriculture of the United States and by the undersigned Commissioner for the purpose of considering such similar and complementary orders and from information concerning conditions existing in the milk industry in the New York Metropolitan Milk-Marketing Area that conditions exist in such area which so affect the orderly marketing of milk in such area that public interest requires that the public policy declared in Section 258-k of the Agriculture and Markets Law shall be effective, and

Whereas, the Secretary of Agriculture of the United States has determined to promulgate and make effective his Order No. 27 regulating the handling of milk in the aforesaid New York Metropolitan Milk-Marketing Area;

Now, therefore, I, Holton V. Noyes, the Commissioner of Agriculture and Markets of the State of New York, pursuant to the terms and provisions of the Agriculture and Markets Law, as amended, and in accordance with the power and authority in me vested, do hereby adopt and promulgate Official Order No. 126, said order to become effective concurrently with and to be complementary to such similar Order No. 27 to be made effective by the Secretary of Agriculture of the United States.

Said Official Order No. 126 shall be effective on and after 12:01 a. m., e. s. t., September 1, 1938, and I do hereby order that
3327 from such date the handling of milk produced for sale in the New York Metropolitan Milk-Marketing Area shall be in conformity to and in compliance with the terms and conditions in said Official Order No. 126.

In addition I do hereby announce that the average of the prices reported daily during the sixty days preceding the 25th day of August, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market was 26.18 cents and that the average of the prices reported daily during the thirty days preceding the 25th day of August, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market was 26.25 cents; and hereby order that the Class I price pursuant to Article IV of said order, for the month of September, shall be $2.45 per hundredweight, and that the Class II-A price pursuant to Article IV of said order for the month of September, shall be $1.75 per hundredweight.

In witness whereof, I have hereto set my hand and the official seal of the Department of Agriculture and Markets of the State of New York, this 25th day of August 1938.

[SEAL] HOLTON V. NOYES,
Commissioner of Agriculture and Markets.

3329 Article I—Definitions

SECTION 1. Definitions.—The following terms shall have the following meanings:

1. "Statute" means the Agriculture and Markets Law as amended.

2. "Commissioner" means the Commissioner of Agriculture and Markets of the State of New York.

3. "New York Metropolitan Milk Marketing Area" means the city of New York, and the counties of Nassau, Suffolk, and Westchester, all in the State of New York, and is hereinafter called the "marketing area."

4. "Person" means any individual, partnership, corporation, association, or any other business unit.

5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

6. "Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area. This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered

from producers to any other handler for the account of such association and for which such association collects payment. This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area.

7. "Market Administrator" means the agency, which is described in article II, for the administration of this order.

Article II—Market Administrator

SECTION 1. Selection, removal and bond.—The agency for the administration of this order shall be a market administrator who shall be a person selected and subject to removal by the Commissioner. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Commissioner a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Commissioner.

SECTION 2. Compensation.—The market administrator shall be entitled to such reasonable compensation as shall be determined by the Commissioner.

SECTION 3. Powers.—The market administrator shall have power:

3330 1. To administer the terms and provisions hereof;

2. To receive, investigate, and report to the Commissioner complaints of violations of this order.

SECTION 4. Duties.—The market administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Commissioner at any and all times;

3. Furnish such information and such verified reports as the Commissioner may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

5. Publicly disclose to handlers and producers, unless otherwise directed by the Commissioner, the name of any person who, within 15 days after the date upon which he is required to perform such acts, has not

(a) Made reports pursuant to section 3 of article V or

(b) Made payments required by sections 1 and 8 of article VII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof;

7. Pay out of the funds received pursuant to article VIII (a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, (b) his own

compensation, and (c) all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties;

8. Maintain a main office, and such branch offices as may be necessary.

SECTION 5. Announcement of prices.—The market administrator shall publicly announce prices as follows:

1. Not later than the 25th day of each month, the Class I and Class II-A prices to be in effect for the following month, pursuant to section 1 of the article IV.

2. Not later than the 5th day of each month, the prices effective for the preceding month for Classes II-B, III-A, III-B, III-C, III-D, IV-A, and IV-B, pursuant to section 1 of article IV.

3. Not later than the 14th day of each month, the uniform price computed pursuant to section 2 of article VI.

Article III—Classification of milk

SECTION 1. Basis of classification.—All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or
3331 movement from, the plant where received from producers, including members of any cooperative association; Provided, That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant; and provided further that, if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant, classification of such milk at the first plant may be in accordance with its utilization at such second plant.

Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the market administrator to verify such statement by an audit of such person's records.

Any milk or cream which is on hand at any plant at the end of any month shall be classified in accordance with the form in which it leaves, or is utilized at, such plant not later than the 8th day of the following month.

SECTION 2. Classes of utilization.—The classes of utilization of milk shall be as follows:

1. Class I milk shall be all milk which leaves a plant as milk, chocolate milk, or any whole milk drink, and all milk the utilization of which is not established for classification in some other class named in this section, except that loss or waste of milk in the plant where received from producers, not to exceed 2 percent of the total quantity of milk received from producers, may be prorated to each

class to the proportion which the milk in such class is of the total quantity of milk classified.

2. Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs 5 and 7 of this section.

3. Class II-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of plain condensed milk, or, except as set forth in paragraph 6 of this section, frozen desserts or homogenized mixtures.

4. Class III-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of evaporated milk in hermetically-sealed cans, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than American Cheddar and cream cheese.

5. Class III-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is subsequently held in a licensed cold storage warehouse for more than seven days at a temperature below zero degrees Fahrenheit.

6. Class III-C milk shall be all milk the butterfat from which leaves a plant in the form of frozen desserts or homogenized mixtures which were sold outside of New York City.

3332 7. Class III-D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese.

8. Class IV-A milk shall be all milk the butterfat from which leaves or is on hand at the plant in the form of butter.

9. Class IV-B shall be all milk the butterfat from which leaves or is on hand at a plant in the form of American Cheddar cheese.

Article IV.—Minimum Prices

SECTION 1. Class prices.—For milk containing 3.5 percent of butterfat received during each month from producers or cooperative associations or producers at plants in the 201–210 mile zone, each handler shall pay per hundredweight not less than the prices set forth in this section. For milk containing more or less than 3.5 percent of butterfat or received from producers or cooperative associations of producers at plants in other zones, each handler shall pay per hundredweight not less than the prices set forth in this section plus or minus the differentials set forth in sections 2 and 3 of this article.

The minimum prices for Class I and Class II-A milk shall apply to all Class I and Class II-A milk which is sold in the marketing area or which passes through a plant in the marketing area. The minimum prices for milk in Classes II-B, III-A, III-B, III-C, III-D, IV-A, and IV-B shall apply to all milk of any handler in

these classes unless such handler has milk in Class I to which the minimum price is not applicable, in which event the minimum III–A, III–B, III–C, III–D, IV–A, and IV–B prices shall not apply to the percent of his milk, if any, in each of the said classes which is equal to the percent of his total milk received from producers to which the Class I price is not applicable.

Payment of the minimum prices for milk received direct from producers shall be in accordance with article VII. Any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum prices applicable pursuant to this article.

1. For Class I milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 60 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range (cents per pound)	Class I price	
	April through July	August through March
	Dollars per cwt.	*Dollars per cwt.*
Under 20	1.80	2.05
20-24.9	2.00	2.25
25-29.9	2.20	2.45
30-34.9	2.20	2.65
35-39.9	2.40	2.65
40-44.9	2.60	2.85
45-49.9	2.80	3.05
Over 49.9	3.00	3.25

2. For Class II–A milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 30 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range (cents per pound)	Class II-A Price		
	March through July	August through October	November through February
	Dollars per cwt.	*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.30	1.35	1.50
20-24.9	1.50	1.55	1.70
25-29.9	1.70	1.75	1.90
30-34.9	1.85	1.90	2.05
35-39.9	2.00	2.05	2.20
40-44.9	2.15	2.20	2.35
45-49.9	2.30	2.35	2.50
Over 49.9	2.45	2.50	2.65

3. For Class II–B milk the price during each month shall be 10 cents higher than the Class III–A price.

4. For Class III–A milk the price during each month shall be 10 cents higher than the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such month to farmers by each of the evaporated milk plants which are located at places listed in this paragraph and for which prices are reported: Provided, That in no event shall the Class III–A price be less than a price computed by the market administrator as follows: To the average price of 92-score butter at
3334 wholesale in the Chicago market for such month, as reported by the United States Department of Agriculture, add 80 percent, multiply by 5.5, and add 7 cents.

Locations of Evaporated Milk Plants

Mt. Pleasant, Mich.	Black Creek, Wis.
Sparta, Mich.	Orfordville, Wis.
Hudson, Mich.	Chilton, Wis.
Wayland, Mich.	Berlin, Wis.
Coopersville, Mich.	Richland Center, Wis.
Greenville, Wis.	Oconomowoc, Wis.
Jefferson, Wis.	New London, Wis.
New Glarus, Wis.	Coldwater, Ohio.
Belleville, Wis.	Delta, Ohio.

5. For Class III-B milk the price during each month shall be 20 cents higher than the Class IV-A price.

6. For Class III-C milk the price during each month shall be 10 cents higher than the Class IV-A price.

7. For Class III-D milk the price during each month shall be 7½ cents higher than the Class IV-A price.

8. For Class IV-A milk the price during each month shall be a price computed by the market administrator as follows: From the average of the highest prices reported daily during such month by the United States Department of Agriculture for 92-score butter at wholesale in the New York market, deduct 4 cents, add 20 percent, and multiply by 3.5.

9. For Class IV-B milk the price during each month shall be a price computed by the market administrator as follows: Take the average of the weekly quotations, with differentials as indicated, from such of these markets as may issue quotations during such month; Single Daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York; deduct 3 cents, and multiply by 9.45. In the absence of any such quotation the price for the preceding month shall be effective.

SECTION 2. Butterfat differentials.—The minimum prices for Classes I, II-A, II-B, III-B, III-C, and III-D milk set forth in

section 1 of this article shall be subject to payment of butterfat differentials pursuant to section 3 of article VII. The minimum prices for Classes III-A and IV-A milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the respective prices set forth in paragraphs 4 and 8 of section 1 of this article, divided by 35. The minimum price for Class IV-B milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the price set forth in paragraph 9 of section 1 of this article divided by 9.45 and multiplied by 0.23.

335 SECTION 3. Transportation differentials.—The market administrator shall from time to time publicly announce for each plant operated by each handler the freight zone set forth in the schedule below in this section according to the railway mileage distance from New York City of its nearest railway shipping point, or its highway mileage distance from New York City, if the latter is less than the former by more than 15 miles. Any such mileage distance shall be that recognized for rate-making purposes by the Interstate Commerce Commission. The minimum prices set forth in section 1 of this article shall be plus or minus the amounts as set forth in the following schedule.

A	B	C	D	A	B	C	D
Freight zone miles	Class I Cents per cwt.	Classes II-A, II-B, III-B and III-C Cents per cwt.	Class III-A Cents per cwt.	Freight zone miles	Class I Cents per cwt.	Classes II-A, II-B, III-B and III-C Cents per cwt.	Class III-A Cents per cwt.
1- 10	+15	+8	+4	251-260	−3.5	−2	−1
1- 20	+14	+8	+4	261-270	−3.5	−2	−1
1- 25	+13	+8	+4	271-275	−3.5	−2	−1
1- 30	+13	+7	+4	276-280	−3.5	−3	−1
1- 40	+13	+7	+4	281-290	−4.5	−3	−1
1- 50	+10.5	+7	+4	291-300	−5.5	−3	−1
1- 60	+10.5	+6	+3	301-310	−5.5	−4	−2
1- 70	+9.5	+6	+3	311-320	−5.5	−4	−2
1- 75	+9	+6	+3	321-325	−7	−4	−2
1- 80	+8	+5	+3	326-330	−7	−5	−2
1- 90	+8	+5	+3	331-340	−7	−5	−2
1-100	+7	+5	+3	341-350	−8	−5	−2
1-110	+7	+4	+2	351-360	−8	−6	−3
1-120	+6	+4	+2	361-370	−8	−6	−3
1-125	+5	+4	+2	371-375	−9	−6	−3
1-130	+5	+3	+2	376-380	−9	−7	−3
1-140	+5	+3	+2	381-390	−9	−7	−3
1-150	+3.5	+3	+2	391-400	−9	−7	−3
1-160	+2.5	+2	+1	401-410	−10.5	−8	−4
1-170	+2.5	+2	+1	411-420	−10.5	−8	−4
1-175	+1.5	+2	+1	421-425	−10.5	−8	−4
1-180	+1.5	+1	+1	426-430	−10.5	−9	−4
1-190	+1.5	+1	+1	431-440	−11.5	−9	−4
1-200	0.0	+1	+1	441-450	−11.5	−9	−4
1-210	0.0	0	0	451-460	−11.5	−10	−5
1-220	−1	0	0	461-470	−12.5	−10	−5
1-225	−1	0	0	471-475	−12.5	−10	−5
1-230	−1	−1	0	476-480	−12.5	−11	−5
1-240	−2	−1	0	481-490	−14	−11	−5
1-250	−2	−1	0	491-500	−14	−11	−5

3337 Article V—Reports of Handlers

SECTION 1. Preliminary monthly reports.—On or before the 23rd day of each month each handler shall, when requested by the market administrator, report to the market administrator in the manner and form prescribed by him (a) the total quantity of milk received during the first twenty days of such month from producers, and (b) the utilization of such milk in the several classes set forth in article III.

SECTION 2. Reports of deliveries per day per producer.—Each handler shall, upon request of the market administrator given not less than two weeks in advance, report the average deliveries of milk per day per producer during a specified period of time.

SECTION 3. Final monthly reports.—On or before the 10th day of each month each handler shall report to the market administrator, in the manner and on forms prescribed by the market administrator, with respect to milk received at each plant during the preceding month:

1. The total quantity of milk, with the average butterfat content thereof, received from producers, from other plants, from such handler's own farm, and from other handlers;

2. The total quantity of milk and of each product of milk moved out of such plant during such month or on hand at such plant at the end of such month, the butter fat content of each product; and the destination of any milk which moved out of such plant:

3. If classification of any milk is claimed by such handler on the basis of utilization at some other plant, the utilization of such milk, together with written consent for verification by audit thereof signed by the operator, if not a handler, of the other plant, and

4. The computation, pursuant to section 1 of article VI of such handler's net pool obligation.

SECTION 4. Verification of reports and payments.—The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records. Each handler shall, during the usual hours of business, make available to the market administrator or his representative such of his records and facilities as will enable the market administrator to:

1. Verify the receipts and utilization of all milk required to be reported, pursuant to this article, and, in case of errors or omissions, ascertain the correct figures;

2. Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

3. Verify the payments to producers prescribed in article VII.

3338 Article VI—Determination of Uniform Price

SECTION 1. Net pool obligation of handlers.—The net pool obligation of any handler for milk received from producers during each month shall be a sum of money computed for such month as follows:

1. Determine the total quantity of milk in each class at each plant;
2. Subtract from the quantity of milk in each class the quantity such milk received from other plants, or from other handlers;
3. Subtract pro rata out of each class the quantity of milk received om the handler's own farm;
4. Subtract from the remaining quantity of milk in each class, the antity of each to which the prices in section 1 of article IV do not pply, which result shall be known as the "net pooled milk" in each ass;
5. Multiply the total quantity of net pooled milk in each class, at l plants of the handler combined, by the respective class prices set rth in section 1 of article IV, and add together the resulting sums;
6. Deduct, in the case of each plant where the average butterfat ntent of all milk received from producers is in excess of 3.5 percent d add in the case of each plant where the average butterfat content all milk received from producers is less than 3.5 percent, an amount ual to the difference between the total value of the butterfat differtials on net pooled milk in Classes III–A, IV–A, and IV–B at e rates set forth in section 2 of article IV for such milk and the tal value of the butterfat differentials on such milk as set forth in ction 3 of article VII;
7. Deduct, in the case of each plant nearer New York City than e 201–210 mile zone and add in the case of each plant farther om New York City than the 201–210 mile zone, an amount equal the difference between the sum of the respective transportation fferentials, as set forth in section 3 of article IV, on all net pooled ilk in Classes II–A, II–B, III–A, III–B, and III–C, and the sum otained by applying the appropriate zone differential set forth in olumn B of the schedule in section 3 of article IV to the total net ooled milk at each plant in Classes II–A, II–B, III–A, III–B, II–C, III–D, IV–A, and IV–B.
8. Deduct 20 cents per hundredweight for all net pooled milk ceived from producers at plants in the counties or portions of unties listed below in this section. The result thus obtained shall known as the "handler's net pool obligation."

39

Counties

ew Jersey:
Hunterdon.
Somerset.
Essex.
Union.
Morris.
Warren.
Sussex.
Passaic.

onnecticut:
Litchfield.

New York:
Columbia.
Dutchess.
Nassau.
Orange.
Putnam.
Suffolk.
Westchester.

Massachusetts:
Berkshire.

Towns in Ulster County, New York

Kingston.
Ulster.
Rosendale
Esopus.
New Paltz.
Lloyd.
Gardiner.
Plattekill.
Marlborough.
Shawangunk.

SECTION 2. Computation of the uniform price.—The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the final report submitted for the preceding month by each handler and, on the 14th day of such month, compute from all of such corrected reports the uniform price in the following manner:

1. Combine into one total the net pool obligations of all handlers.
2. Subtract the total of payments required to be made for such month by section 5 of article VII and the total of payments claimed pursuant to section 6 of article VII;
3. Add the amount of cash in the producer settlement fund;
4. Divide the result by the total quantity of milk represented in the sum obtained pursuant to paragraph 1 of this section; and
5. Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 201–210 mile zone.

Article VII—Payments to Producers

SECTION 1. Time of payment.—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from producers and he does not pay the uniform price for all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such producer's milk which was paid for at the uniform price
3340 and furnish a copy of such statement to the market administrator at the time payment is made.

SECTION 2. Transportation and location differentials.—The uniform price shall be plus or minus the differential shown in Column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties and towns in New York State listed in paragraph 8 of section 1 of article VI.

SECTION 3. Butterfat differential.—The uniform price shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of one percent above or below 3.5 percent of average butterfat content of milk delivered by any producer during any month.

SECTION 4. Grade A premiums.—In addition to the uniform price and all other payments required pursuant to this article, each handler

hall pay for milk which is qualified under the New York City De-
artment of Health requirements for sale as Grade A milk and which
delivered to a plant similarly qualified, an amount per hundred-
eight equivalent to the following differentials on that Class I milk
hich such handler sold in the marketing area as Grade A milk:

Butterfat content (percent)	Bacteria colonies per c. c.		
	10,000 or less	10,000 to 25,000	Over 25,000
	Cents per cwt.	*Cents per cwt.*	*Cents per cwt.*
	60	42	5
	66	48	7½
	72	54	10
and above	78	60	12

SECTION 5. Payments to cooperative associations.—Any coopera-
ve association of producers may apply to the Commissioner for a
etermination of its qualifications to receive payments pursuant in
is section by reason of its having and exercising full authority in
e sale of the milk of its me[illegible] using its best efforts to supply
times of short supply Class [illegible]K to the marketing area, and to
cure utilization of milk, in times of long supply, in a manner to
sure the greatest possible returns to all producers, and having its
tire activities under the control of its members. After such deter-
ination the cooperative association of producers shall be entitled to
continue to receive such payment until it has been disqualified
41 by the Commissioner, after hearing for failure to exercise the
authority and to perform the functions upon which such de-
rmination was based.

The market administrator shall make the payments authorized by
is section, or issue credit therefor, out of the producer settlement
nd on or before the 25th day of each month, subject to verification
the reports upon which such payment is based. Such payments
all be made to each cooperative association of producers under the
llowing conditions and at the following rates:

1. One cent per hundredweight of net pooled milk at any
ndler's plant which was caused to be delivered from its members
such association and on which such handler has made the reports
d payments required by this order.

2. Except as set forth in paragraph 3 of this section, 2½ cents
r hundredweight of net pooled milk at plants of other handlers
hich was reported and collected for by such association.

3. Five cents per hundredweight of net pooled milk at plants
erated by such association and, if, in addition to the other quali-
ations, such association has been determined by the Commissioner
have sufficient plant capacity to receive all the milk of producers
ho are members and to be willing and able to receive milk from
oducers not members, 5 cents per hundredweight of any net
oled milk which was caused by it to be delivered to any other
ndler and which is reported and collected for by such association.

SECTION 6. Market Service Payment.—The market administrator shall pay out of the producer settlement fund to any handler immediately after audit of claim for such payment made on forms supplied by the market administrator:

1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area, which was during any month except November or December, moved to a plant where it was utilized in Classes II–A, II–B, III–A, III–B, III–C, III–D, or, during the month of October, IV–A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles, and plus $\frac{1}{10}$ of 1 cent per hundredweight per additional mile, of the shortest highway distance between the two plants; and

2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equipped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area.

SECTION 7. Producer settlement fund.—The market administrator shall establish and maintain a separate fund known as 3342 "the producer settlement fund" into which he shall deposit all payments made by handlers pursuant to sections 8 and 10 of this article and out of which he shall make all payments to handlers pursuant to sections 6, 9, and 10 of this article and to cooperative associations of producers, pursuant to section 5 of this article.

SECTION 8. Payments to the producer settlement fund.—Each handler shall, on or before the 18th day of each month, pay to the market administrator for payment to producers through the producer-settlement fund the amount by which his net pool obligation for the preceeding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price.

SECTION 9. Payments out of producer settlement fund.—On or before the 20th day of each month the market administrator shall remit to each handler for payment to producers the amount, if any, by which such handler's net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. If at such time the balance in the producer settlement fund is insufficient to make all payments due to such handler, the market administrator shall reduce uniformly the payments made to each handle and shall complete such payments as soon as the necessary funds are available. No handler who on the 25th day of the month has not received the balance of such reduced payment from the market administrator shall be

deemed to be in violation of section 1 of this article if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer settlement fund.

SECTION 10. Adjustments of errors in payments.—Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall, within five days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within five days, make such payment to such handler. Whenever verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of less than is required by this article, the handler shall make up such payment to the producer not later than the time of making payment next following such disclosure.

Article VIII—Expense of Administration

SECTION 1. Payment by handlers.—As his pro rata share of the expense of administration hereof, each handler shall, on or before the 20th day of each month, pay to the market administrator
3343 a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handler, directly or at the instance of a cooperative association of producers, and which was utilized in Classes I, II-A, and II-B, the exact amount to be determined by the market administrator subject to review by the Commissioner.

Article IX—Suspension, Termination, and Liquidation

SECTION 1. Continuing obligation of handlers.—Unless otherwise provided by the Commissioner in any notice of amendment, termination, or suspension of any or all of the provisions hereof such amendment, termination, or suspension shall not (a) affect, waive, or terminate any right, duty, obligation, or liability which shall have arisen or may thereafter arise in connection with any provision of this order; (b) release or waive any violation of this order occurring prior to the effective date of such amendment, termination, or suspension; or (c) affect or impair any rights or remedies of the Commissioner or of any other person with respect to any such violations.

SECTION 2. Continuing power and duty.—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The market administrator shall (a) continue in such capacity until discharged by the Commissioner; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator, to such person as the Commissioner shall direct; and (c) if so directed by the Commissioner, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator pursuant to this order.

SECTION 3. Liquidation.—Upon the termination or suspension of this order, the market administrator shall, if so directed by the Commissioner, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator in liquidating the business of the market administrator's office shall be distributed by the market administrator to handlers in an equitable manner.

3344 *Exhibit Number 4 to Stipulation*

BRIEFS FILED PURSUANT TO NOTICE OF OPPORTUNITY TO FILE WRITTEN ARGUMENTS

Brief of New York State Milk Committee.

Brief of Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc.

Brief of Crowley's Milk Producers Cooperative Association, Inc.

Brief submitted by Sherrill A. Hufcut on behalf of: Circleville Milk Producers' Cooperative Association, Inc.; Slate Hill Milk Producers' Cooperative, Inc.; Sheffield Producers' Coop. Assn., Inc., representing Harlem Valley District No. 11; Sheffield Producers' Cooperative Assn., Inc., representing Columbia County; Dairymen's League Coop. Assn., Inc., representing Ulster County; Dairymen's League Cooperative Assn., Inc., representing northern New Jersey; Dairymen's League Cooperative Assn., Inc., representing Dutchess and Columbia Counties; Dairymen's League Cooperative Assn., Inc., representing Orange County; Chester Milk Producers' Cooperative, Inc.

Brief on behalf of Sheffield Farms Company, Inc.

Brief of United Milk Producers of New Jersey.

Brief of Sussex County Co-Operative Milk Producers' Association.

Memorandum of John Kane Mills, representing independent producers selling quality milk in the metropolitan area.

Brief of Sheffield Producers Co-operative Association, Inc.

Brief of New York State Guernsey Breeders' Co-Operative, Inc.

Brief on behalf of the Southern Regional Group of the Association of ice cream manufacturers of New York State.
Memorandum on behalf of Adler's Creamery, Inc.
Brief of John W. Jones, metropolitan milk producer.
Brief on behalf of Milk Industries, Inc.
Argument submitted by Vogt's Dairies, Inc.
3345 Brief on behalf of: Breyer Ice Cream Company; Breyer Ice Cream Company, Inc.; Hydrox Ice Cream Company, Inc.; Consolidated Dairy Products Co., Inc.; Castles Ice Cream Company, Inc.; Castles Ice Cream Company.
Brief on behalf of the New York Metropolitan Milk Distributors' Bargaining Agency.

3346 *Exhibit number 5 to stipulation*

Docket No. A–71

UNITED STATES DEPARTMENT OF AGRICULTURE—AGRICULTURAL ADJUSTMENT ADMINISTRATION

TENTATIVELY APPROVED MARKETING AGREEMENT REGULATING THE HANDLING OF MILK IN THE NEW YORK METROPOLITAN MARKETING AREA

I hereby certify that this document is a true and correct copy of the said Marketing Agreement as tentatively approved by the Secretary of Agriculture, August 5, 1938.

HEARING CLERK,
U. S. Department of Agriculture.

Dated August 5, 1938, Washington, D. C.

3347 INSTRUCTIONS FOR SIGNING MARKETING AGREEMENT

(Please read carefully before signing)

Handlers of milk who wish to enter into the Marketing Agreement Regulating the Handling of Milk in the New York Metropolitan Marketing Area with the Secretary of Agriculture should fill in and sign in accordance with the following instructions:

1. The agreement should be signed in the space provided for the signer's signature and address on page 3 just below article headed "Signature of Par ies." The type of business organization which you represent, whether corporation, partnership, or individual, should be indicated with your signature. If your business is organized as a corporation you should be sure to impress the corporate seal at the left of your signature.

2. The record of milk handled during the month of May 1938 should be properly certified as indicated on page 4.

3. The authorization to correct typographical errors on page 5 should be signed.

4. If your business is a corporation the board of directors should pass a resolution, in the form attached to the agreement on page 5, authorizing the signing of this agreement.

5. In the case of partnerships and corporations the agreement should be signed by persons authorized to represent the same, such authorization to be indicated.

When the above procedure has been completed, the agreement should be returned to the Hearing Clerk, Room 0318 South Building, United States Department of Agriculture, Washington, D. C.

3348 TENTATIVELY APPROVED MARKETING AGREEMENT REGULATING THE HANDLING OF MILK IN THE NEW YORK METROPOLITAN MARKETING AREA

Whereas, under the terms and provisions of Public, No. 10, 73d Congress, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the New York metropolitan marketing area would tend to effectuate the declared policy of said act, gave, on the 29th day of April 1938, notice of public hearings to be held on a proposed marketing agreement and a proposed order, said hearings being held jointly with the Commissioner of Agriculture and Markets of the State of New York at Albany, New York, May 16, 1938; Malone, New York, May 17, 1938; Syracuse, New York, May 18, 1938; Elmira, New York, May 19, 1938; New York City, May 20, 24, 25, and 26, 1938; and Albany, New York, June 3, 4, and 7, 1938, and at said times and places all interested parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order; and

Whereas the Secretary of Agriculture has found and proclaimed the period August 1921–July 1929 to be the base period to be used in connection with ascertaining the purchasing power of milk produced for sale in the New York metropolitan marketing area; and

Whereas the Secretary of Agriculture finds upon the basis of the evidence introduced at said hearings that the execution of this marketing agreement and all of its terms and provisions will tend to effectuate the declared policy of the said act; and

Whereas the parties hereto, in order to effectuate the declared policy of the said act, desire to enter into this marketing agreement,

Now, therefore, the parties hereto agree as follows:

1. The terms and provisions of Article I through Article IX of the order regulating the handling of milk in the New York metropolitan marketing area, issued by the Secretary of Agriculture on the 5th day of August 1938, shall be the terms and provisions of Article I through Article IX of the marketing agreement with the exception that wherever the word "order" is used the words
3349 "marketing agreement" shall be substituted therefor; and

2. The following articles shall also be a part of the marketing agreement in addition to Article I through Article IX of said order:

Article X—Termination

SECTION 1. Termination.—The Secretary may terminate this agreement whenever he finds that this agreement obstructs or does not tend to effectuate the declared policy of the act.

This agreement shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

Article XI—Liability

SECTION 1. Handlers.—The liability of the handlers hereunder is several and not joint and no handler shall be liable for the default of any other handler.

Article XII—Antitrust Laws

SECTION 1. Antitrust Laws—Any exemption from the antitrust laws and any validation of any acts or things, which otherwise would have been unlawful, resulting from the execution of this agreement by the Secretary, shall not extend or be construed to extend further than is absolutely necessary for the purpose of carrying out the provisions of this agreement.

Article XIII—Duration of Immunities

SECTION 1. Duration of Immunities.—The benefits, privileges, and immunities conferred by virtue of this agreement shall cease upon its termination, except with respect to acts done under and during the existence of this agreement, and the benefits, privileges, and immunities conferred by this agreement upon any parties signatory hereto shall cease upon its termination as to such party, except with respect to acts done under and during the existence of this agreement.

Article XIV—Counterparts and Additional Parties

SECTION 1. Counterparts.—This agreement may be executed in multiple counterparts, and when one counterpart is signed by the Secretary, all such counterparts shall constitute, when taken together,

one and the same instrument, as if all such signatures were obtained in one original.

Sec. 2. Additional Parties.—After this agreement first takes effect, any handler may become a party to this agreement if a counterpart thereof is executed by him and delivered to the Secretary.
3350 This agreement shall take effect as to such new contracting party at the time such counterpart is delivered to the Secretary, and the benefits, privileges, and immunities conferred by this agreement shall then be effective as to such new contracting party.

Article XV—Signatures of Parties

In witness whereof, the contracting handlers, acting under the provisions of the act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

_____
Signature

By _____
Name Title

Address _____

Attest _____

_____
Date

Now, therefore, _____, Secretary of Agriculture, acting under the provisions of the Agricultural Marketing Agreement Act of 1937, which reenacts and amends certain provisions of Public, No. 10, 73d Congress, as amended, for the purposes and within the limitations therein contained and not otherwise, does hereby execute this agreement under his hand and the official seal of the Department of Agriculture in the city of Washington, District of Columbia, on this _____ day of _____ 1938, and, pursuant to the provisions hereof, declares this agreement to be effective on and after 12:01 a. m., e. s. t., 1938.

_____
Secretary of Agriculture

3351 RECORD OF MILK HANDLED DURING THE MONTH OF MAY 1938

The undersigned certifies that to the best of his knowledge, as shown by his books and records, he handled during the month of May 1938, _____ hundredweight of milk covered by this agreement and marketed within the New York metropolitan marketing area.

(SEAL) _____
(Signed)

By _____

_____, being duly sworn, deposes and says that he has read the foregoing statement by him subscribed and knows the contents thereof and that the same are true and correct to the best of his knowledge and belief.

_____
Notary Public

3352 AUTHORIZATION TO CORRECT TYPOGRAPHICAL ERRORS TO BE EXECUTED BY ALL SIGNERS

We, the undersigned, hereby authorize E. W. Gaumnitz to consent on our behalf to the correction of any typographical errors which the Agricultural Adjustment Administration may consider it advisable to make in the Marketing Agreement Regulating the Handling of Milk in the New York Metropolitan Marketing Area.

Date _____ Firm name _____

Name _____ Title _____ [SEAL] (If Corporation)

Corporation only

CERTIFICATE OF RESOLUTION

At a duly convened meeting of the Board of Directors of _____ held at _____ on the _____ day of _____ 1938, the following resolution was adopted:

Resolved, that _____ shall become a party to the Marketing Agreement Regulating the Handling of Milk in the New York Metropolitan Marketing Area, as read and explained to the meeting, and it is further RESOLVED, That _____ (title) and _____ (title) by, and hereby are authorized and directed to sign, execute, and deliver a counterpart of said agreement attached hereto, to the Secretary of Agriculture, together with an authorization naming E. W. Gaumnitz to correct typographical errors.

I, _____ Secretary of _____ do hereby certify that this is a true and correct copy of a resolution adopted at the above-named meeting, as said resolution appears in the minutes thereof.

_____

Address of firm _____ [SEAL]

And seal at signature line in body of agreement.

3353 *Exhibit Number 6 to stipulation*

MARKETING AGREEMENT REGULATING THE HANDLING OF MILK IN THE NEW YORK METROPOLITAN MARKETING AREA—FOR THE SIGNATURE OF HANDLERS

Dated August 29, 1938

List of signers attached.

3354 INSTRUCTIONS FOR SIGNING MARKETING AGREEMENT

(Please read carefully before signing)

Handlers of milk who wish to enter into the Marketing Agreement Regulating the Handling of Milk in the New York Metropoli-

tan Marketing Area with the Secretary of Agriculture should fill in and sign in accordance with the following instructions:

1. The agreement should be signed in the space provided for the signer's signature and address on page 3 just below article headed "Signature of Parties." The type of business organization which you represent, whether corporation, partnership, or individual, should be indicated with your signature. If your business is organized as a corporation you should be sure to impress the corporate seal at the left of your signature.

2. The record of milk handled during the month of May 1938, should be properly certified as indicated on page 4.

3. The authorization to correct typographical errors on page 5 should be signed.

4. If your business is a corporation the board of directors should pass a resolution, in the form attached to the agreement on page 5, authorizing the signing of this agreement.

5. In the case of partnerships and corporations the agreement should be signed by persons authorized to represent the same, such authorization to be indicated.

When the above procedure has been completed, the agreement should be returned to Wellington J. Griffith, Jr., Room 1900, Hotel Commodore, New York, N. Y.

3355 MARKETING AGREEMENT REGULATING THE HANDLING OF MILK IN THE NEW YORK METROPOLITAN MARKETING AREA

Whereas under the terms and provisions of Public, No. 10, 73d Congress, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the New York metropolitan marketing area, would tend to effectuate the declared policy of said act, gave on the 29th day of April 1938, notice of public hearings to be held on a proposed marketing agreement and a proposed order, said hearings being held jointly with the Commissioner of Agriculture and Markets of the State of New York at Albany, New York, May 16, 1938; Malone, New York, May 17, 1938; Syracuse, New York, May 18, 1938; Elmira, New York, May 19, 1938; New York City, May 20, 24, 25, and 26, 1938; and Albany, New York, June 3, 4, and 7, 1938, and at said times and places all interested

parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order; and

Whereas the Secretary of Agriculture has found and proclaimed the period August 1921–July 1929 to be the base period to be used in connection with ascertaining the purchasing power of milk produced for sale in the New York metropolitan marketing area; and

Whereas the Secretary of Agriculture finds upon the basis of the evidence introduced at said hearings that the execution of this marketing agreement and all of its terms and provisions will tend to effectuate the declared policy of the said act; and

Whereas the parties hereto, in order to effectuate the declared policy of the said act, desire to enter into this marketing agreement;

Now, therefore, the parties hereto agree as follows:

1. The terms and provisions of Article I through Article IX of the order regulating the handling of milk in the New York metropolitan marketing area, issued by the Secretary of Agriculture on the 5th day of August 1938 shall be the terms and provisions of Article I through Article IX of the marketing agreement with the exception that wherever the word "order" is used, the words
3356 "marketing agreement" shall be substituted therefor; and

2. The following articles shall also be a part of the marketing agreement in addition to Article I through Article IX of said order:

Article X—Termination

SECTION 1. Termination.—The Secretary may terminate this agreement whenever he finds that this agreement obstructs or does not tend to effectuate the declared policy of the Act.

Any handler signatory to this agreement may withdraw as a party to it upon 30 days' written notice to the Secretary effective at midnight on the last day of the month first succeeding the expiration of such 30 days. Such notice of withdrawal may be given to the Secretary by sending it by postpaid, registered mail addressed to the Secretary of Agriculture, Washington, D. C. Such termination shall not release such handler from any obligations under this agreement in respect of transactions occurring prior to the effective date of withdrawal.

Such handler has signed this agreement on the express condition, and the Secretary agrees and confirms, that the execution of this agreement and compliance therewith and with the order of the Secretary for the period that the agreement remains in effect shall be without prejudice to any and all rights of the handler, and shall not constitute an admission by the handler of the validity of the Agricultural Marketing Agreement Act of 1937 or of the order of the Secretary or any of its terms, or any obligation imposed in connection therewith, or any waiver by such handler or estoppel of his rights to question the validity of the Agricultural Marketing Agree-

ment Act of 1937 or the order of the Secretary or any provision thereof, on any and all grounds; all of which rights are hereby expressly reserved to any such handler upon and after withdrawal from the agreement with the same force and effect as if the handler had never become party hereto.

This agreement shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

Article XI—Liability

SECTION 1. Handlers.—The liability of the handlers hereunder is several and not joint and no handler shall be liable for the default of any other handler.

Article XII—Antitrust Laws

SECTION 1. Antitrust Laws.—Any exemption from the antitrust laws and any validation of any acts or things, which otherwise would have been unlawful, resulting from the execution of this agreement by the Secretary, shall not extend or be construed to extend further than is absolutely necessary for the purpose of carrying out the provisions of this agreement.

Article XIII—Duration of Immunities

SECTION 1. Duration of Immunities.—The benefits, privileges, and immunities conferred by virtue of this agreement shall cease upon its termination, except with respect to acts done under and during the existence of this agreement, and the benefits, privileges, and immunities conferred by this agreement upon any parties signatory hereto shall cease upon its termination as to such party, except with respect to acts done under and during the existence of this agreement.

3357 Article XIV—Counterparts and Additional Parties

SECTION 1. Counterparts.—This agreement may be executed in multiple counterparts, and when one counterpart is signed by the Secretary, all such counterparts shall constitute, when taken together, one and the same instrument, as if all such signatures were obtained in one original.

SECTION 2. Additional Parties.—After this agreement first takes effect, any handler may become a party to this agreement if a counterpart thereof is executed by him and delivered to the Secretary. This agreement shall take effect as to such new contracting party at the time such counterpart is delivered to the Secretary, and the benefits, privileges, and immunities conferred by this agreement shall then be effective as to such new contracting party.

Article XV—Signatures of Parties

In witness whereof, the contracting handlers, acting under the provisions of the act, for the purposes and subject to the limitation

herein contained and not otherwise, have hereunto set their respective hands and seals.

_____
Signature

By _____
Name Title

Address _____

Attest_____

_____
Date

Now, therefore, Secretary of Agriculture, acting under the provisions of the Agricultural Marketing Agreement Act of 1937, which reenacts and amends certain provisions of Public, No. 10, 73d Congress, as amended, for the purposes and within the limitations therein contained and not otherwise, does hereby execute this agreement under his hand and the official seal of the Department of Agriculture in the city of Washington, District of Columbia, on this ____ day of 1938, and, pursuant to the provisions hereo, declares this agreement to be effective on and after 12:01 a. m., e. s. t., 1938.

_____
Secretary of Agriculture

3358 RECORD OF MILK HANDLED DURING THE MONTH OF MAY 1938

The undersigned certifies that to the best of his knowledge, as shown by his books and records, he handled during the month of May 1938 _____ hundredweight of milk covered by this agreement and marketed within the New York metropolitan marketing area.

[SEAL]

_____
(Signed)

By _____

_____, being duly sworn, deposes and says that he has read the foregoing statement by him subscribed and knows the contents thereof and that the same are true and correct to the best of his knowledge and belief.

_____
Notary Public

3359 AUTHORIZATION TO CORRECT TYPOGRAPHICAL ERRORS TO BE EXECUTED BY ALL SIGNERS

We, the undersigned, hereby authorize E. W. Gaumnitz to consent on our behalf to the correction of any typographical errors which the Agricultural Adjustment Administration may consider it advisable to make in the Marketing Agreement Regulating the Handling of Milk in the New York Metropolitan Marketing Area.

_____ _____
Date Firm Name

_____
Name Title—[SEAL]
(If Corporation)

Corporation only

CERTIFICATE OF RESOLUTION

At a duly convened meeting of the Board of Directors of _____ held at _____ on the _____ day of _____ 1938, the following resolution was adopted:

Resolved, that _____ shall become a party to the Marketing Agreement Regulating the Handling of Milk in the New York Metropolitan Marketing Area, as read and explained to the meeting, and it is further resolved, That

_____,
(Title)

and _____
(Title)

be, and hereby are authorized and directed to sign, execute, and deliver a counterpart of said agreement attached hereto, to the Secretary of Agriculture, together with an authorization naming E. W. Gaumnitz to correct typographical errors.

I, _____, Secretary of _____, do hereby certify that this a true and correct copy of a resolution adopted at the above-named meeting, as said resolution appears in the minutes thereof.

_____

_____
Address of firm [SEAL]

And seal at signature line in body of agreement.

3361 SIGNERS OF NEW YORK MILK MARKETING AGREEMENT

Adler's Creamery, Inc., New York City, Samuel Adler, Pres.

Amsterdam Milk Producers Coop., Inc., Amsterdam, N. Y., Clarence A. Joslin, Sec. and Treas.

Andes Cooperative Dairy Co., Andes, N. Y., Wm. Wight, Pres.

Arnstein & Beckmann, Inc., 810 E. 136 St., New York City, W. J. McKay, Pres.

The B & B Dairy Co., Inc., Margaretsville, N. Y., J. A. Brundage, Treas.

Fred Beers, Inc., 101–11 100 St., Brooklyn, N. Y., Fred Beers, Pres.

Bennington County Coop. Creamery, Inc., Manchester Depot, Vt., I. N. Bartlett, Secy.

Boonville Farms Cooperative, Inc., Boonville, N. Y., Ralph C. Norton, Pres.

Borden's Farm Products Division, The Borden Co., 110 Hudson St., New York City, Wm. H. Marcussen, Pres. of Division.

Bovina Centre Coop. Creamery Co., Inc., Bovina Centre, N. Y., W. J. Stenie, Sec. and Treas.

Breakstone Bros., Inc. (Natl. Dairies subsidiary) 195 Franklin St., N. Y. C., Louis Josephson, Pres.

The Brescia Milk Co. Inc., Montgomery, N. Y., J. J. Brescia, Secy.

Breyer Ice Cream Co. (Natl. Dairies subsidiary) 43rd below Woodlawn v. Phila., Pa. Wilbur S. Scott, Pres.

Brown & Bailey Milk Producers Coop. Asso., Inc., Potsdam, N. Y., T. F. Lynch, Sec. and Treas.

Brown Creameries, Inc., 149 Reade St., New York City, J. S. Brown, Treas.

Camden-Westdale Milk Producers Coop., Inc., Camden, N. J., James N. Barker, Pres.

Canajoharie Coop. Milk Producers Inc., Canajoharia; N. Y., John P. A. Failing, Pres.

Central Milk Producers Coop. Assn., Inc., Hamilton, N. Y., L. L. Lamb, Pres.

Central New York Co-operative Assn., Inc., East Homer, N. Y., Frank M. Henry, Pres.

Chateaugay Coop. Mktg. Assoc., Inc., Chateaugay, N. Y., Jerry F. Sheehan, Pres.

Chautauqua Malted Milk Inc., Mayville, N. Y., C. G. Van Atter, Pres.

Christiana Farms, Honey Brook, Pa., Wm. J. Warkle, Mgr.

Clemo Milk Prod. Co., Inc., 401 E. 107th St., New York City, Samuel Goldberg, Treas.

Conesus Milk Producers Coop. Assn., Inc., Honeoye Falls, N. Y., J. C. Treat, Pres.

Cooperative Dairymen of Cannonsville, Cannonsville, N. Y., A. A. Turner, Pres.

3362 C. J. Couse, Wells Bridge, N. Y., C. J. Couse, owner.

Crowley's Milk Company, Inc., 145 Conklin Ave., Binghamton, N. Y., E. B. Parsons, Treas.

Dairy Sealed, Inc. (Borden Co., subsidiary), 102–45 94th Ave., Ozone Park, N. Y., R. Webb Peploe, Pres.

Dairyland Milk & Cream Co., Inc., Fraser, New York, Richard Sisco, Pres.

Dairymen's League Co-Op. Assn., Inc., 11 W. 42nd St., New York City, Fred H. Sexauer, Pres.

L. Daitch & Co., Inc., 516 Westchester Ave., Louis Daitch, Pres.

Rocco Dalessio, 1302 Metropolitan Ave., same.

Delaware County Dairies, Inc., Roxbury, N. Y., Daniel Franklin, Pres.

Dellwood Dairy Co. Inc., 80 Ellwood Ave., Mt. Vernon, N. Y., A. H. Rubenfeld, Pres.

De Stafeno Dairy, Monroe, Orange Co., N. Y., Michael De Stafeno, Pres.

East Smithfield Farms, Inc., 262 So. Second St., Phila., Pa., L. D. Edmon, Vice-Pres.

Eastern Farms Products, Inc., 390 Oakland St., Brooklyn, N. Y. Max Sachs, Treas.

Eisenberg Farms, Inc., 290 Junius St., Brooklyn, N. Y., Alex Eisenberg, Pres.

Fairmont Creamery Company of New York, 197 Scott St., Buffalo, N. Y., E. F. Howe, Pres.

H. P. Farmers Cooperative, Inc., Holland Patent, N. Y., John N. Savage, Pres.

C. J. Fayen, 798 E. 133 St., New York City, same individual.

John Feldman, Amityville, N. Y., same individual.

Ferndale Farms, Inc., 219 Liberty Ave., Brooklyn, N. Y., Irwin Kotcher, Pres.

Fiorlat Dairy Products Corp., 149–55 7th St., Brooklyn, N. Y., Albert Pollio, Pres.

Foremost Dairies, Inc., of New York, 110 Bridge St., Brooklyn, N. Y., Harry Marshall, Vice-Pres.

Freeman's Dairy, Inc., 56–24 58 St., Maspeth, L. I., N. Y., Bennett Metzger, Pres.

General Ice Cream Corp. (Natl. Dairies subsidiary) Schenectady, N. Y., P. P. Miller, Vice-Pres.

Glen & Mohawk Milk Assn., Inc., Fultonville, N. Y., John L. Ingersoll, Pres.

Gold Medal Farms, Inc., 1157 E. 156 St., Bronx, N. Y., Abraham Bagden, Secy.

Gold Seal Farms, Inc., 426 E. 108th St., New York City, Louis Maggiolo, Vice-Pres.

Gracie Dairy Coop. Assn., Inc., Cortland, N. Y., H. C. Griswold, Secy.

Grandview Dairy, Inc., 6071 Metropolitan Ave., Ridgewood, N. Y., Charles Cacioppo, Pres.

Grover Farms, Honey Brook, Pa., Wm. J. Warkle, Mgr.

3363 Harrington & Co., Dushore, Pa., M. J. Harrington, Pres.

Hoffman & Dudo, Lowville, N. Y., W. H. Hoffman, Partner.

Hovey, Stanter & Co., Inc., 100 Hudson St., New York City, W. W. Hovey, Pres.

Hygienci Dairy Co., 35 High St., Watertown, N. Y., C. A. Brown, Pres.

Irona Creamery Inc., Irona, N. Y., Robert J. Duley, Treas.

Janssen Dairy Corporation, Hoboken, N. J., John Schlichting, Pres.

The Jersey Milk & Cream Co., 47 Waverly Ave., Newark, N. J., Morris Cohn, Pres.

Jetter Dairy Co., Inc., 43 Perry St., New York City, Arthur Jetter, Pres.

Keuka Milk Producers Co-op., Inc., Prattsburg, N. Y., Leon H. Lewis, Pres.

Keystone Dairy Co., 535 Carlton Ave., Brooklyn, N. Y., B. M. Manning, Vice Pres.

Knoll Creek Dairy Inc., 889 E. 134 St., New York City, Albert Knaeller, Jr., Pres.

Lancaster Milk Company, Lancaster, Pa., S. Nissley Gingrich, Pres.

Lexington Farms, Inc., 463 Watkins St., Brooklyn, N. Y., L. B. Samuels, Pres.

Lisle Producers Coop., Inc., Richford, N. Y., R. D. # 2, Edward Watts, Pres.

Little Falls Dairy Co., Inc., Little Falls, N. Y., P. A. Bellinger, Treas.

Local Milk Products, Inc., 605 W. 48th St., New York City, Max Levy, Pres.

Lowville Producers Dairy Coop., Inc., Lowville, N. Y., John O'Leary, Sec.

Mallory Milk Producers' Coop., Inc., Mallory, N. Y., Nelson Edick, Pres.

Manchester Cream Co., Inc., (Borden Co. subsidiary) 421 E. 174 St., N. Y. C., Harry L. Holsten, Pres.

Martville Milk Producers' Coop. Assn., Martville, N. Y., Lee Irwin, Pres.

McDermott Bros. Milk Corp., R. D. # 2, Gilboa, N. Y., J. A. McDermott, Vice Pres.

Meridale Dairies, Inc., 541 W. 22 St., New York City, B. I. Christensen, Vice Pres.

Middletown Milk & Cream Co., Inc., 1060 Broad St., Newark, N. J., Nathan Wedeen, Vice Pres.

Mifflin Creamery Company, Inc., Mifflintown, Pa., R. A. Gaul, Pres.

Milk Products Div. of the Borden Co., 350 Madison Ave., New York City, G. M. Waugh, Jr., Exec. V. P.

Montgomery Eastern Dairy Coop., Inc., Fort Hunter, N. Y., J. F. Harris, Pres.

Mount Joy Farmers Co-op Assoc., Mount Joy, Pa., Abner H. Risser, Pres.

3364 —Muller Dairies, Inc. (Natl. Dairies subsidiary) 470 W. 128 St., N. Y. C., Wm. Jorden, Pres.

Municipal Farms, Inc., 704 E. 133 St., New York City, J. Makin, Pres.

Northeastern Milk Corporation, 235 High St., Watertown, N. Y., C. A. Brown, Pres.

Northern Milk Corporation, 235 High St., Watertown, N. Y., C. A. Brown, Treas.

O'Neill Milk & Cream Co., Inc., 617–11 Ave., N. Y. C., Joseph McCarthy, Sec.

Orboek Farm, Inc., Pleasantville, N. Y., Elmer Mikkelsen, Sec.

Oriskany Valley Milk Producers' Coop., Inc., Deansboro, N. Y., Claude M. Hinman, Pres.

P & K Dairy Co., Inc., 47 Waverly Ave., Newark, N. J., Morris Cohn, Vice Pres.

Pawlet Creamery Corp., West Pawlet, Vt., Gladys J. Butler, Vice Pres.

Penn Argyl Farmers' Coop. Union, Penn Argyl Pa., Milton Miller, Director.

Penn-Reed Milk Co., Inc., Reedsville, Pa., J. A. Hostetler, Sec.

Phila. Milk Producers' Coop. Assn., Inc., Philadelphia, N. Y., Lynn E. Maynard, Trustee.

Pioneer Ice Cream, Div. The Borden Co., New York City, E. B. Lewis, Jr., Vice Pres. of div.

Poland Milk Producers' Coop., Poland, N. Y., Grant Hines, Pres.

Prattsburg Creamery Co., Inc., 103 Jefferson St., Passaic, N. J., George Burr, Secy.

Producers' Co-operative, Inc., Dolgeville, N. Y., E. K. Tompkins, Pres.

Queensboro Farm Products, Inc., 35-13-41 St., Long Island City, N. Y., Louis Miller, Secy.

Queens Farm Dairy Co., Inc., 10345 98th St., Ozone Park, N. Y., Jacob Kotcher, Pres.

Rainbow Dairies Inc., 13 Morton St., New York City, John B. Rosaaco, Pres.

Raison & Levine, Inc., 345 Greenwich St., New York City, Jerome Raisin, Partner.

Reid's Union Dairy, Inc., 531 Waverly Ave., Brooklyn, N. Y., R. U. Wood, Vice Pres.

M. H. Renkin Dairy Co., 584 Myrtle Ave., Brooklyn, N. Y., Henry Renken, Pres.

Richmond Coop. Assn., Inc., Richmond, Vt., L. D. Ware, Mgr.

The Rider Dairy Co., 11 New St., Danbury, Conn., Wm. J. Rider, Vice Pres.

Rock Gate Farm Dairy, Mt. Kisco, N. Y., Letitia C. Darlington, Owner.

Rupert Creamery Corp. (Rupert, Vt.), 238 N. B'way, Yonkers, N. Y., Harold A. Rose, Pres.

Saquoit Valley Farmers Coop. Assn., West Winfield, N. Y., Earl C. Bordin, Pres.

3365 William Schade, Yonkers, N. Y., same.

Schuyler Jct., N. Y., Milk Shed Coop. Assn., Inc., Frankfort, N. Y., David Doolen, Pres.

Seelig Creamery Corp., 522 W. 29th St., New York City, W. J. Seelig, Treas.

G. A. P. Seelig, Inc., 522 W. 29th St., New York City, W. J. Seelig, Treas.

Sheffield Condensed Milk Co., Inc., (Natl. Dairies subsidiary), 524 W. 57th St., N. Y. C., R. M. Wellwood, Vice-Pres.

Sodus Creamery Corp., Wolcott, N. Y., D. M. Weisman, Pres.

David H. Springsteen, 35 Chasworth Pl., New Rochelle, N. Y., owner.

Sullivan County Coop. Dairy Assn., Inc., Jeffersonville, N. Y., Carl Stecker, Secy.

Sunshine Farms, Inc., Bronx Terminal Market, New York City, Morris H. Abler, Pres.

Sussex Milk & Cream Co., Inc. (Borden Co. subsidiary), 110 Hudson St., N. Y. C., J. O. Eastlack, Vice-Pres.

Teitler Milk Products Corp., 270 Broadway, New York City, Jack Teitler, Pres.

Titusville Dairy Products Co., Titusville, Pa., Helmer Rabild, Pres.

Tri-County Dairy Co., Honey Brook, Pa., Wm. J. Warkle, Mgr.

Troy Dairy Farms, Troy, Pa., George C. Morris, Sec.-Treas.

Vermont Farms, Inc., East Dorsent, Vt., Edward C. Eggleston, Pres.

Vogt's Dairies, Inc., 223 E. 141st St., F. C. Vogt, Pres.

Waddington Milk Co., Inc., 102 W. 4th St., New York City, W. J. McKay, Pres.

B. R. Waldron & Sons Co., Inc., Califon, N. J., E. D. Waldron, Vice-Pres.

O. A. Weatherly & Co., Inc., Milford, N. Y., S. D. Haight, Pres.

Weisglass Gold Seal Dairy Corp., 2014 Forest Ave., S. I., N. Y., Joseph Weisglass, Vice-Pres.

West Leyden Producers Coop. Assn., Inc., Boonville, N. Y., Raymond O. Hahn, Pres.

The Wetmiller Dairy & Farm Products Co., Inc., Cohocton, N. Y., N. S. Wetmiller, Pres.

Whitehouse Milk & Cream Co., Inc., 219 Liberty Ave., Brooklyn, N. Y., Samuel Kotcar, Sec.

Willow Brook Dairy, Inc. (Borden Co. subsidiary), 253 Washington, Mt. Vernon, N. Y., F. R. Elliott, Pres.

3366 *Exhibit No. 8 to stipulation*

DM-7—Marketing Information Series—Issued August 1938

UNITED STATES DEPARTMENT OF AGRICULTURE—AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

Questions and Answers on the Federal-State Milk Program for New York

1. Question. What is the purpose of the Federal-State program which the dairy industry is requesting for the New York metropolitan milk marketing area?

Answer. To help stabilize conditions in the New York milk market and to improve returns to the milk producers.

2. Question. How is this program possible?

Answer. Through a marketing agreement and order issued by the Secretary of Agriculture of the United States together with an order issued by the New York State Commissioner of Agriculture and Markets.

3. Question. What is a marketing agreement?

Answer. A marketing agreement is a voluntary contract between the Secretary of Agriculture and the handlers of milk who sign.

4. Question. What is an order?

Answer. An order is a regulation issued for the purpose of making the program applicable to all handlers in the market. The Federal order embodies the provisions of the agreement. The State order contains the same provisions.

5. QUESTION. What is necessary before the Federal-State program can go into effect?

ANSWER. Most important is the fact that producers must vote their approval of the plan. The Federal marketing agreement and order may go into effect if handlers of more than 50 percent of the milk sold in the marketing area sign the agreement, and if at least two-thirds of the producers voting in the referendum approve the issuance of the Federal order. In the event the required number of handlers fail to sign the agreement, the order may go into effect with Presidential approval together with the required two-thirds producer vote. The State order requires a three-quarters vote before it can go into effect. Both the Federal and State orders must receive the required producer approval before the program as a whole can go into effect.

6. QUESTION. How was the program developed?

ANSWER. The program was developed by dairy farmers and cooperative organizations working through the Metropolitan Milk Producers' Bargaining Agency. Public hearings on the plan were held jointly by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets.

7. QUESTION. What part did the dealers play in preparing it?

ANSWER. Information presented by the dealers before, during, and after public hearings was taken into consideration.

3367 8. QUESTION. How long has it taken to develop the program?

ANSWER. Approximately 8 months.

9. QUESTION. Why has it taken so long?

ANSWER. Because of the complexity of the problem and the attempt to bring about a program which would as nearly as possible fit the needs of the market.

10. QUESTION. Why is the order so long?

ANSWER. Since the marketing of milk in an area as large as New York is a complicated problem, the order must be so worded as to apply to the many varying conditions. The obligations imposed must be fully and accurately defined in the order so as to prevent evasion and stand the test in the courts.

11. QUESTION. Who is a producer as defined in the order?

ANSWER. A producer is any person who produces milk which is delivered to a handler at a plant approved by any health authority for the receiving of milk to be sold in the marketing area.

12. QUESTION. What is the meaning of the word "handler"?

ANSWER. Handler means any person who engages in the handling of milk or cream which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area.

13. QUESTION. Does the term handler include cooperative associations?

ANSWER. Yes, as applied to any milk received from producers at any plant operated by a cooperative association, or with respect to

any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment.

14. QUESTION. Are persons engaged in the handling of milk not received from producers considered as handlers?

ANSWER. No; neither are persons who handle milk or cream all of which is sold outside the marketing area.

15. QUESTION. Are producers required to file reports under the order?

ANSWER. No. Reports are required only from handlers.

16. QUESTION. Does the order regulate producers in their capacity as producers in any way?

ANSWER. No. Handlers only are regulated under its provisions.

17. QUESTION. Why cannot the State regulate the metropolitan New York milk market without the assistance of the Federal Government?

ANSWER. Because the Supreme Court of the United States has ruled that while a State can regulate the handling of milk produced within that State, such regulations cannot apply to milk moving in the current of interstate commerce.

18. QUESTION. Who would be directly responsible for the administration of the program?

ANSWER. The market administrator.

19. QUESTION. By whom would he be selected?

ANSWER. By the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets.

20. QUESTION. What would be his principal duties?

ANSWER. Receiving reports from handlers, computing prices to be paid producers, assuring proper payments to producers, and checking on the accuracy of reports and payments made by handlers.

3368 21. QUESTION. Is the authority of the market administrator strictly prescribed in the order?

ANSWER. Yes. His duties are definitely stated and the scope of his work clearly indicated.

22. QUESTION. How would the expense in connection with the administrator's office be met?

ANSWER. By an assessment on handlers of not more than 2 cents per hundredweight of milk utilized in classes I, II-A, and II-B under the terms of the order.

23. QUESTION. Would this assessment be made as a deduction from producers' checks?

ANSWER. No. It would be paid by handlers in addition to the price paid producers as fixed in the order.

24. QUESTION. What provision has been made for violations?

ANSWER. Specific procedure for enforcement of the program in the courts is provided for under the Federal and State laws.

25. QUESTION. Would the market administrator be placed under bond?

ANSWER. Yes. For protection against losses through possible irregularity, he is required to furnish bond commensurate with his financial responsibility.

26. QUESTION. Under what authority do State and Federal agencies act in exercising regulation in the milk industry?

ANSWER. Laws passed by the Legislature of the State of New York and the Congress of the United States.

27. QUESTION. Just which laws?

ANSWER. The New York State Rogers-Allen Act and the Federal Agricultural Marketing Agreement Act of 1937.

28. QUESTION. Have there been other attempts by the State of New York to regulate the New York milk market?

ANSWER. Yes. The latest attempt terminated in March 1937 because the State regulations could not apply to milk shipped in from other States.

29. QUESTION. How would the Federal order overcome the problem which the State encountered in dealing with milk which moves in interstate commerce?

ANSWER. By complementing the State order and thus providing a complete program under which intrastate and interstate milk will be subject to identical regulations.

30. QUESTION. How may the present provisions of the program be changed?

ANSWER. They are subject to modification by amendment, suspension, or termination in accordance with the provisions of the respective State and Federal Acts.

31. QUESTION. Can producers secure termination of the order?

ANSWER. Yes; at the request of producers of more than 50 percent of the milk.

32. QUESTION. Is the plan established by the order an experiment?

ANSWER. No. The basic features of the plan are those which have developed out of approximately 25 years of cooperative marketing experience.

33. QUESTION. How does the program tend to increase the purchasing power of producers?

ANSWER. In two ways: First, by establishing minimum
3369 producer prices which are in line with market conditions for each class of milk according to its use; and second, by requiring that not less than such minimum prices be paid for all milk received from producers by handlers under the order.

34. QUESTION. Why does the order provide that milk be classified on the basis of its use?

ANSWER. Because that method is generally recognized as the only fair basis on which milk should be purchased.

35. QUESTION. What assurance is there that milk sold to handlers under the order will be properly classified?

ANSWER. The market administrator is required to verify all reports received from handlers as one of his duties in administering the program. Handlers must make available to the market administrator all records and facilities so that a complete check may be made on these reports which show receipts and utilization of milk delivered by producers at handlers' plants.

36. QUESTION. Why does the order provide for so many classes of milk?

ANSWER. To enable producers to receive the highest return from milk according to the use which handlers make of it.

37. QUESTION. Does the program throw open the metropolitan New York market to milk producers anywhere in the United States?

ANSWER. No. As in the past, the health departments in the area must approve or reject plants supplying milk to the market. The program merely provides for the pricing of milk delivered to plants approved by the health authorities.

38. QUESTION. Are producers required to control the production of milk?

ANSWER. No. Under the laws provided for issuance of State and Federal orders, there are no provisions for production control.

39. QUESTION. Would dealers be prohibited from paying producers more for milk than the minimum price to producers as computed under the order?

ANSWER. No. The prices established are minimum prices and dealers may pay their producers more than the order requires.

40. QUESTION. Under the provisions of the order, is the producer permitted to sell his milk where he pleases?

ANSWER. Yes. The responsibility for selling his milk remains entirely with the producer.

41. QUESTION. Are resale prices established under the order?

ANSWER. No. Neither the State nor Federal order provides for establishment of resale prices. Such prices are left to the forces of competition.

42. QUESTION. Have the interests of the consumer been considered in the development of the program?

ANSWER. Yes. Under the law consideration must be given to the interests of consumers. A stabilized market safeguards the interests of consumers and assures an adequate supply of wholesome milk which can be sold at prices reasonable to consumers.

43. QUESTION. Can the Federal-State program greatly help the dairy industry without the cooperation of that industry?

ANSWER. No. The policy of Government is to help the industry to help itself.

3370 *Exhibit No. 9 to stipulation*

DM–6—Issued August 1938

MARKETING INFORMATION SERIES—NEW YORK MILK

EXPLANATION OF THE FEDERAL-STATE MARKETING PLAN CONTAINED IN ORDER NO. 27

This order can become effective only after approval of two-thirds of the producers voting in a referendum and, in conjunction with a New York State order.

Approval of three-fourths of the producers voting in a referendum is required before the New York State order can become effective.

United States Department of Agriculture, Agricultural Adjustment Administration, Division of Marketing and Marketing Agreements, Dairy Section, Washington, D. C. United States Government Printing Office, Washington: 1938.

3371 WHAT CAN BE DONE

The Federal-State program which the dairy industry has requested for the metropolitan New York milk marketing area is designed to:

1. Provide a market-wide program under which all handlers will operate in buying milk from producers.
2. Establish minimum prices which handlers will pay producers for milk according to the use made of it.
3. Assure to all producers a uniform rate of payment on milk sold for the marketing area.
4. Enable each producer to obtain his fair portion of benefits from the fluid milk market, and to bear his equitable share of the market's surplus milk burden.
5. Safeguard the interests of the consumer by stabilizing milk marketing conditions and assuring an adequate supply of wholesome milk which can be sold at reasonable prices.

WHAT CANNOT BE DONE

1. The program cannot control production, nor can it regulate dairymen as producers.
2. The program cannot take over the producer's milk-selling job.
3. The program cannot obtain for producers, over a period of time, more than milk is actually worth in relation to supply and demand conditions.
4. Milk prices to consumers cannot be fixed, nor margins of handlers protected.
5. The program cannot solve all of the problems in the market.

3372 NEW YORK MILK

A Federal-State program for regulating the handling of milk in the New York metropolitan marketing area is now before producers and handlers for final consideration. The Secretary of Agriculture of the United States has tentatively approved a marketing agreement and issued an order which, with an order issued by the New York State Commissioner of Agriculture and Markets, provide for the milk regulatory program. The same provisions are included in both the State and Federal orders.

The New York metropolitan milk marketing area under the program includes the city of New York and the counties of Nassau, Suffolk, and Westchester, all in the State of New York.

Approval by producers is necessary before the Federal-State program can go into effect to regulate the handling of milk in the New York metropolitan marketing area.

The tentatively approved marketing agreement is now before handlers of milk in the New York metropolitan marketing area for signature. A referendum will be held to determine whether producers approve the order issued by the Secretary of Agriculture, which embodies the provisions of the agreement and makes the milk regulatory program for the New York market binding on all handlers in that market.

The marketing agreement and order may go into effect if handlers of more than 50 percent of the milk sold in the marketing area sign the agreement, and if at least two-thirds of the producers whose votes are expressed in the referendum approve the issuance of the order. In the event that the required number of handlers fail to sign the agreement, the order may go into effect with the approval of the President and the two-thirds producer vote.

3373 Purpose of the Program

The marketing agreement program for regulating the handling of milk in the New York metropolitan marketing area is designed to:

1. Establish uniform prices for milk sold by producers to handlers in the metropolitan market;

2. Assure uniform returns to producers for milk sold in the marketing area regardless of the handler to whom the milk was sold or the use made of the milk by the individual handler;

3. Assure each producer a fair share of the fluid milk market; and

4. Provide for the control of surplus milk supplies so that the burden is borne fairly by all producers interested in the metropolitan market, and enable the use of surplus so that it will bring the highest return to producers.

Producers Expressed V at Hearings

The Federal-State program for the New York metropolitan milk market was considered at a series of public hearings held in various sections of New York State from May 16 to June 8. These hearings, conducted jointly by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets, gave the representatives of the thousands of producers who attended opportunity to express their views on the proposal. Handlers and consumers also voiced their opinions and testified at these hearings.

The hearings on the marketing agreement program were called at the request of the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., which claims a membership of cooperative organizations representing over 40,000 producers. The proposal was developed by representatives of producers through conferences with cooperative leaders, handlers of milk, and representatives of the Agricultural Adjustment Administration and the New York State Department of Agriculture.

3374

Principal Provisions

The marketing agreement program which is now before producers and handlers for final consideration incorporates changes and suggestions which were made by industry spokesmen and others at the public hearings. No changes have been made in the basic idea of the program.

The main provisions of the program provide for:

1. The selection of a market administrator by the Secretary of Agriculture and the Commissioner of Agriculture and Markets to administer the program;

2. The classification of milk received from producers at handlers' plants into nine classes, according to the use made of that milk;

3. The establishment of minimum prices which handlers are required to pay producers for each class of milk according to its use;

4. A method for determining uniform prices which handlers are to pay producers through the operation of a market-wide pool to assure each producer his fair share of the fluid milk market; and

5. The filing of periodic reports by handlers to the market administrator showing deliveries and tests of milk received from producers and from other sources, the use made of this milk, and payments made to producers. The market administrator is given authority to check and verify the accuracy of all reports made to him by handlers.

Producers to Decide

Whether the Federal-State program for regulating the handling of milk in the New York metropolitan marketing area goes into effect, rests largely with the producers themselves. The decision of producers whose votes are expressed in the referendum to be held will

indicate whether dairymen favor the issuance of the order and will determine whether it will be possible to put the order into actual operation.

The order cannot regulate the production of milk, nor can any producer be required to do anything under its provisions. A producer is defined as any person who produces milk which is
3375 delivered to a handler at a plant approved by any health authority in the metropolitan marketing area.

A handler is defined in the order as any person who engages in the handling of milk received at a plant approved by any health authority in the metropolitan marketing area. The definition specifically includes any cooperative association that operates plants or any cooperative association which causes milk to be delivered to plants of handlers and collects payments for such milk. The definition specifically excludes those persons who neither receive milk from producers nor handle milk which is sold in the metropolitan marketing area.

Joint State and Federal Administration

The program would be administered by a market administrator named by the Secretary of Agriculture and the Commissioner of Agriculture and Markets. The market administrator would administer both the Federal and the State orders, thus making it possible for the Federal and State Governments to operate jointly.

The order provides for the selection of the market administrator. It defines his powers and duties. The order requires the market administrator to furnish a bond to guarantee faithful performance of his duties.

The market administrator has the power to administer the terms and provisions of the order and to receive, investigate, and report complaints of violations.

Among his duties the market administrator is required to keep books and records which will clearly reflect the transactions of his office, furnish such information as the Secretary of Agriculture or the Commissioner of Agriculture and Markets may request, and employ such persons as may be necessary to carry on the functions of his office.

The expense of administering the joint Federal-State program would be borne by handlers. Each handler would be required to pay as his pro rata share of the expense of administering the program not more than 2 cents per hundredweight on that total quantity of milk received from producers at his plant which is sold primarily as fluid milk or fluid cream. The exact amount per
3376 hundredweight of milk to be paid would be determined by the market administrator on the basis of what was necessary for administering the program.

Milk Classified According to Use

The order provides that all milk received from producers by handlers must be classified according to its use at, or the form in which milk leaves, the plant where first received from producers with the proviso that if milk is moved as milk from the plant where it was originally received from producers to a second plant outside the marketing area, the classification of such milk at the first plant may be according to its use at the second plant. Any use of milk claimed by a handler would be subject to verification by the market administrator.

Milk received at the plants of handlers would be classified into nine classes so that payments to producers may be made on the basis of the use value of the milk.

Each class of milk is defined in substance as follows:

Class I milk is defined as milk which leaves the plant as whole milk, chocolate milk, or a whole milk drink, or any milk not so accounted for as to be placed in a class lower than class I.

Class II–A milk is all milk the butterfat from which leaves a plant as cream which was not sold as frozen cream, made into ice cream, or shipped to markets in any county where there is no New York approved plant.

Class II–B milk is that milk which furnishes butterfat for plain condensed milk and homogenized mixtures (for ice cream).

Class III–A milk is all milk which supplies butterfat in evaporated milk, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than cream cheese and American Cheddar cheese.

Class III–B milk is milk which supplies butterfat in frozen cream.

Class III–C milk is milk furnishing butterfat for frozen desserts sold outside of New York City.

Class III–D milk is milk furnishing the butterfat for cream sold outside the New York milkshed and the butterfat in cream cheese.

3377 Class IV–A milk is milk which is manufactured into butter.

Class IV–B milk is milk which is manufactured into American cheese.

The nine classifications for milk which are provided for in the order follow rather closely the classes used by the State of New York in regulating milk since 1933 and the classes used by a large portion of the market for 10 or more years before that time. These use classifications are made necessary by the large territory of the New York milkshed, the wide variations in conditions of production and climate, the great variety of possible manufacturing outlets for milk at times not needed for Class I or Class II–A uses, and the tremendous volume of milk involved in even small proportionate changes in the sales and production of milk in the shed from day to day, week to week, and month to month. These classes, together with the

rice applicable to each class, are designed to permit all producers' ilk to be absorbed in some channel of use at all times in order that may be available when needed for Class I and Class II–A uses in ne market.

Minimum Price for Each Class of Milk

For each of the nine use classifications there is provided in the der a method which will fix the price of milk in each class for each onth. The method used is designed to provide flexibility in the ricing of milk so as to recognize seasonal changes in production, eneral economic conditions, and the level of dairy prices.

The prices prescribed in the order are minimum prices based on ilk containing 3.5 percent butterfat received during each month rom producers or associations of producers at plants in the 201–210-ile zone from New York City. Differentials are provided for milk eceived at plants in zones nearer or farther than the 201–210-mile one is from New York City.

The order contains a schedule which prescribes the class I price hich handlers would be required to pay from April through July and from August through March. The schedule sets $2.20 378 per hundredweight for the 25–34.9-cent butter price range for the months of April through July, and $2.65 per hundred-eight for the 30–39.9-cent butter price range for the months of ugust through March. This seasonal movement of the class I price modified by changes in the price of butter, moving up or down by cents per hundredweight for each 5-cent rise or fall in the average f New York 92-score butter prices for a period of 60 days before ch month. The following table is contained in the order and pre-cribes the butter price range and the class I price to be paid during ne different periods:

Butter price range (cents per pound)	Class I price	
	April through July	August through March
	Dollars per cwt.	*Dollars per cwt.*
der 20	1.80	2.05
to 24.9	2.00	2.25
to 29.9	2.20	2.45
to 34.9	2.20	2.65
to 39.9	2.40	2.65
to 44.9	2.60	2.85
to 49.9	2.80	3.05
er 49.9	3.00	3.25

If an order had become effective August 1, the class I price for ugust would be $2.45, since the average of butter prices was in the -29.9-cent range.

The method for fixing the class II–A price follows along the same nes as that for fixing the class I price, but it is designed to move the

class II–A price more nearly in keeping with changes in the pric
of butter. This is done by requiring that the butter price range
determined during the 30 days preceding the 25th of the mon
before the price would be in effect. In making this determinati
the average of New York 92-score butter prices would be used. T
lowest level of class II–A prices in the same butter price range is s
for the months of March through July when production is heavie
with slight increases for the months of August through October, t
highest prices coming during the months of November throu
February. The following table contained in the order pr
3379 scribes the butter price range and the class II–A price for t
various periods:

Butter price range (cents per pound)	Class II–A price		
	March through July	August through October	November through February
	Dollars per cwt.	*Dollars per cwt.*	*Dollars per c*
Under 20	1.30	1.35	1
20 to 24.9	1.50	1.55	1
25 to 29.9	1.70	1.75	1
30 to 34.9	1.85	1.90	1
35 to 39.9	2.00	2.05	2
40 to 44.9	2.15	2.20	2
45 to 49.9	2.30	2.35	2
Over 49.9	2.45	2.50	2

If an order had become effective August 1, the class II–A pri
for August would be $1.75 per hundredweight since the average
butter prices was in the 25–29.9-cent range. The class II–A pri
would move to $1.90 for the month of October if the butter pri
level moved into the 30–34.9-cent range, and to $2.05 per hu
dred-weight for November if the butter price level remain
the same. From the 25–29.9-cent butter price level the class II-
price moves down 20 cents, or up 15 cents, for each 5-cent change
the butter price level.

Prices for milk in the lower use classifications are established on
basis so as to absorb all the milk not needed for class I and cl
II–A purposes. These prices are set up so as to enable the man
facturer of products made from these lower classes of milk to compe
without undu advantage or disadvantage with the same produc
made from milk not qualified for the New York market.

The class III–A milk price under the order is to be 10 cents high
than the average of prices paid at 18 evaporated milk plants in t
States of Ohio, Michigan, and Wisconsin. The order contains
provision to prevent the class III–A milk price from being less th
that price which the market administrator would compute by t
following formula: The average price of 92-score butter at who
sale in the Chicago market for the month, plus 30 percent
that average price, times 3.5, plus 7 cents. This formu
3380 approximates that contained in the Federal marketing agr
ment program in effect for the evaporated milk industry.

The class II–B price is to be 10 cents higher than the class III–A price.

The class IV–A milk price is to be calculated by the market administrator each month from the average of the highest daily prices of 92-score butter at wholesale in the New York market, deducting 4 cents as allowance for manufacturing costs, adding 20 percent of the remainder, and multiplying by 3.5.

The class IV–A milk price is the basis for the class III–B, III–C, and III–D prices, which each month are to be respectively 20 cents, 10 cents, and 7½ cents per hundredweight higher than the class IV–A price.

The class IV–B price is to be determined by the market administrator on the basis of the average of weekly quotations of cheese per pound at Plymouth, Wis., Gouverneur, N. Y., and Cuba, N. Y., deducting 3 cents as an allowance for manufacturing costs, and multiplying by 9.45, a reasonably expected yield of cheese per hundred pounds of 3.5 percent butterfat milk.

A butterfat differential of 4 cents per one-tenth of one percent butterfat content above or below 3.5 percent is to apply on all class prices except those for class III–A, IV–A, and IV–B. In the case of class III–A, IV–A, and IV–B milk prices, the butterfat differential is to be in direct ratio to the price of milk of 3.5 percent butterfat content.

Handlers Required to Report

Administration of the order by the market administrator is based largely on periodic reports which handlers are required to make. The market administrator is charged with the duty of promptly verifying all reports, and handlers must, under the order, make available to the market administrator records and facilities to enable him to verify their reports and to obtain correct figures in case of errors or omissions.

The most important report which handlers must file with the market administrator is the final monthly report which, in addi-
3381 tion to considerable detailed information, shows the total quantity of milk and the average butterfat content of the milk received from producers and from other sources, and the utilization of the milk at each plant, together with a complete computation of the sum of money which represents the handlers' net cost of milk on the basis of the 201–210 mile zone.

Upon receipt of reports for a month the market administrator is required under the order to audit each report for mathematical correctness and obvious errors. These reports, subject to verification by the market administrator, must be sent to him on the 10th of the month following the month for which the report is made.

The Uniform Price Computation

On the 14th day of the month the market administrator is required to compute the uniform pool price, or blended price, out of all reports in his hands at that time.

For purposes of convenience, the milk of each class, to which the minimum prices apply, is known as the "net pooled milk." Class I and Class II–A milk which never enters the marketing area is not included in the net pooled milk. The uniform price is computed by the market administrator upon this net pooled milk in all classes of all handlers.

In computing the uniform pool price from all reports each month, the market administrator is required to deduct payments for services rendered by cooperatives and payments for market services rendered by handlers.

Payments Out of Pool

Payments for services by cooperatives are to be made to those co-operative associations which have been determined by the Secretary of Agriculture as having their entire activities under the control of their members and as being able to render service to producers as a whole by facilitating the delivery of milk to persons at the point where it may be used in the highest possible class and by making available to handlers in need of milk, an adequate supply. These payments would go to producers' cooperatives which exercise
3382 control over milk and route milk into the channels of utilization which net the highest returns to all producers.

Under the order, any cooperative association of producers may apply to the Secretary of Agriculture for determination as to its qualifications to receive the cooperative service payment. If the determination is made in favor of the cooperative, the service payment is to be received by the cooperative until it has been disqualified by the Secretary for failure to exercise the authority and to perform the functions upon which the determination was made.

These payments are to be made at only one of the following rates on net pooled milk dealt with by a cooperative:

One cent per hundredweight of net pooled milk to a cooperative which caused the milk of its members to be delivered to a handler's plant and on which the handler made reports to the market administrator and paid producers as required under the order;

Two and a half cents per hundredweight of net pooled milk to a cooperative which has collected payments for milk delivered to the plant of a handler by its members and which has met its obligations under the order; and

Five cents per hundredweight of net pooled milk to a cooperative which operates plants, is able to take care of all the milk of all its members, and is willing and able to take care of milk from producers who are not members.

Market service payments to handlers would be made for facilitating the utilization of milk in a way so as to benefit all producers sharing in the pool.

During any month except November or December one market service payment would be made to those handlers who move milk from a plant equipped only for receiving and shipping milk to one equipped for manufacturing when it is impossible to move the milk in fluid form. For moving the milk to the manufacturing plant the handler would receive for that service 23 cents per hundredweight of milk so moved, plus a small additional allowance for hauling. No such payment would be made for any month when the manufacturing plant shipped Class I milk to the marketing area if both plants are operated by the same handler.

Another market service payment would be made during November and December to a handler who moved class I milk from a plant which is primarily a manufacturing plant, and who would be entitled to claim this market service payment. This payment is at
3383 the rate of 30 cents per hundredweight of class I milk during these 2 months only, and the manufacturing plant must not have shipped to the marketing area more than 10 percent of its receipts as class I milk nor more than 50 percent as cream during the preceding May and June.

Uniform Pool Prices for Producers

The order requires handlers to pay the uniform pool or blended price calculated by the market administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as class I milk outside of the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. For the remainder of each producer's milk the handler may pay such prices as he sees fit, but is required to furnish the producer with a statement of the percentage of the producer's milk paid for at the uniform price.

Payment of the uniform price is subject to the butterfat differential of 4 cents per hundredweight for each one-tenth of 1 percent butterfat content above or below 3.5 percent in the milk delivered by each producer and to the transportation and location differentials.

The transportation differential scale is that prescribed in the order to apply to class I milk and is based on the railway tariff for the movement of milk in tank cars.

The location differential amounts to 25 cents per hundredweight to producers who deliver at plants in counties of New York, New Jersey, Connecticut, and Massachusets, located close to New York City, and separated to a large extent from the rest of the milkshed by mountainous country in which very little, if any, milk is produced. Of

this 25 cents paid to producers, the handler is reimbursed 20 cents per hundredweight from the total pool. This leaves a location differential of 5 cents per hundredweight to be paid by the handler.

In addition to the other differentials, handlers are required to pay to producers delivering milk qualified as grade A by the
3384 New York City Department of Health premiums according to butterfat content and bacteria count on that amount of milk actually sold in the marketing area as grade A milk. The premiums range from 78 cents for 4 percent milk having less than 10,000 bacteria count down to 5 cents for 3.7 percent milk containing over 25,000 bacteria count.

A producer settlement fund operated by the market administrator is provided for under the order as a clearing arrangement into which each handler pays the amount by which his net pool obligation is greater than his net pooled milk multiplied by the uniform price, or out of which he is paid the amount by which his net pool obligation is less than his net pooled milk multiplied by the uniform price. Provision is also made for receiving or paying out of the producer settlement fund amounts of money arising out of any errors. Handlers must make payments to producers on or before the 25th day of each month for milk received during the preceding month.

The arrangement which the order prescribes for determining and paying a uniform pool price to producers for milk sold in the marketing area operates under what is commonly termed a market-wide pool plan. Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to all producers at a uniform rate except for the transportation and other differentials provided.

3385 *Exhibit No. 10 to stipulation*

COOPERATIVE EXTENSION WORK IN AGRICULTURE AND HOME ECONOMICS
STATE OF NEW YORK

State Agricultural College and U. S. Department of Agriculture Cooperating. Extension Service, Dept. of Agr. Economics and Farm Management.

ITHACA, NEW YORK, *August 13, 1938.*

TO DAIRYMEN INTERESTED IN THE NEW YORK MARKET:

Enclosed you will find the following copies of material prepared by the Dairy Section of the Agricultural Adjustment Administration in Washington and our State Department of Agriculture and Markets concerning the proposed Federal and State Orders for marketing milk for the New York Market:

1. The proposed federal order.
2. An explanation of the order.
3. Questions and answers concerning the order.

4. A list of the polling places, giving location and time.
5. The proposed State order.

The extension service is sending this information to all dairymen approved for the New York Market in order that they may have an opportunity to study the proposals before the date for balloting.

M. C. Bond,
M. C. Bond,
Extension Economist.

3386 *Exhibit No. 12 to stipulation*

No. ------

UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE

October 18, 1938.

Pursuant to Title 28, Section 661, U. S. Code (Section 882, Revised Statutes of the United States), I hereby certify:

1. That there is now on file in this Department the following-described original document:

"Order directing that a referendum be conducted among the producers supplying milk to the New York metropolitan marketing area; determination that the month of May is representative period; and designation of agent to conduct said referendum, dated July 25, 1938."

2. That a true and correct copy of the original of said document is attached hereto.

By direction of Henry A. Wallace, Secretary of Agriculture, and in witness whereof, the said copies of said documents are hereby authenticated and the seal of the Department of Agriculture affixed hereto, and I have signed my name hereto on the day and year first above written.

[SEAL] J. D. LeCron.
Assistant to the Secretary of Agriculture.

3387 ORDER DIRECTING THAT A REFERENDUM BE CONDUCTED AMONG THE PRODUCERS SUPPLYING MILK TO THE NEW YORK METROPOLITAN MARKETING AREA; DETERMINATION THAT THE MONTH OF MAY IS A REPRESENTATIVE PERIOD; AND DESIGNATION OF AGENT TO CONDUCT SAID REFERENDUM

I, M. L. Wilson, Acting Secretary of Agriculture of the United States, acting pursuant to Section 8c (19) of the Agricultural Marketing Agreement Act of 1937, hereby direct that a referendum be conducted among producers, who, during the month of May, 1938, which month I hereby determine to be a representative period, were engaged in the production of milk for sale in the marketing area specified and defined in the proposed marketing agreement regulating

the handling of milk in the New York Metropolitan Marketing Area, upon which public hearings were held in May and June 1938, to determine whether such producers favor or approve the issuance of an order regulating the handling of milk in said area, and I hereby designate Wellington J. Griffith, Jr., of the United States Department of Agriculture, as my agent to conduct such referendum in accordance with the following instructions.

Said Wellington J. Griffith, Jr., shall:

1. Ascertain the names of producers who, during the month of May 1938, were engaged in the production of milk for sale in said marketing area by auditing the records of handlers;

2. Determine the commencement, duration, and termination of the period of the referendum, Provided, That the referendum shall be completed on or before August 30, 1938;

3. Designate the polling places and the hours at which such polling places shall open and close, Provided, That all polling places shall remain open not less than eight consecutive daylight hours during the day or days designated as the period of the referendum;

3388 4. Give notice of the date or dates, places, and hours of polling by (a) issuing, at least five days prior to the first day of the referendum, a press release giving such information; (b) posting a copy of such press release at each polling place at least three days prior to the date of balloting; and (c) such others means, including announcements by the use of the radio, as the said Wellington J. Griffith, Jr., may deem necessary.

5. Appoint a person or persons who shall be in charge of each polling place;

6. Instruct all polling officers as to (a) the conduct of the referendum and (b) the manner of transmittal of the ballots;

7. Supervise the counting of the ballots and, within 14 days after the close of the referendum, transmit to the Secretary a tabulation which will show the number of producers favoring the issuance of the order, the number of producers opposed to the issuance of the order, the number of producers whose ballots were disqualified, and all ballots.

Cooperative associations of producers whom the Secretary determine to be bona fide engaged in marketing milk or its products, or in rendering services for or advancing the interests of producers of milk, may vote for or against the issuance of the order for those producers who are members of, stockholders in, or under contract with, such cooperative associations of producers.

No person who shall present himself at any one of the polling places and who alleges that during the month of May 1938, he was engaged in the production of milk for sale in said marketing area, or that during said month he produced milk which was sold within said marketing area, shall be refused a ballot. If, in the checking of the ballots, however, it is found that any ballots have been cast by producers who were not during said month engaged in the production of milk for sale in said marketing area or who did not pro-

duce milk which was sold in said marketing area, you are directed to disqualify any such ballots and to mark on the back thereof the reason for such disqualification. In addition, any ballot on which all questions asked relative to the status of any producer are not properly filled in shall be disqualified. All ballots, including disqualified ballots, shall be transmitted to me.

389 All ballots shall be treated as confidential and the contents thereof shall be divulged only to me or to such persons as I may direct.

In witness whereof, I, M. L. Wilson, Acting Secretary of Agriculture of the United States, have executed this order, determination, and designation and caused the official seal of the United States Department of Agriculture to be affixed hereto, in the city of Washington, District of Columbia, this 25th day of July 1938.

[s] M. L. WILSON,
Acting Secretary of Agriculture.

390 *Exhibit No. 13 to stipulation*

No. ------

UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE

October 18, 1938.

Pursuant to Title 28, Section 661, U. S. Code (Section 882, Revised Statutes of the United States), I hereby certify:

1. That there is now on file in this Department the following-described original document:

"Amendment to order directing that a referendum be conducted among producers supplying milk to the New York metropolitan marketing area, dated August 15, 1938."

2. That a true and correct copy of the original of said document is attached hereto.

By direction of Henry A. Wallace, Secretary of Agriculture, and in witness whereof, the said copies of said documents are hereby authenticated and the seal of the Department of Agriculture affixed hereto, and I have signed my name hereto on the day and year first above written.

[SEAL] J. D. LECRON,
Assistant to the Secretary of Agriculture.

391 AMENDMENT TO ORDER DIRECTING THAT A REFERENDUM BE CONDUCTED AMONG PRODUCERS SUPPLYING MILK TO THE NEW YORK METROPOLITAN MARKETING AREA

Whereas, M. L. Wilson, Acting Secretary of Agriculture, on July 5, 1938, issued an order directing, among other things, that a referendum be conducted among the producers supplying milk to the New York metropolitan marketing area; and

Whereas, it is now desired to amend certain provisions of said order:

Now, Therefore, M. L. Wilson, Acting Secretary of Agriculture of the United States, pursuant to the powers vested in him by the terms and provisions of the Agricultural Marketing Agreement Act of 1937, hereby amends said order as follows:

1. Delete the paragraph numbered 1 and substitute therefor the following:

"1. Ascertain the names of persons who, during the month of May 1938, delivered milk to any plant approved by any health authority in said marketing area for the receiving of milk to be sold in said marketing area, using producer pay rolls of handlers, records of health authorities, or such other authoritative sources as may be readily available."

2. In the paragraph numbered 3, place a period after the word "close" and delete the remainder of that paragraph.

3. Delete the first unnumbered paragraph and insert a new paragraph, numbered 8, as follows:

"8. Furnish each cooperative association of producers whom the Secretary determines to be qualified to cast a ballot for those producers who are members of, stockholders in, or under contract
3392 with such cooperative association, a ballot for the use of such association, and by examination of the records of each such cooperative association verify names of producers for whom such cooperative association is entitled to cast a ballot."

4. In the next to the last paragraph delete the words "or who did not produce milk which was sold in the marketing area" occurring in the seventh and eighth lines thereof.

In witness whereof, the Secretary of Agriculture of the United States has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed hereto, in the City of Washington, District of Columbia, this 15th day of August 1936.

(s) M. L. WILSON,
Acting Secretary of Agriculture.

3393 *Exhibit No. 14 to stipulation*

UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL ADJUSTMENT ADMINISTRATION, WASHINGTON, D. C.

Received Dept. Agric. & Markets, Jul. 11, 1938. Division of Milk Control.

JULY 8, 1938.

DEAR: Pursuant to Section 8c of the Agricultural Marketing Agreement Act of 1937 and to Section 258–m of the New York State Agriculture and Markets Law, hearings were held on a Proposed Marketing Agreement and Order Regulating the Handling of Milk in the New York Metropolitan Milk Marketing Area. Subsections (8) and (9) of section 8c of the Federal act require the Secretary

to determine that the issuance of an order is approved or favored by two-thirds of the producers by number or volume, who produce milk affected by the order before the order may become effective. Subsection 1 of the section 258–m of the New York law provides that no order fixing the price to be paid to producers for milk shall be effective unless the Commissioner of Agriculture and Markets finds that it is favored by at least seventy-five percentum of the producers of milk for the marketing area. It is expected that simultaneous referenda will be conducted by the Secretary and the Commissioner in order to ascertain the extent of producer approval, if and when such an order is perfected for the New York market.

In anticipation that such referenda will probably be held, and in order to expedite its conduct as much as possible, the Secretary and the Commissioner have instructed the undersigned to send you this communication, advising you of the following and to secure the information listed below.

Your attention is called to the following provision of the Federal act:

"SECTION 8c (12): Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in 3394 marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers."

Your attention is also called to the following provision of the New York act:

"4. In determining the approval or request for an order as herein provided or the termination thereof on the part of producers the commissioner shall consider the approval, request or favor in respect thereto by any bona fide cooperative association of producers engaged in marketing milk within such marketing area as the approval, request, or favor either of making an order or of termination thereof of the producers who are under contract with such cooperative association of producers."

We are instructed to advise you that before any association can exercise the privilege of expressing approval or disapproval on behalf of its producers in such referenda a determination must be made by the Secretary on behalf of the Federal Government and by the Commissioner on behalf of the State, that such an association comes within the provisions of the acts quoted above. For the proper conduct of such referenda it will also be necessary to know in advance which of those qualified associations intend to exercise that privilege so that a clear understanding may be had by both producers and association officers. Consequently, unless an intention to the contrary

is specifically stated, the submission of the information requested below will be construed as a declaration on the part of the cooperative submitting such information that it intends, if the Secretary and/or the Commissioner determines it to be qualified, to vote in the referenda on behalf of its producers. In the event the requested information is not submitted, or the Secretary or the Commissioner determines that such association is not qualified, the member producers will be given an opportunity to vote individually and any vote submitted by such a cooperative will be disregarded.

In order to aid the Secretary and the Commissioner in making that determination the following information must be submitted:

1. One copy of:

(a) Articles of incorporation.

(b) Bylaws.

(c) Membership contract or agreement, each of which is to be certified by the secretary or some other responsible officer of the association as being a true and correct copy of the documents now in effect and being used by the cooperative. If a membership
3395 contract is not being used, there should be submitted a brief statement by a responsible officer indicating the basis upon which the association acts in behalf of its members in marketing milk and the nature of the reciprocal obligations involved.

If the association seeks to represent in the referendum only those producers who are members, the number of stockholders or producers under contract with the association need not be given. If, however, the association also seeks to represent producers who are not members but who may be stockholders in, or who may have some kind of a contractual arrangement with, the association, the number of such producers, should be given and indication made as to what group they come under. A copy of any of the contracts, upon the basis of which the association may desire to represent such a producer, *must* be submitted in addition to the actual membership contract requested above.

2. The name, location, and ownership of each plant to which members of the association deliver milk.

3. The number of producers delivering to each plant listed under #2, for which the association desires the privilege of expressing approval or disapproval in the referenda.

4. List of the officers and members of the board of directors and their addresses, indicating with respect to each, when their present term of office expires and with respect to the members of the board, how long each member has served in that capacity.

(a) Are any of the officers or members of the board, also officers or directors in any other business unit or cooperative association engaged in the collection, processing, or distribution of milk or its products? If so, state specifically what these connections are.

5. On what basis does the association sell or dispose of the milk of its producers to handlers? A brief statement of the kind of trans-

ctions which are now being entered into with an indication of their erms, and, if milk is being sold under contract, a copy of such contract or contracts should be submitted.

(a) Does the association take title to any or all of the milk marketed by it on behalf of its members?

(b) Does the association receive payment from handlers for any or ll milk marketed through the association? State the method used in distributing total returns to producers.

396 6. Will the association make its membership records available, if requested, to a representative of the United States Department of Agriculture or the New York State Department of griculture and Markets for the purpose of checking and verifying embership lists submitted in connection with this or any subsequent referenda?

7. Any other information which the association may deem relevant nd desire to be considered by the Secretary or by the Commissioner.

The above information should be mailed to E. W. Gaumnitz, Chief, airy Section, United States Department of Agriculture, Washingn, D. C., not later than July 16, 1938, and a duplicate of the same mailed to Kenneth F. Fee, Director, Division of Milk Control, epartment of Agriculture and Markets, Albany, New York, not ter than the same date.

Very truly yours,

E. W. GAUMNITZ,
Chief, Dairy Section.
KENNETH F. FEE,
Director, Division of Milk Control,
Department of Agriculture and Markets.

397 *Exhibit 15 to stipulation*

LIST NUMBER 1

Associations qualified to vote on behalf of producers

1. Amsterdam Milk Producers Cooperative, Inc., C. A. Joslin, Secary-Treasurer, Amsterdam, N. Y., R. D. 4.
2. Antwerp Milk Producers Cooperative, Inc., W. D. Bennett, ecretary, Philadelphia, New York.
3. Bennington County Co-operative Creamery, Inc., I. N. Bartlett, ecretary, Manchester Depot, Vermont.
4. Canajoharie Co-operative Milk Producers, Inc., Elmer A. Fredicks, Secretary, Canajoharie, New York.
5. Central Mohawk Producers Cooperative, Inc., L. S. Lenson, Secary, Fultonville, New York.
6. Circleville Milk Producers Cooperative, Inc., Circleville, N. Y., ene F. Hufout, Secretary, Middletown, New York. R. F. D. #3.
7. Consensus Milk Producers Cooperative Association, Inc., Webr's Crossing, New York, J. C. Treat, President.

8. Crowley's Milk Producers Cooperative Association, Inc., Lloyd C. Anderson, Acting Secretary, 302 Capitol Building, Binghamton, New York.

9. Dairymen's League Cooperative Association, Inc., 11 West 42nd Street, New York, New York.

10. Lakeville Milk Producers Cooperative Association, Inc., E. W. Shellman, Secretary, Holcombe, New York.

3398 11. Lehigh Valley Cooperative Farmers, 1026–1052 North 17th Street, Allentown, Pa., G. A. Boyer, President.

12. Leon Milk Producers Cooperative, Inc., Gilbert Kysor, Secretary, Cattaraugus, New York.

13. Liberty Valley Cooperative Milk Producers Association, Walter Krotzer, Secretary, Liberty, Pa.

14. Malone Milk Producers Cooperative, Inc., P. R. Ryan, Secretary, 10 Constable Street, Malone, New York.

15. Milton Cooperative Dairy Corporation, Leon D. Latham, Secretary, Milton, Vermont.

16. Mount Joy Farmers Cooperative Association, Henry H. Eby, Secretary, Mount Joy, Pa.

17. North Blenheim Milk Producers Cooperative Association, Inc., Edward Strella, Middleburg, New York.

18. Osceola Milk Producers Cooperative Association, J. H. Walsh, Osceola, Pa.

19. Poland Milk Producers Cooperative Association, Inc., John Snyder, Secretary, Poland, New York.

20. Portville Milk Producers Association, Ernest D. Witter, Cuba, New York.

21. Richmond Cooperative Association, Inc., L. D. Ware, Manager, Richmond, Vermont.

22. Sanquoit Valley Farmers Cooperative, Inc., Henry M. Brown, Treasurer, 491 French Road, Utica, New York.

3399 LIST NUMBER 2

Associations not determined to be qualified, but who replied with some information, the assumption being that they would vote their members if qualified

1. And-Well Milk Producers Cooperative, Inc., Andover, New York, H. W. Jackson, President, Wellsville, New York, R. D. 4. Reason: Reply mailed so long after date specified in letter of July 8 that acceptance would afford unequal treatment to those who might have replied if they had known consideration would be given.

2. East Freetown Milk Producers Cooperative, Inc., Robert Cameron, Secretary, McGraw, New York. Reason: Letter received in behalf of this association came from the office of the Producers' Bargaining Agency and was signed by an individual not shown to be

connected with the organization in any way nor supported by written authorization to sign.

3. Keuka Milk Producers Cooperative, Inc., W. C. McConnel, Secretary, Prattsburg, New York. Reason: Same as for East Freetown.

4. Mettowee Valley Cooperative Milk Producers, Inc., West Pawlett, Vermont, Borden Nelson, Clerk. Reason: Insufficient information.

5. Mississquoi Valley Milk Producers Cooperative Association, Inc., Enosburg Falls, Vermont. Reason: Same as for And-Well Milk Producers Cooperative, Inc.

3400 6. Montgomery Eastern Dairy Cooperative, Inc., H. E. Merry, Secretary, Amsterdam, New York, R. #1. Reason: Reply signed by one of the directors as an individual without any indication that it represented the action of the board, or that he had specific authority to speak for the association.

7. Otter Valley Producers, Inc. (East Dorset, Vermont), Bert A. Johnson, Secretary, Wallingford, Vermont. Reason: Insufficient information.

8. Roseboom Cooperative, Inc., Roseboom, New York, Joseph L. Hutton, Secretary. Reason: Insufficient information.

9. Slate Valley Cooperative Milk Producers, Inc., Fair Haven, Vermont, Guy Reid, Secretary. Reason: Same as for And-Well Milk Producers Cooperative, Inc., and Mississquoi Valley Milk Producers Cooperative Association, Inc.

10. Tri-County Milk Producers Cooperative Association, Inc., Bullville, New York, H. L. George, Secretary. Reason: No information submitted. Expressed only attitude toward an order. See letter E. W. Gaumnitz, dated August 2.

11. Farmers' Cooperative Milk Company, Inc., C. A. Bishop, Treasurer, 729-31 Main Street, Poughkeepsie, New York. Reason: Same as And-Well. Also see letter to them from E. W. Gaumnitz, dated August 8.

3401 LIST NUMBER 3

Those answering, but indicating wish that producers vote individually. (No determination as to qualification)

1. Coventry Dairymen's League Cooperative Association, Inc.
2. Crowley's Milk producers' Coop. Assn., Inc. (see List #1).
3. Grover Coop. Milk Prod. Assn., Inc.
4. Holland Patent Farmer's Coop., Inc.
5. Indian Castle Dairy Coop., Inc.
6. Interstate Milk Producers' Assn.
7. Jefferson-Lewis Milk Prod. Coop., Inc.
8. Lafayette Milk Producers Coop. Assn., Inc.
9. Little Falls Dairy Co., Inc.

10. Lowville Producers Dairy Coop., Inc.
11. Mutual Dairy Cooperatives, Inc.
12. North Country Producers' Coop. Assn., Inc.
13. Sheffield Producers Coop. Assn., Inc.

3402 LIST NUMBER 4

Those answering and indicating that they are not eligible to vote, because no milk goes into New York; are out of business; or are a federated organization and member cooperatives will vote if they wish

1. Associated Marketing Cooperatives, Inc.
2. Chester County Dairymen's Cooperative Association (Penna.).
3. Creighton's Producers Cooperative Association, Inc.
4. Metropolitan Cooperative Milk Producers Bargaining Agency.
5. New England Dairies.
6. Oak Hill Cooperative Dairies, Inc.
7. Parkway Cooperative Dairy Association, Inc.
8. Western New York Milk Producers Cooperative Association, Inc.

3403 LIST NUMBER 5

Letters returned unclaimed

1. Bovina Cooperative Creamery Co., Inc.
2. Buskirk Milk Producers Cooperative Association, Inc.
3. Clifford Cooperative Milk Producers Association, Inc.
4. Community Cooperative Marketing Association, Inc.
5. Frankfort Milk Producers Cooperative, Inc.
6. High Bridge Milk Producers Cooperative Association, Inc.
7. New York Milk Shed Cooperative, Inc.
8. Niagara Frontier Cooperative Milk Producers Bargaining Agency, Inc.
9. Northeastern Producers Cooperative Association, Inc.
10. North Branch Dairymen's League Cooperative Association, Inc.
11. Oswegatchie Milk Producers Cooperative, Inc.
12. Producers Cooperative, Inc. (Dolgeville, N. Y.)
13. Reliable Producers Cooperative Association, Inc.
14. Rutland Cooperative Association, Inc.
15. United Cooperative Dairymen's Association, Inc.
16. Utica Milk Producers Cooperative, Inc.
17. Wallkill Valley Milk Producers Cooperative, Inc.

3404 *Exhibit No. 16 to stipulation*

[Copy]

UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL ADJUSTMENT ADMINISTRATION

HEARING ROOM NO. 3,
STATE OFFICE BUILDING,
Albany, New York, August —, 1938.

Mr. WELLINGTON J. GRIFFITH, Jr.
Hearing Room No. 3, State Office Building, Albany, New York.

DEAR MR. GRIFFITH: The undersigned association, which the Secretary of Agriculture of the United States has determined to be qualified to express the approval or disapproval of the producers who are members of, stockholders in, or under contract with this association, had, during the month of May 1938, ------ producers who were members of, stockholders in, or under contract with this association, as shown by the attached list of producers and which list may be verified by you, and who, during the month of May 1938, delivered milk to a plant which was approved by any health authority for the receiving of milk to be sold in the New York Metropolitan Milk Marketing Area, as defined in Order No. 27.

In behalf of the attached list of producers, this association approves disapproves the issuance, by the Secretary of Agriculture of the United States, of Order No. 27 regulating the handling of milk in the New York Metropolitan Milk Marketing Area.

There is enclosed a resolution of the Board of Directors which has been signed by the duly qualified officers and has been sealed with the seal of this association.

Very truly yours,

3405 *Exhibit No. 17 to stipulation*

COOPERATIVE ASSOCIATIONS QUALIFIED TO VOTE FOR MEMBERS ON PROPOSED ORDER FOR NEW YORK METROPOLITAN MILK MARKETING AREA

Amsterdam Milk Producers ' ative, Inc., R. D. 4, Amsterdam, New York.

Antwerp Milk Producers ative, Inc., Philadelphia, New York.

Canajoharie Cooperative Milk Producers, Inc., Canajoharie, New York.

Central Mohawk Producers Cooperative, Inc., Fultonville, New York.

Circleville Milk Producers Cooperative, Inc., R. F. D. No. 3, Middletown, New York.

Conesus Milk Producers Cooperative Association, Inc., Webster's Crossing, New York.

Crowley's Milk Producers Cooperative Association, Inc., Binghamton, New York.

Dairymen's League Cooperative Association, Inc., 11 West 42nd Street, New York City, New York.

Lakeville Milk Producers Cooperative Association, Inc., Holcomb, New York.

Leon Milk Producers Cooperative, Inc., Cattaraugus, New York.

Malone Milk Producers Cooperative Inc., 10 Constable Street, Malone, New York.

North Blenheim Milk Producers Cooperative Association, Middleburg, New York.

Osceola Milk Producers Cooperative Association, Osceola, Pa.

Poland Milk Producers Cooperative Association, Inc., Poland, New York.

Portville Milk Producers Association, Cuba, New York.

Sauquoit Valley Farmers Cooperative, Inc., 491 French Road, Utica, New York.

3406 COOPERATIVE ASSOCIATIONS NOTIFIED BY STATE AUTHORITIES THAT THEY WERE NOT QUALIFIED TO VOTE ON BEHALF OF THEIR MEMBERS ON PROPOSED ORDER NO. 126 [1]

Addison Cooperative Milk Producers Association,
And-Well Milk Producers Coop. Association, Inc.
East Freetown Milk Producers Cooperative, Inc.
Farmers' Cooperative Milk Company, Inc.
Gouverneur Cooperative Dairymen, Inc.
Keuka Milk Producers Cooperative, Inc.
Montgomery Eastern Dairy Cooperative, Inc.
Roseboom Cooperative, Inc.
Tri-County Milk Producers Coop. Association, Inc.

[1] Each cooperative association known or thought to be marketing milk within the New York Metropolitan Milk Marketing Area was advised, on July 8th, by letter, of certain information to be submitted to aid making the determination of those qualified to vote on behalf of their members. Of those submitting such information and indicating that they desired to vote on behalf of their members, the above associations for various reasons were advised that they were not determined to be qualified to express approval or disapproval on behalf of their members.

3407 *Exhibit No. 21 to stipulation*

Docket No. A-71, 0-71. Notice of hearing signed by the Secretary of Agriculture, April 29, 1938.

UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL ADJUSTMENT ADMINISTRATION

PROPOSED MARKETING AGREEMENT AND ORDER REGULATING THE HANDLING OF MILK IN THE NEW YORK METROPOLITAN MILK MARKETING AREA, PREPARED AND PROPOSED BY THE METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY AND UPON WHICH SAID AGENCY HAS REQUESTED THE SECRETARY OF AGRICULTURE TO HOLD HEARINGS UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

The Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., of the State of New York, has presented to the Secretary a petition for public hearing on a proposed marketing agreement and a proposed order regulating the handling of milk for the New York metropolitan milk marketing area under the Agricultural Marketing Agreement Act of 1937. This agency, according to its petition, comprises in its membership a majority of the dairymen supplying milk to the New York metropolitan area.

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture after due notice of and opportunity for hearing to enter into marketing agreement with and to issue orders applicable to processors, producers, associations of producers, and others engaged in the handling of milk and its products in the current of interstate or foreign commerce. This act also authorizes the Secretary of Agriculture to issue orders complementary to orders of the States, to cooperate fully with the States in their programs to regulate the handling of milk, and authorizes the Secretary of Agriculture to call hearings whenever he has reason to believe that the issuance of an order will tend to effectuate the declared policy of this act. In simple terms, as applied to milk, the declared policy of the act is to establish and maintain such orderly marketing conditions for milk in interstate commerce as will establish prices for milk at a level which will give that milk a purchasing power with respect to articles that farmers buy equivalent to its purchasing power in a prescribed base period, after taking into account the available supplies of feed, the prices of feed and other economic conditions affecting the demand for and the supply of milk.

In response to the petition of the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., the Secretary of Agriculture has called hearings as follows: Chancellor's Hall, Albany, N. Y., at 9:30 a. m., e. s. t., May 16, 1938; State Armory, Malone, N. Y., at 9:30 a. m., e. s. t., May 17, 1938; Lincoln Auditorium, Syracuse, N. Y. at

9:30 a. m., e. s. t., May 18, 1938; State Armory, Elmira, N. Y., at 9:30 a. m., e. s. t., May 19, 1938; Room 652 State Office Building, 80 Centre Street, New York City, at 9:30 a. m., e. s. t., May 20, 1938.

The Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., is likewise petitioning the Commissioner of Agriculture and Markets of the State of New York for hearings on an order to be promulgated under the New York State law. It is anticipated that the above mentioned hearings will be conducted as joint hearings of the Secretary of Agriculture of the United States and of the Commissioner of Agriculture and Markets of the State of New York.

At each of the above times and places opportunity will be given for interested parties to present evidence (1) as to whether or not any marketing agreement and order should be issued, and (2) as to each and every provision set forth below and as to other provisions which may be proposed in the course of the hearings. It is suggested that each interested party who so desires carefully present all facts which he feels the Secretary of Agriculture should have in the record of the public hearing upon which to base a decision, (1) as to the issuance of an order, and (2) if an order is to be issued, what
3408 provisions such an order is to contain. The best interests of a proponent, or of an opponent, of the whole plan, or any provision thereof, will best be served by concise presentation, in the session of the hearing most convenient to him, of the relevant facts in his possession, reserving his arguments for filing in written form at the close of the hearing session.

If upon the facts in the record the Secretary of Agriculture decides that he can issue an order, the content of the order, based upon the facts in the record, will then be made known to producers and their approval or disapproval determined as to whether the order shall become effective. The content of the order will be the same as that of a marketing agreement which handlers will be given opportunity to sign.

The provisions proposed by the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., are set forth below as possible provisions of a marketing agreement and of an order. Their publication in this form is for the convenience of interested parties and is not to be considered as in any way signifying their approval by the Secretary of Agriculture.

Article I—Definitions

The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which reenacts and further amends certain provisions of Public, No. 10, 73rd Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "New York Metropolitan Milk Marketing Area" means the city of New York and Nassau, Suffolk, and Westchester Counties, all in

the State of New York, and is hereinafter called the "marketing area."

4. "Person" means any individual, partnership, corporation, association, and any other business unit.

5. "Producer" means any person who delivers milk of his own production to a handler at a plant approved by a health authority having jurisdiction in any part of the marketing area during each respective monthly period.

6. "Handler" means any person, including a cooperative association, who receives milk from producers or cooperative associations at one or more plants which are approved for the sale of milk by health authorities having jurisdiction in any part of the marketing area and who engages in such handling of milk or cream as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce.

7. "Market Administrator" means the agency for the administration hereof which is described in article II.

8. "Cooperative Association" means a cooperative corporation of producers, organized or operated under or subject to the provisions of Chapter seventy-seven of the Consolidated Laws of the State of New York, or of similar laws of other States, engaged in making collective sales or marketing of milk for the producers represented thereby, and complying with the provisions of act of Congress of February eighteenth, nineteen hundred twenty-two, entitled "An Act to Authorize Association of Producers of Agricultural Products."

9. "Plant" means the building where milk is received and which is approved by a health authority having jurisdiction in any part of the marketing area.

Article II—Market Administrator

SECTION 1. Selection, Removal, and Bond.—The market administrator shall be selected and shall be subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

3409 SEC. 2. Compensation.—The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

SEC. 3. Powers.—The market administrator shall have power:

(1) To administer the terms and provisions hereof;

(2) To receive, investigate, and report to the Secretary complaints of violations of this order.

SEC. 4. Duties.—The market administrator, in addition to the duties hereinafter described, shall:

(1) Keep such books and records as will clearly reflect the transactions provided for herein;

(2) Submit his books and records to examination by the Secretary at any and all times;

(3) Furnish such information and such verified reports as the Secretary may request;

(4) Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

(5) Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person, who within 15 days after the date upon which he is required to perform such acts has not

(a) Made reports pursuant to article V or

(b) Made payments pursuant to article VII;

(6) Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof;

(7) Pay out of the funds received

(a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator;

(b) His own compensation, and

(c) All other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties.

(8) Maintain a main office and such branch offices as may be necessary.

SEC. 5. Responsibility.—The market administrator in his capacity as such shall not be held responsible in any way whatever to any handler or to any other person for errors in judgment, for mistakes, or for other acts either of commission or omission, except for his own wilful misfeasance, malfeasance, or dishonesty.

Article III—Classification of Milk

SECTION 1. Milk received by handlers at plants approved by the health authorities of any part of the marketing area as sources of supply for such area shall be classified as follows:

1. Class I milk shall be all milk which leaves such plant in fluid form except when there is a clear record of use as provided in section 2 of this article.

2. Class II milk shall be all milk which leaves, or is on hand at, such plant in the form of cream, plain condensed milk, homogenized mixtures, or cheeses of the soft type, such as Cream, Neufchatel, Pimento, Pimento Olive, De Brie, D'Isigny, Lunch, Kosher, Petit Suisse, or used as either whole or partly skimmed milk in Farmer Pressed cheese, except when there is a clear record of its use in Class III.

3. Class III milk shall be all milk which leaves, or is on hand at, such plant in the following forms:

(a) Sterilized and evaporated whole milk, sweetened whole condensed milk, milk chocolate, whole milk powder, and milk powder

with added milk fat, powdered malted milk, and all cheese other than the soft cheeses described in Class II and other than American cheese.

3410 (b) Milk separated to contain at least 43 percent butterfat, frozen and stored in licensed cold storage warehouses; whole milk, cream, or unsweetened condensed milk used in the manufacture of ice cream outside New York City; cream, plain condensed milk, or homogenized mixtures used outside the marketing area, outside of New York State, and outside of the following counties:

Maryland:
Cecil.
Massachusetts:
Berkshire.
New Jersey:
Bergen.
Burlington.
Essex.
Hudson.
Hunterdon.
Mercer.
Middlesex.
Morris.
Passaic.
Somerset.
Sussex.
Union.
Warren.
Vermont:
Addison.
Bennington.
Chittenden.
Franklin.
Rutland.
Pennsylvania:
Bradford.
Center.
Chester.
Clearfield.
Clinton.
Columbia.
Crawford.
Dauphin.
Erie.
Juniata.
Lackawanna.
Lancaster.
Lebanon.
Luzerne.
Lycoming.
McKean.
Mifflin.
Montour.
Northampton.
Northumberland.
Perry.
Potter.
Snyder.
Sullivan.
Susquehanna.
Tioga.
Union.
Warren.
Wayne.
Wyoming.
York.
Connecticut:
Litchfield.

(c) Butter.

(d) American cheese.

SEC. 2. In the event that milk is moved in fluid form from a plant where it was received from producers, to another plant outside of the marketing area, classification of such milk shall be made in accordance with the clear record of its movement from, or use at, the second plant.

Article IV—Minimum Prices

SECTION 1. Minimum Prices.—The prices for milk received hereunder by handlers, f. o. b. country receiving plants, subject to the transportation and other differentials as herein provided for the purpose of the determination of the uniform price and the resultant payments to the market administrator and to producers and to associations of producers as provided in articles VI and VII hereof, shall be as follows:

1. For Class I milk, $2.20 per cwt. for the months of March, April, May, June, and July; $2.67 per cwt. for the months of August, September, October, November, December, January, and February;

2. For Class II milk, $2.00 per cwt. for the months of March, April, May, June, and July; $2.20 per cwt. for the months of August, September, October; $2.40 per cwt. for the months of November, December, January, and February;

The above prices for the months of March, April, May, June, and July remain in effect for each month unless the official New
3411 York average outside quotations for 92-score butter, as determined by the market administrator for the 30 days preceding the 25th day of the preceding month, is below 25 cents or above 34 cents, in which event such prices shall be changed in accordance with the following schedule:

Butter price (cents)	Class I price	Class II price
	Dollars	*Dollars*
Under 20	1.73	1.60
20-24	1.97	1.80
25-34	2.20	2.00
35-39	2.44	2.20
40-44	2.67	2.40
Over 44	2.91	2.60

The above prices for the months of August, September, October, November, December, January and February remain in effect for each month unless the official New York average outside quotation of 92-score butter, as determined by the market administrator for the preceding months, is below 30 cents or above 39 cents, in which event such prices shall be changed in accordance with the following schedule:

Butter price (cents)	Class I price	Class II price	
		Aug., Sept., Oct.	Nov., Dec., Jan., Feb.
	Dollars	*Dollars*	*Dollars*
Under 25	2.20	1.80	2.00
25-29	2.44	2.00	2.20
30-40	2.67	2.20	2.40
40-44	2.91	2.40	2.60
45-49	3.14	2.60	2.80
Over 49	3.38	2.80	3.00

3. For Class III milk, as follows:

(a) For milk used in manufacturing evaporated whole milk and otherwise, as stated in subdivision (a) of Class III, a price per cwt. 10 cents higher than the average, as computed by the market administrator, of the prices paid at the following midwest condenseries:

Bordens	Carnation	Pet
Mt. Pleasant, Mich.	Sparta, Mich.	Hudson, Mich.
New London, Wis.	Chilton, Wis.	Wayland, Mich.
Greenville, Wis.	Berlin, Wis.	Coopersville, Mich.
Black Creek, Wis.	Richland Center, Wis.	New Clarus, Wis.
Orfordville, Wis.	Oconomowoc, Wis.	Belleville, Wis.
	Jefferson, Wis.	Delta, Ohio
		Coldwater, Ohio.

(b) For milk used in manufacturing frozen cream, and otherwise as stated in subdivision (b) of Class III, a price per cwt. determined by the price of milk for butter as computed as hereinafter set forth, plus 20 cents per cwt.;

(c) For milk made into butter, a price determined for each month by the market administrator by taking the official New York average outside quotations for 92-score butter for the respective month, deducting 3 cents a pound for making and figuring an overrun of 20 percent;

3412 (d) For milk made into America cheese, a price determined by the market administrator by taking the average weekly quotations for the respective month per pound of cheese, with differentials as indicated at the following markets, or of the quotation with differentials as indicated from such of these markets as may issue quotations during the period; Single daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York. From the average price of cheese, as determined from these quotations and differentials, shall be deducted 2 cents per pound of cheese allowance for making, and the price per 100 pounds of milk shall be computed according to the yield of cheese per 100 pounds of milk as follows:

B. F. test (pct.)	Cheese yield	B. F. test (pct.)	Cheese yield	B. F. test (pct.)	Cheese yield
	Lb.		*Lb.*		*Lb.*
3.0	8.30	4.0	10.60	5.0	12.90
3.1	8.53	4.1	10.83	5.1	13.13
3.2	8.76	4.2	11.06	5.2	13.36
3.3	8.99	4.3	11.29	5.3	13.59
3.4	9.22	4.4	11.52	5.4	13.82
3.5	9.45	4.5	11.75	5.5	14.05
3.6	9.68	4.6	11.98		
3.7	9.91	4.7	12.21		
3.8	10.14	4.8	12.44		
3.9	10.37	4.9	12.67		

SEC. 2. Butterfat Differentials.—The above prices in Classes I, II, and II (b) are based on milk containing 3.5 percent butterfat and are subjected to the addition of 4 cents for each 1/10 of one percent butterfat above 3.5 percent and to the deduction of 4 cents for each 1/10 of one percent butterfat below 3.5 percent, and the amount of such differential to be added to or deducted from the price in Class III (a) and III (c) are to be figured on a direct ratio between the milk fat content and the price.

SEC. 3. Transportation Differentials.—The above prices in Classes I, II, III (a) and III (b) are subject to the application of transportation differentials on the basis of the distance of the receiving plants from New York City, as follows:

Cents per cwt.

	Class I and whole milk in class III (b)	Classes II and III (b) except whole milk	Class III (a)		Class I and whole milk in class III (b)	Classes II and III (b) except whole milk	Class III (a)
1-10	+15	+8	+4	251-260	−3.5	−2	[illegible]
11-20	+14	+8	+4	261-270	−3.5	−2	[illegible]
21-25	+13	+8	+4	271-275	−3.5	−2	[illegible]
26-30	+13	+7	+4	276-280	−3.5	−3	[illegible]
31-40	+13	+7	+4	281-290	−4.5	−3	[illegible]
41-50	+10.5	+7	+4	291-300	−5.5	−3	[illegible]
51-60	+10.5	+6	+3	301-310	−5.5	−4	[illegible]
61-70	+9.5	+6	+3	311-320	−5.5	−4	[illegible]
71-75	+8	+6	+3	321-325	−7	−4	[illegible]
76-80	+8	+5	+3	326-330	−7	−5	[illegible]
81-90	+8	+5	+3	331-340	−7	−5	[illegible]
91-100	+7	+5	+3	341-350	−8	−5	[illegible]
3413 101-110	+7	+4	+2	351-360	−8	−6	[illegible]
111-120	+6	+4	+2	361-370	−8	−6	[illegible]
121-125	+5	+4	+2	371-375	−9	−6	[illegible]
126-130	+5	+3	+2	376-380	−9	−7	[illegible]
131-140	+5	+3	+2	381-390	−9	−7	[illegible]
141-150	+3.5	+3	+2	391-400	−9	−7	[illegible]
151-160	+2.5	+2	+1	401-410	−10.5	−8	[illegible]
161-170	+2.5	+2	+1	411-420	−10.5	−8	[illegible]
171-175	+1.5	+2	+1	421-425	−10.5	−8	[illegible]
176-180	+1.5	+1	+1	426-430	−10.5	−9	[illegible]
181-190	+1.5	+1	+1	431-440	−11.5	−9	[illegible]
191-200	0.0	+1	+1	441-450	−11.5	−9	[illegible]
201-210	0.0	0	0	451-460	−11.5	−10	[illegible]
211-220	−1	0	0	461-470	−12.5	−10	[illegible]
221-225	−1	0	0	471-475	−12.5	−10	[illegible]
226-230	−1	−1	0	476-480	−12.5	−11	[illegible]
231-240	−2	−1	0	481-490	−14	−11	[illegible]
241-250	−2	−1	0	491-500	−14	−11	[illegible]

3414 The above applies to all points except those from which points the railroads have different rates. Where improved highway mileage suitable for such hauling is available and shorter, it shall govern. On milk shipped by rail, there shall be a further differential of 5 cents per cwt. for truck shuttle handling from city railroad sidings to pasteurizing plants on reports by the handler.

SEC. 4. Market Service Differentials.—The above prices are subject to the deduction of the following differentials which are hereby authorized for services which, the Secretary has found, are for the benefit of the industry in the market and will aid in effectuating the purposes of the act.

(a) By cooperatives and other handlers for receiving plants handling costs and transportation charges when milk is diverted in flush seasons to plants equipped to make products described in Classes III (a) and (d), or plants equipped to make butter or cream and manufacture the skim milk, from receiving plants regularly engaged in shipping fluid milk to the marketing area, to protect markets; 20 cents per can receiving plant handling cost and plus reimbursement for transportation to such manufacturing plant at 4 cents per cwt. for first five miles or fraction thereof plus ¼ cent per cwt. per mile for the next 20 miles or fraction thereof, and 1/10 of one cent per cwt. per mile thereafter.

(b) By cooperatives and other handlers for extra expense involved in shipping milk, in short seasons to protect markets, by fulfilling market demands equitably as to all distributors from plants equipped for and which had during the preceding year been engaged in manufacturing to the extent of at least half of their total receipts, products described in Classes III (a) and (d) or making cream and manufacturing the skim milk; 15 cents per can in case of regular fluid shipments of outputs of such plants for a fixed period of not less than 20 days or 25 cents per can in case of fluid shipments of a fluctuating character, that is not for shipment of the entire output as fluid for a fixed period of 20 days or started for a fixed period of 20 days and then changed back to manufacturing before the expiration of said 20-day period.

SEC 5. Outside Market Differential.—In the case of Class I milk used outside the marketing area, outside New York State, and outside of the counties listed under Class III (b), a differential may be applied which will adjust the Class I price on such milk to the average price of fluid milk in the market where used, as determined by the market administrator, but in no event shall a deduction exceed the difference between the Class I and III (b) prices hereunder, for the respective months.

Article V—Reports of Handlers

SECTION 1. Monthly Reports.—Each handler shall make a monthly report to the market administrator on or before the 10th day of each month with respect to milk or cream handled by him during the preceding month, except in case of purchases by handlers from collecting cooperatives of milk delivered by members at such handler's receiving plant or plants, in which event the handler shall report to the collecting cooperatives on or before the 8th day of the month and the cooperatives shall make such report to the market administrator on or before the 10th day of the month. Such reports shall show in the detail as follows:

(1) The receipts at each plant from producers who are not handlers;

(2) The receipts at each plant from any other handler, including any handler who is also a producer;

(3) The quantity, if any, produced by the handler; and

(4) The manner in which the respective quantities of milk were sold or used, including sales to other handlers, for the purpose of classification, pursuant to article III and pricing pursuant to article IV.

(5) The net blended price of the handler computed from the classifications and prices.

3415 (6) All such reports shall be made on forms supplied by the market administrator and shall contain all other data necessary to make this order fully effective.

SEC. 2. Verification of Reports.—In order that the market administrator may submit verified reports to the Secretary pursuant to section 4 of article II, each handler shall permit the market administrator or his representative, during the usual hours of business, to

(a) Verify the information contained in reports submitted by such handler pursuant to this article, and

(b) Weigh, sample, and test milk for butterfat.

Article VI—Determination of Uniform Price

SECTION 1. Computation and Announcement of Uniform Price.—The market administrator shall compute and announce the uniform price per cwt. of milk delivered during each delivery period in the following manner;

1. Verify the quantities of milk and the mathematical correctness of reports of handlers.

2. Determine the total quantity of milk of each handler from the reports of such handlers.

3. Determine the total quantity of Class I and II milk of each handler.

4. Determine the quantity of Class I and II milk used in the marketing area by each handler.

5. Determine the percent that 4 is of 3.

6. Determine the total quantity of Class III milk of each handler.

7. Apply the percent, determined in 5, to 6.

8. Add 7 to 4.

9. Add to 8 the amount of milk to which the outside market differential applies.

10. Deduct from 9 the quantity of milk purchased from new producers in accordance with the second proviso of section 3, article VII.

11. Combine into one total the net quantities and values of milk of all handlers included in 10, by the application of the prices for milk containing 3.5 percent butterfat, at a receiving station 201–210 miles from New York City, as set forth in article IV, to which shall be applied an adjustment equal to the difference between the amount of the transportation and butterfat differentials at the rates provided in article IV, sections 2 and 3, for the respective classes and the amount of such differentials at the rate provided for Class I milk; and subject to the deduction of the following differentials:

(a) One cent per cwt. by handlers to be paid to cooperatives which do not collect, or operate plants, for performing services which are for the benefit of the industry in the market, and will aid in effectuating the purposes of the act.

(1) By obtaining or continuing the firm contractual relations with the producers delivering to the plant or plants covered by the respective cooperative so that the milk of such producers is subject to the exclusive sale by the respective cooperative for not less than monthly periods of time, and

(2) By obtaining firm contractual commitments, as to the purchase of such milk for monthly periods from the operator or operators of the plant or plants covered by the cooperative, providing not only for the payment for such milk as is accepted at the prices and under the terms and conditions of this order, but also for the acceptance of all the milk involved during the full duration of the contractual periods and furthermore for its manufacture when not needed by the market in surplus seasons on the best possible basis taking into consideration the milkshed as a whole and general market demands and for the shipment of the milk even though it involves the discontinuance of manufacturing operations whenever it may be necessary in short seasons to furnish an adequate supply of fluid milk at reasonable prices to the market from within the confines of the milkshed and for
3416 its sale in such event at not more than the prices and handling charges fixed herein; Provided however, That nothing herein contained shall prevent application for service payments under article 4, section 5 (a) and (b) above as to any such operation as may be found qualified to receive same;

(3) By furnishing marketing information service to its producers and providing for verification of weights, sampling, and testing of milk purchased from said producers when and where necessary.

(b) 2½ cents per cwt. by cooperatives which collect but do not operate plants, for performing the services set forth in (a) above and for performing additional services which are for the benefit of the industry in the market and will aid in effectuating the purposes of the act.

(1) In providing in such contractual commitments of the plant operator or operators for it or them to report their dispositions of the milk to the respective cooperative in order that it in turn may report to the market administrator as provided in article V and for such cooperative to audit the operators' records to determine the correctness of such reports subject to the recheck by the market administrator hereunder, and

(2) Receiving such reports from the plant operator or operators and reporting therefrom to the market administrator as provided in article V, and

(3) Making such audits, and

(4) Collecting from the operators and disbursing to the producers, and

(5) Guaranteeing payments to the adjustment fund in accordance with article VII, section 1;

(c) 5 cents per cwt. by cooperatives which collect and operate plants, for performing the services set forth in (a) and (b) above and for performing additional services which are for the benefit of the industry in the market, and will aid in effectuating the purposes of the act.

(1) By holding under producer control receiving and handling facilities and in many cases manufacturing equipment, any part of which may be unused for varying periods of time due to production and sale conditions, but which it is necessary to hold available to their own and other producers in order to provide flexibility for the industry in the interest of orderly marketing hereunder and in order that all the milk of such cooperative shall have a market at all times irrespective of favorable or unfavorable conditions of the markets for the products of surplus milk and in order to expand surplus operations quickly to support the fluid market by withdrawing milk from fluid sale when additional fluid shipments are started by condensary plant operators and separators for storage after the seasonal completions of their packs of their estimated requirements for fixed markets for case goods and storage over which estimates and resultant resumptions of fluid shipments producers have no control and in order that all other milk in emergencies may find a market, at least to the extent of such facilities, and

(2) By the creation of reserve funds to assure payments to the adjustment fund as guaranteed in (b) (5) of this paragraph and to assure prompt payment monthly to each producer of the cooperative association of his full distributive share of the proceeds of sale of milk by such association: Provided, That any cooperative making deductions under any of the provisions of this paragraph must be found qualified by the Secretary under article I, paragraph 8, and actually performing as determined by the Secretary, the services for which it is receiving or making deductions under (a), (b), or (c) of this paragraph.

12. Divide the total value of milk, as determined in 11, by the total quantity of milk in 11.

13 Subtract not less than four and not more than five cents for the purpose of retaining a cash balance in connection with the payments set forth in article VII, section 2.

14. Add an amount which will prorate any cash balance available as a result of payments to the market administrator under paragraph 13 of this section and the second proviso of section 3, article VII.

3417 15. On or before the 14th day after the end of each delivery period, mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per cwt. which is the result of these computations, and the Class III prices.

Article VII—Payments for Milk

SECTION 1. Payments by Handlers to Market Administrator.—On or before the 16th day of the month, each handler shall pay to the market administrator the amount by which the net blended value of the milk of such handler covered hereby as based upon such reports exceeds the said uniform price as so determined by the market administrator from such reports, after excluding therefrom butterfat, grade, transportation, and other differentials. The amount so paid shall be deposited in an account to be designated "adjustment fund" and withdrawals therefrom shall be made in accordance with the provisions of section 2 of this article.

SEC. 2. Payments by Market Administrator.—On or before the 18th day of the month, the market administrator shall pay from the "adjustment fund" in trust, to each handler whose report shows that the net blended value of the milk of such handler covered hereby as based upon such reports is less than the said uniform price as so determined by the market administrator, the amount necessary to bring the net blended value of the milk of such handler covered hereby up to the uniform price.

SEC. 3. Payments by Handlers.—On or before the 20th day of the month, each handler other than cooperative associations, shall pay to each cooperative association and each producer for all milk covered hereby delivered by producers to such handler's receiving plant or plants the uniform price subject to a butterfat differential of 4 cents for each $\frac{1}{10}$ of one percent of butterfat above or below 3.2 percent and subject to the transportation differentials as fixed in article III, section 3, and subject to the one cent deduction to be paid direct by handlers to bargaining cooperatives under article VI, section 1, paragraph 11 (a) and subject to any other deductions properly authorized by the producers and cooperatives representing them for payment to such cooperatives or any other person: Provided however, That no such deduction shall be made for payment directly or indirectly to the handler making the deductions; and Provided further, as to each producer who has not regularly delivered milk to a handler, for a period of thirty (30) days prior to the effective date hereof, each handler shall pay to such producer or his collecting cooperative association the Class III (c) price for all milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two (2) full calendar months following the first day of the next succeeding month and shall pay to the market administrator on such milk for addition to the "adjustment fund" any amount by which the net blended value of all the milk of such handler exceeds the price paid for such milk by the handler.

SEC. 4. Location Differential.—Each handler, other than cooperative associations, shall pay to each cooperative association and each

producer for all milk covered hereby, delivered by producers to such handler's receiving plant or plants in the territories hereinafter specified, the respective differentials indicated for the various parts of such territory, in addition to, and at the same time as the payments to be made under section 3 of this article.

20 cents per cwt. for milk testing 3.5% or over

New Jersey Counties:
- Hunterdon.
- Somerset.
- Essex.
- Union.
- Morris.
- Warren.
- Sussex.
- Passaic.

New York Counties:
- Westchester.
- Putnam.
- Dutchess.
- Orange.

And the following towns in Ulster Co.:
- Marbletown.
- Hurley.
- Kingston.
- Ulster.
- Rosendale.
- Esopus.
- New Paltz.
- Lloyd.
- Gardiner.
- Plattekill.
- Marlborough.
- Shawangunk.

Connecticut:
- Litchfield.

3418

10 cents per cwt. for all milk

Columbia Co., N. Y.

Berkshire Co., Mass.

SEC. 5. Saving Clause.—Nothing herein contained shall affect the time of payment for milk shipped by an operating cooperative association or other handler to another handler which time of payment is a matter for negotiation between such seller and buyer. Similarly, nothing herein contained shall be deemed as in derogation or modification of the right of nonoperating cooperatives to require handlers to make payments on account in advance of the final adjustment payments as provided in this article.

SEC. 6. Adjustment of Overpayments and Underpayments.—(1) In the event of any overpayment of any handler to the fiscal agent or to the market administrator through erroneous reports or otherwise, the market administrator shall make adjustment thereof in the next succeeding month in the payment as hereinbefore provided in article VI.

(2) In the event of any underpayment by any handler to the market administrator, through erroneous reports or otherwise, said handler upon demand made by the market administrator shall immediately make payment of said underpayment to the market administrator.

Article VIII—Expense of Administration

SECTION 1. Payments by Handlers.—As a pro rata share of the expense of administration hereof, each handler shall, on or before the 20th of each month pay to the market administrator, a sum not exceeding 2 cents per cwt. on all milk handled by him and covered hereby according to article V and VI, the exact amount to be determined by the market administrator subject to review by the Secretary. In case the handler pays to a collecting cooperative association for milk delivered by its producers to the handler's receiving plant or plants such payment shall be made by the handler to such cooperative association in addition to the payment for the milk as provided herein at the prices fixed hereby and then paid over immediately by such cooperative association to the market administrator.

Article IX—Handlers Who Are Also Producers

SECTION 1. Milk Purchased from Producers.—In the case of a handler who is also a producer and has purchased milk from producers, the market administrator shall, in the computations set forth in article V first exclude the milk purchased by him in each class from other handlers, and then apportion the milk purchased by him from producers to each class according to the ratio which such handler's remaining total sales in each class bears to his remaining total sales in all classes.

Article X—Miscellaneous Provisions

SECTION 1. Suits by Market Administrator.—The market administrator may maintain a suit in his own name against any handler for the collection of any sum which the handler is required to pay to the market administrator hereunder, including the handler's pro rata share of expenses as set forth in article V.

SEC. 2. Derogation.—Nothing contained in this order is or shall be construed to be in derogation or in modification of the rights of the Secretary or of the United States (a) to exercise any powers granted by the act or otherwise, and (b) in accordance with such powers to act in the premises whenever such action is deemed advisable.

SEC. 3. Duration of Immunities.—The benefits, privileges and immunities conferred by virtue of this order shall cease upon its termination, except with respect to acts done under and during the existence of this order, and the benefits, privileges, and immunities conferred by this order upon any handler shall cease upon its termination, except with respect to acts done under and during the existence of this order.

3419 SEC. 4. Action of State Authorities.—This order shall not be exclusive of orders or other regulations issued by the duly constituted authorities of any State, insofar as such orders or regu-

lations are issued or shall be issued relating primarily to milk not in interstate or foreign commerce.

SEC. 5. Unfair Competition.—It shall be an unfair method of competition and an unfair trade practice for any handler, continuously or repeatedly, to sell milk, or any product thereof, in or for the marketing area at prices lower than the prices herein named as minimum prices, plus reasonable handling, processing and transportation charges, with the purpose or with the result that such handler substantially increases its business of such kind in or for said area by such practices.

Article XI—Effective Time, Termination, and Suspension

SECTION 1. Effective Time.—This order shall become effective at such time as the Secretary may declare above his signature attached hereto, and shall continue in force until terminated in one of the ways hereinafter specified.

SEC. 2. Suspension.—The Secretary may at any time suspend this order, by giving at least ten (10) days' notice by means of a press release or in any other manner which the Secretary may determine.

SEC. 3. Termination.—(1) The Secretary may at any time terminate this order, by giving at least ten (10) days' notice by means of a press release or in any other manner which the Secretary may determine.

(2) The Secretary shall terminate this order at the end of any month whenever he finds that such termination is favored by a majority of the producers who during the preceding month have been engaged in the production for market of milk in the marketing area, or who, during such preceding month, have been engaged in the production for sale of milk in the marketing area; Provided, That such majority have during such preceding month produced for market or produced for sale more than 50 percent of the volume of the milk produced for market or produced for sale within the production area.

(3) This order shall in any event terminate whenever the provisions of the act authorizing it cease to be in effect.

SEC. 4. Effect.—Unless otherwise provided by the Secretary in the notice of amendment, termination or suspension of the provisions hereof, the amendment, termination, or suspension shall not (a) affect, waive or terminate any right, duty, obligation or liability which shall have arisen or may thereafter arise in connection with any provision of this order; (b) release or waive any violation of this order occurring prior to the effective date of such amendment, termination or suspension; or (c) affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violation.

SEC. 5. Continuing Power and Duty.—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the market administrator, or by any other person,

the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The market administrator shall (a) continue in such capacity until discharged by the Secretary; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator or such person, to such person as the Secretary shall direct; and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property and claims vested in the market administrator or such person pursuant to this order.

SEC. 6. Liquidation.—Upon the termination or suspension of this order, the market administrator shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his
3420 control, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator in liquidating the business of the market administrator's office, shall be distributed by the market administrator to the contributing handlers and producers in an equitable manner.

N. B.—In addition to the foregoing provisions proposed by the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., which are appropriate to either a marketing agreement or an order, the following formal provisions appropriate to a marketing agreement are presented for discussion at the public hearing:

Article XII—Liability

SECTION 1. Handlers.—The liability of the handlers hereunder is several and not joint and no handler shall be liable for the default of any other handler.

Article XIII—Amendments

SECTION 1. Proposals.—Amendment of any or all provisions hereof may at any time be proposed in writing by any handler signatory hereto or by the Secretary. Any amendment proposed in writing by any one or more handlers signatory hereto shall be deposited with the market administrator who shall promptly mail the same to the Chief of the Dairy Section, Agricultural Adjustment Administration, United States Department of Agriculture, Washington, D. C.

Article XIV—Anti-Trust Laws

SECTION 1. Anti-trust Laws.—Any exemption from the anti-trust laws and any validation of any acts or things, which otherwise would have been unlawful, resulting from the execution of this agreement

by the Secretary, shall not extend or be construed to extend further than is absolutely necessary for the purpose of carrying out the provisions of this agreement.

Article XI—Duration of Immunities

SECTION 1. Duration of Immunities.—The benefits, privileges, and immunities conferred by virtue of this agreement shall cease upon its termination, except with respect to acts done under and during the existence of this agreement, and the benefits, privileges, and immunities conferred by this agreement upon any parties signatory hereto shall cease upon its termination as to such party, except with respect to acts done under and during the existence of this agreement.

Article XVI—Agents

SECTION 1. Agents.—The Secretary may, by a designation in writing, name any person (not a party to this agreement), including any officer or employee of the Government, or name any bureau or division of the Department of Agriculture, to act as his agent or representative in connection with any of the provisions of this agreement.

3421 Article XVII—Additional Parties and Counterparts

SECTION 1. Additional Parties.—After this agreement first takes effect, any handler may become a party to this agreement if a counterpart thereof is executed by him and by the Secretary. This agreement shall take effect, as to such handler, at such time as the Secretary may declare above his signature attached to such counterpart, and the benefits, privileges, and immunities conferred by this agreement shall then be effective as to such handler.

SEC. 2. Counterparts.—This agreement may be executed in multiple counterparts, and when one counterpart is signed by the Secretary all such counterparts shall constitute, when taken together, one and the same instrument, as if all such signatures were obtained in one original.

3422 *Exhibit No. 22 to Stipulation*

MR. DAIRYMAN—SAVE THIS BOOKLET—THE PLAN IT EXPLAINS MAY SAVE YOUR FARM

3423 Hearings Will Be Held On This Order At Albany, May 16; Malone, May 17; Syracuse, May 18; Elmira, May 19; New York, May 20.

Study the Plan—Attend the Hearings—Present Your Views

This booklet contains a copy of the Federal Order accepted by the Secretary of Agriculture and the Commissioner of Agriculture and Markets of the State of New York as the basis for public hearings in the Milk Shed. This Order was prepared by representatives of producers with some assistance from Federal and State authorities and represents the combined efforts and experience of many farm leaders. Six months of hard work has gone into its development and preparation. The operation of Federal Orders in other Milk Sheds has been carefully studied and checked to the end that mistakes or omissions occurring in them might be avoided or guarded against in this Order. This Milk Shed was carefully surveyed, its unusual features examined, and the trend of its experience over a period of years carefully noted. A complete study of milk production and farm economics in its relation to distribution and consumption of milk, together with the statistical and factual information available in regard to the utilization of milk, the periodic problem of surplus and shortage conditions provided the basis upon which this proposed Order is established.

Principles Upon Which the Order is Based

From an examination of all the facts in the case viewed in the light of the experience of past efforts to direct the industry toward the goal of orderly, stabilized marketing, it was generally agreed that any plan presented to producers must be built around certain acceptable principles; that those principles must be supported fully by the mechanical and legal necessary means to give them full force and effect. The fundamental requirements of the industry which this Order seeks to establish are five in number, viz:

1. An equal purchase price to be paid by all dealers for milk for the same use.

2. An equal share to each producer of the benefits of the fluid markets.

3. An equal share by each producer in the burden of the surplus and the expense of controlling it.

4. Reasonable contribution to those having surplus facilities for the use of them seasonally for market protection.

5. Effectuation of the foregoing principles in such a manner as will perpetuate and encourage farmers' cooperative organizations.

The Order then is a statement of these five basic essentials in legal verbiage, surrounded, fortified, and explained by the language and terms required to give them legal effect and protect them from overthrow, disregard, or violation by opposing or unfriendly interests. Complete simplicity in the terms of the Order is impossible, partly because of the complexity of the subject dealt with and partly be-

cause of the impossibility of giving the desired legal effect to certain provisions without employing the language of the Courts. It is confidently believed that the present Order can successfully withstand any assaults upon its legality. If this be so, it is important for the success of the Order, if adopted, depends upon its uninterrupted enforcement.

Definitions

The Order in establishing the five basic ideas outlined above, first defines the terms to be used many times throughout the docu-
3425 ment itself. This is done to avoid any confusion or disagreement over definitions. Definitions are as important in this document as they were in learning grammar in school, and setting them forth in the Order avoids any possibility of disagreement later on as to what certain terms mean. In this way, the marketing area, person, producer, handler, cooperative association, etc., have been defined and if the Order is accepted each of those terms will have the meaning that the Order says it has and no person can successfully substitute a different definition.

Administration

Having disposed of definitions, the Order next takes up the subject of who shall administer the Order and the duties and powers attaching to that office. This is important because in this section, we learn the limits of the power given the Administrator. The American people and especially farmers are intense believers in this retention, by the people, of all power except that which is especially delegated by them to the State or the Federal Government and any delegation of such power should be carefully examined. The man appointed will be the appointee of both the Secretary of Agriculture and the State Commissioner of Agriculture and Markets. A State Order containing the same provisions as the Federal Order will be submitted by the Commissioner of Agriculture and Markets at the public hearing The two Orders are practically identical and are necessary in order that regulation of both interstate and intrastate milk can be secured. The greatest contributing cause to the failure of Milk Control was inability of the State to regulate interstate shipments. The distributors avoided the State Law by claiming their operations to be interstate. This time we don't intend that any dealer, regardless of the character of his operations, shall be able to evade compliance under the provisions of this Order. Reading this section, you will find that the Order strictly defines the power possessed by the Administrator. Unless the Order contains the power for him to do certain things, he cannot do them. The power he has can only be exercised in the manner set forth in the Order. He is no Dictator in any sense of the word. Rather he is a man skilled in accounting and investigation for his principal duty is in checking the activities of milk dealers.

The Order is an order to regulate distributors, not an order to regulate producers. There are no reports by producers to the Administrator and he has no power to compel producers to do or not to do anything. Neither the Administrator nor any employee of his office is empowered under the Order to inspect producers' premises, regulate milk production, nor interfere in any way, by suggestion or otherwise, with the business as now carried on by any producer. His job is to check weights, tests at plants and to investigate dealer movements of milk. He is appointed by the Secretary of Agriculture and the Commissioner of Agriculture and Markets of the State of New York and is removable by the Secretary at any time. What his salary will be, no one knows, but it will be about the same as that paid other government employees performing the same character of work.

The Administrator will maintain a staff of investigators, accountants, etc. The entire expense of his office, including salaries, will be borne by a levy of not to exceed 2¢ per cwt. paid by every distributor monthly to the Administrator on the milk handled during the 3426 preceding month. This 2¢ or less per cwt. does not come out of the producer's check but is paid by the distributor in addition to the fixed price paid producers by the terms of the Order. The Administrator is compelled to furnish ample bond so no losses can be incurred by his misbehavior. Who will be appointed Administrator cannot be foretold but we can rest assured that producers will be consulted and advised with before the appointment is made. The Government is as anxious for successful administration of this Order as we are and the imposition of an Administrator unapproved by the industry, would make a distinctly unfavorable start.

How Will Milk Be Sold?

Milk will be sold in three classes and those classes are defined in Art. 3 of the Order. You will note that in defining Class 1, all milk which leaves a country plant and enters the Marketing Area will be paid for as Class 1. This will break up the age-old practice of dealers reclassifying fluid milk after it reaches the city. A dealer who receives 600 cans, or any other number of cans, of fluid in New York, cannot say, "I used 300 for fluid and 300 for cream," and pay for it on the basis. He must pay the Class 1 price. Everything shipped as milk or cream into the Marketing Area must be paid for under Class 1 or Class 2, as the case may be. Marketing Area is defined as New York City, Westchester, Nassau, and Suffolk counties.

Class 3 milk, which is the manufactured class, is subdivided into four sections and paid for according to formulas which have been used by the industry and the Milk Control Board for many years. However, some important gains in prices to producers have been provided for. In the butter formula, making deduction has been reduced from 4¢ to 3¢ and overrun increased from 16% to 20%. In the cheese formula the deduction for making has been reduced from 3¢ to 2¢.

Butterfat and Freight Differentials

In all classes of milk, prices are based on 3.5% butterfat with [illegible] added for each 1/10 percent in excess of 3.5%. All milk is delivered by the producer f. o. b. country plant subject to a freight differential computed upon the 201–210 mile zone but on a new basis. At present your milk is subject to a freight differential based upon the less than carload lot can shipment rate. This order provides that the tank car freight rate shall be used in figuring transportation differentials. When put into effect, thousands of dollars will be diverted from dealers' to producers' pockets by this change. This particular section will meet with solid opposition from dealers at the hearings but we feel we are well prepared to demand its adoption because almost no milk is shipped today in less than carlot shipments.

Grade A Premium

The present system of grading milk is not interfered with. Grade A premiums will continue on the present basis as far as the Order is concerned. The prices established by the Order are on a Grade B basis to which will be added such Grade A premiums as each producer earns.

The Method of Establishing Prices

Article 4 of the Order deals with the prices which are to be fixed in the Order and from the viewpoint of many producers con-
3427 stitutes the most important section in the Order. The prices inserted in the Order are tentative prices and placed in the Order merely by way of example and as a basis for discussion. The price of milk in Classes 1 and 2 will be fixed at the public hearings by the producers themselves thru testimony offered by them. Under the law and under this Order no other authority than the producers can fix the price. After the price is fixed by the producers, it becomes the legal price dealers are compelled to pay. And let us say at this point, that not only prices, but every line of this Order is subject to change, alterations, or complete deletion if proof is produced at the hearing indicating that such action is needed. There is nothing fixed as far as the contents of the Order is concerned until after the public hearings. In fact, the hearings are for the purpose of writing the Order and this proposed Order is but the basis upon which the Order is written, so if some provision of this Order is unsatisfactory to you, don't think that you have to accept it as written, for you need not. Present your objections and your proof at the hearings and if you are right, the Order will undoubtedly be changed.

The Control of Surplus

In Section 4 of Article III, you will find provisions made for certain market service differentials which are to be deducted from the pool before the uniform price is set and paid to those perform-

ng the services. The Order seeks to keep "distress" milk off the fluid market by supplying only normal fluid market demands and providing for the manufacture of such milk as may be in excess of such demands. Thus you maintain the stability of your fluid and cream market, protect its price and in so doing will receive a higher blended price than if you sold all of your milk as fluid but contributed to market break-down in so doing. Competition for fluid markets by producer groups has periodically caused market breakdown. Eliminate that competition by equalization of prices by which you give every producer his share of the fluid market but compel him to bear his portion of the burden of surplus, and you maintain a stable market. For example, the cooperative to which your milk is being delivered may not be equipped to manufacture surplus. Let's say the fluid requirements of your dealer are 200 cans daily. Your plant is taking in 300 cans so you have 100 cans which would be shipped to New York, under present conditions, as fluid at "distress" milk prices, contributing to further market demoralization. Under the Order, we will say that 20 miles away from your plant is a manufacturing plant, so you load your 100 cans of surplus on a truck and take it to the manufacturing plant. For that service, your plant receives from the Administrator 20¢ per can handling charge, or $20, and for transporting the milk your plant receives 8¢ per cwt. Carrying out the principle of an equal share by each producer in the surplus and the expense of controlling it, the Order has provided compensation to those who bear surplus expense and has equitably distributed that expense over the industry.

Serving markets During Shortage Periods

Paragraph (b) in Section 4 compensates manufacturing plants for diverting milk from manufacture to fluid during short periods. The market must be assured of an adequate supply of milk during every part of the year. That is our obligation as producers and if 3428 we fail to fulfil it, the City of New York will secure milk elsewhere. To supply fluid markets in short seasons, we must fall back upon milk which is being delivered to manufacturing plants. Everyone knows that a manufacturing plant has a much greater investment in equipment than a fluid plant and if it is compelled to suspend manufacturing and supply the fluid market, it means idle equipment and unprofitable investment. No manufacturing plant can ship fluid milk as cheaply as a fluid plant. Its business is interfered with by being compelled to ship fluid and it is compensated for that interference and for serving the market.

Dealers' Reports

Under Article 5, all handlers are instructed as to what reports they must make. Every effort has been made to provide complete and detailed information in regard to everything which should be known by the Administrator in respect to the movement of milk. In addition

to that, we at last have a means thru the Administrator and his investigators of checking on the accuracy of these reports monthly. If the Order provided no other benefit, that in itself would be sufficient to recommend it to the producers for when you finally get an honest classification of your milk, a larger part of the consumer's dollar is going to return to you.

Uniform Price and Co-operative Service

In setting up the method for the determination of the uniform price, the three principles recognized as basic requirements are carried out. That uniform price guarantees first, "an equal purchase price to be paid by all dealers for milk for the same use." Second, "an equal share to each producer of the benefits of the fluid outlets," and third, "an equal share by each producer in the burden of surplus and the expense of controlling it." Article 6 merely provides the exact mechanical and mathematical formula for attaining the result and places a value on the services rendered by co-operatives of various types. This Order as well as the law which authorizes it, is founded upon a conviction held by Congress, the State Legislature, and farm leaders, that agricultural progress depends upon the successful development of the co-operative. In most states it is the declared policy of the Legislature expressed in law. Our experience justifies recognition of the cooperative as the most potent instrument in the hands of the farmers for the improvement of their condition. Advancement has been more rapid and successful where the co-operative principle has been permitted to work. The fact that the principal discouragement of co-operative action is voiced by the middleman who makes his living handling farm products, should be a convincing argument in its favor, if any were needed. This Order, then, is founded upon a belief in the utility of the co-operative as a means of securing economic justice and equality. To encourage co-operative effort, we have made a vital part of this document the last basic principle deemed essential, "the effectuation of the Order in such a manner as will perpetuate and encourage co-operatives." Furthermore, no marketing agreement or price order has ever been successful in any market except where it had the backing of sound co-operatives.

Three classes of co-operatives are recognized: first, bargaining co-operatives which comprise those co-operatives which are organized for the purpose of maintaining firm contractual relations with
3429 their dealer, represent their membership in the adjustment of local differences and supervise vigilantly all operations, producer and distributor, in order that its members may be constantly informed as to the details of their business. Second, bargaining and collecting co-operatives which, in addition to the service performed by the first class, collect the money from the dealer and disburse it to the members, and third, bargaining, collecting, and operating co-

operatives or those which perform complete co-operative service by way of plant ownership, manufacturing facilities, etc. Co-operatives of the first and second class may develop and qualify for inclusion in the third class, and unorganized farmers can incorporate and qualify for such class as their operations entitle them to. These provisions in the Order, while compensating co-operatives for the services rendered at present, are intended to be an incentive to country plant ownership and operation by every co-operative. The sums earned by these co-operatives are deducted before the uniform price is set. Each co-operative contributes on an equal basis and withdraws benefits according to the service rendered. Each co-operative pays the expenses of the operation of its own organization. There is no charge against any producers for losses incurred, inefficiency, or mismanagement in any co-operative except his own.

Payments for your milk will be made each month by your dealer or co-operative direct to you and in instances where dealers are paying twice a month there is nothing in the order to prevent that arrangement continuing. Your present relations with your dealer continue, except that he must pay the prices fixed in the Order and must correctly classify his purchases of milk. Your dealer's financial rating is still of importance to you, with this difference; many producers have been shipping to dealers of doubtful responsibility in order to retain fluid outlets. Under the Order you get the same price for your milk whether it is sold as fluid or manufactured, so if you have a dealer whose credit is in doubt you can refuse to sell him and manufacture your milk and receive the same price as if it had been used for fluid.

The rest of the Order is composed of stock provisions which do not affect other than to strengthen the administration. It is expected that if accepted by the producers this Order can go into effect about July 1st. Hearings must first be held on the Order and provision has been made for the holding of five public hearings in the State of New York. Shortly after the conclusion of the hearings a vote will be taken on a day designated by the Secretary and if two-thirds of the persons voting, individually or by co-operatives are in favor of the Order it becomes effective upon the Secretary attaching his signature thereto. The Secretary of Agriculture may suspend or terminate the Order on ten days' notice, and he must terminate it at the end of any month if 51% of the producers producing 50% of the milk request it. The method of termination is simple and no involved procedure is necessary to get rid of the Order if it does not work out as anticipated.

This is a sincere effort by a large percentage of all producers to provide a plan which will assure to the producer a living price for milk. As such it is submitted for your consideration and your action.

April 28, 1938.

METROPOLITAN COOPERATIVE
MILK PRODUCERS' BARGAINING AGENCY, INC.

PROPOSED ORDER, UNDER PROVISIONS OF THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, FOR THE NEW YORK METROPOLITAN MILK MARKETING AREA

(Findings, made by the Secretary, to be inserted.)

Article I—Definitions

The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which re-enacts and further amends certain provisions of Public No. 10, 73rd Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "New York Metropolitan Milk Marketing Area" means the City of New York and Nassau, Suffolk, and Westchester Counties, all in the State of New York, and is hereinafter called the marketing area.

4. "Person" means any individual, partnership, corporation, association, and any other business unit.

5. "Producer" means any person who delivers milk of his own production to a handler at a plant approved by a health authority having jurisdiction in any part of the marketing area during each respective monthly period.

6. "Handler" means any person, including a cooperative association, who receives milk from producers or cooperative associations at one or more plants which are approved for the sale of milk by health authorities having jurisdiction in any part of the marketing area and who engages in such handling of milk or cream as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce.

7. "Market Administrator" means the agency for the administration hereof which is described in Article II.

8. "Cooperative Association" means a cooperative corporation of producers, organized or operated under or subject to the provisions of Chapter seventy-seven of the Consolidated Laws of the State of New York, or of similar laws of other states, engaged in making collective sales or marketing of milk for the producers represented thereby, and complying with the provisions of act of Congress of February eighteenth, nineteen hundred twenty-two, entitled "An Act to Authorize Association of Producers of Agricultural Products."

9. "Plant" means the building where milk is received and which is approved by a health authority having jurisdiction in any part of the marketing area.

Article II—Market Administrator

SECTION 1. Selection, Removal, and Bond.—The Market Administrator shall be selected and shall be subject to removal by the Secretary. The Market Administrator shall, within 45 days follow-

ng the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful 1951 performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

SECTION 2. Compensation.—The Market Administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

SECTION 3. Powers.—The Market Administrator shall have power:

1. To administer the terms and provisions hereof.

2. To receive, investigate, and report to the Secretary complaints of violations of this order.

SECTION 4. Duties.—The Market Administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein.

2. Submit his books and records to examination by the Secretary at any and all times.

3. Furnish such information and such verified reports as the Secretary may request.

4. Obtain a bond with reasonable security thereon, covering each employee who handles funds entrusted to the Market Administrator.

5. Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person, who within 15 days after the date upon which he is required to perform such acts, has not

(a) Made reports pursuant to Article V or

(b) Made payments pursuant to Article VII.

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof.

7. Pay out of the funds received

(a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the Market Administrator;

(b) His own compensation, and

(c) All other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties.

8. Maintain a main office, and such branch offices as may be necessary.

SECTION 5. Responsibility.—The Market Administrator in his capacity as such, shall not be held responsible in any way whatever to any handler or to any other person, for errors in judgment, for mistakes or for other acts either of commission or omission, except for his own willful misfeasance, malfeasance or dishonesty.

Article III—Classification of Milk

SECTION 1. Milk received by handlers at plants approved by the health authorities of any part of the marketing area as sources of supply for such area, shall be classified as follows:

1. Class 1 milk shall be all milk which leaves such plant in fluid form, except when there is a clear record of use as provided in Section 2 of this article.

3432 2. Class 2 milk shall be all milk which leaves, or is on hand at such plan in the form of cream, plain condensed milk, homogenized mixtures, or cheeses of the soft type, such as Cream, Neufchatel, Pimento, Pimento Olive, De Brie, D'Isigny, Lunch, Kosher, Petit Suisse, or used as either whole or partly skimmed milk in Farmer Pressed Cheese, except when there is a clear record of its use in Class 3.

3. Class 3 milk shall be all milk which leaves or is on hand at such plant in the following forms:

(a) Sterilized and evaporated whole milk, sweetened whole condensed milk, milk chocolate, whole milk powder, and milk powder with added milk fat, powdered malted milk and all cheese other than the soft cheeses described in Class 2, and other than American Cheese.

(b) Milk separated to contain at least 43% butterfat, frozen, and stored in licensed cold storage warehouses; whole milk, cream, or unsweetened condensed milk used in the manufacture of ice cream outside New York City; cream, plain condensed milk or homogenized mixtures used outside the marketing area, outside of New York State, and outside of the following counties:

Maryland:
Cecil.
Massachusetts:
Berkshire.
New Jersey:
Bergen.
Burlington.
Essex.
Hudson.
Hunterdon.
Mercer.
Middlesex.
Morris.
Passaic.
Somerset.
Sussex.
Union.
Warren.
Vermont:
Addison.
Bennington.
Chittenden.
Franklin.
Rutland.
Pennsylvania:
Bradford.
Center.
Chester.
Clearfield.
Clinton.
Columbia.
Crawford.
Dauphin.
Erie.
Juniata.
Lackawanna.
Lancaster.
Lebanon.
Luzerne.
Lycoming.
McKean.
Mifflin.
Montour.
Northampton.
Northumberland.
Perry.
Potter.
Snyder.

Pennsylvania—Continued.

Sullivan.	Wayne.
Susquehanna.	Wyoming.
Tioga.	York.
Union.	Connecticut:
Warren.	Litchfield.

(c) Butter.
(d) American Cheese.

SECTION 2. In the event that milk is moved in fluid form from a plant where it was received from producers to another plant outside of the marketing area, classification of such milk shall be made in accordance with the clear record of its movement from or use at the second plant.

Article IV—Minimum Prices

SECTION 1. Minimum Prices.—The prices for milk received hereunder by handlers, f. o. b. country receiving plants, subject to the transportation and other differentials as herein provided for the purpose of the determination of the uniform price and the resultant payments to the Market Administrator and to producers and to associations of producers as provided in Articles VI and VII hereof, shall be as follows:

1. For Class 1 milk, $2.20 per cwt. for the months of March, April, May, June, and July; $2.67 per cwt. for the months of August, September, October, November, December, January, and February.

3433

2. For Class 2 milk, $2.00 per cwt. for the months of March, April, May, June, and July; $2.20 per cwt. for the months of August, September, and October; $2.40 per cwt. for the months of November, December, January, and February.

The above prices for the months of March, April, May, June, and July remain in effect for each month unless the official New York average outside quotations for 92 score butter, as determined by the Market Administrator for the thirty days preceding the twenty-fifth day of the preceding month, is below 25¢ or above 34¢, in which event such prices shall be changed in accordance with the following schedule:

Butter price (cents)	Class 1 price	Class 2 price
	Dollars	*Dollars*
Under 20	1.73	1.60
20-24	1.97	1.80
25-34	2.20	2.00
35-39	2.44	2.20
40-44	2.67	2.40
Over 44	2.91	2.60

The above prices for the months of August, September, October, November, December, January, and February remain in effect for

each month unless the official New York average outside quotation of 92 score butter, as determined by the Market Administrator for the thirty days preceding the twenty-fifth day of the preceding month, is below 30¢ or above 39¢, in which event such prices shall be changed in accordance with the following schedule.

Butter price (cents)	Class 1 price	Class 2 price Aug., Sept., Oct.	Class 2 price Nov., Dec., Jan., Feb.
	Dollars	*Dollars*	*Dollars*
Under 25	2.20	1.80	2.0
25-29	2.54	2.00	1.9
30-39	2.67	2.20	2.0
40-44	2.91	2.40	2.0
45-49	3.14	2.60	2.0
Over 49	3.38	2.80	3.0

3. For Class 3 milk, as follows:

(a) For milk used in manufacturing evaporated whole milk and otherwise, as stated in subdivision (a) of Class 3, a price per cwt. 10¢ higher than the average as computed by the Market Administrator of the prices paid at the following mid-west condenseries:

Bordens

Mt. Pleasant, Mich.
New London, Wis.
Greenville, Wis.
Black Creek, Wis.
Orfordville, Wis.

Carnation

Sparta, Mich.
Chilton, Wis.
Berlin, Wis.
Richland Center, Wis.
Oconomowoc, Wis.
Jefferson, Wis.

Pet

Hudson, Mich.
Wayland, Mich.
Coopersville, Mich.
New Glarus, Wis.
Belleville, Wis.
Delta, Ohio
Coldwater, Ohio

(b) For milk used in manufacturing frozen cream, and otherwise as stated in subdivision (b) of Class 3, a price per cwt. determined by the price of milk for butter as computed as hereinafter set forth, plus 20¢ per cwt.;

3434 (c) For milk made into butter, a price determined for each month by the Market Administrator by taking the official New York average outside quotations for 92 score butter for the respective month, deducting 3c a pound for making and figuring an overrun of 20%;

(d) For milk made into American Cheese, a price determined by the Market Administrator by taking the average weekly quotations for the respective month per pound of cheese, with differentials as indicated at the following markets, or of the quotation with differentials as indicated from such of these markets as may issue quotations during the period; Single Daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at

Board of Trade, Cuba, New York. From the average price of cheese, as determined from these quotations and differentials, shall be deducted two cents per pound of cheese allowance for making, and the price per 100 pounds of milk shall be computed according to the yield of cheese per 100 pounds of milk as follows:

B. F. test (percent)	Cheese yield	B. F. test (percent)	Cheese yield	B. F. test (percent)	Cheese yield
10	8.30	3.9	10.37	4.8	12.44
11	8.53	4.0	10.60	4.9	12.67
12	8.76	4.1	10.83	5.0	12.90
13	8.99	4.2	11.06	5.1	13.13
14	9.22	4.3	11.29	5.2	13.35
15	9.45	4.4	11.52	5.3	13.59
16	9.68	4.5	11.75	5.4	13.82
17	9.91	4.6	11.98	5.5	14.05
18	10.14	4.7	12.21		

SECTION 2. Butterfat Differentials.—The above prices in Classes 1, 2, and 3 (b) are based on milk containing 3.5% butterfat and are subjected to the addition of 4 cents for each 1/10 of 1% butterfat above 3.5% and to the deduction of 4 cents for each 1/10 of 1% butterfat below 3.5%, and the amount of such differential to be added to or deducted from the prices in Class 3 (a) and 3 (c) are to be figured on a direct ratio between the milk fat content and the price.

SECTION 3. Transportation Differentials.—The above prices in Classes 1, 2, 3 (a), and 3 (b) are subject to the application of transportation differentials on the basis of the distance of the receiving plants from New York City, as follows:

Cents per cwt.

Miles	Class 1 and whole milk in Class 3 (b)	Classes 2 and 3 (b)—except whole milk	Class 3 (a)	Miles	Class 1 and whole milk in Class 3 (b)	Classes 2 and 3 (b)—except whole milk	Class 3 (a)
10	+15	+8	+4	251-260	−3.5	−2	−1
20	+14	+8	+4	261-270	−3.5	−2	−1
25	+13	+8	+4	271-275	−3.5	−2	−1
30	+13	+7	+4	276-280	−3.5	−3	−1
40	+13	+7	+4	281-290	−4.5	−3	−1
50	+10.5	+7	+4	291-300	−5.5	−3	−1
60	+10.5	+6	+3	301-310	−5.5	−4	−2
70	+9.5	+6	+3	311-320	−5.5	−4	−2
75	+8	+6	+3	321-325	−7	−4	−2
80	+8	+5	+3	326-330	−7	−5	−2
90	+8	+5	+3	331-340	−7	−5	−2
91-100	+7	+5	+3	341-350	−8	−5	−2
101-110	+7	+4	+2	351-360	−8	−6	−3
111-120	+6	+4	+2	361-370	−8	−6	−3
125	+5	+4	+2	371-375	−9	−6	−3
130	+5	+3	+2	376-380	−9	−7	−3
140	+5	+3	+2	381-390	−9	−7	−3
150	+3.5	+3	+2	391-400	−9	−7	−3
160	+2.5	+2	+1	401-410	−10.5	−8	−4
170	+2.5	+2	+1	411-420	−10.5	−8	−4
175	+1.5	+2	+1	421-425	−10.5	−8	−4
180	+1.5	+1	+1	426-430	−10.5	−9	−4
190	+1.5	+1	+1	431-440	−11.5	−9	−4
200	0.0	+1	+1	441-450	−11.5	−9	−4
210	0.0	0	0	451-460	−11.5	−10	−5
220	−1	0	0	461-470	−12.5	−10	−5
225	−1	0	0	471-475	−12.5	−10	−5
230	−1	−1	0	476-480	−12.5	−11	−5
240	−2	−1	0	481-490	−14	−11	−5

The above applies to all points except those from which points th railroads have different rates. Where improved highway mileag suitable for such hauling is available and shorter, it shall govern. On milk shipped by rail, there shall be a further differential of 5c per cwt. for truck shuttle handling from city railroad sidings to pa teurizing plants on reports by the handler.

SECTION 4. Market Service Differentials.—The above prices are subject to the deduction of the following differentials which are hereby authorized for services which, the Secretary has found, are for the benefit of the industry in the market and will aid in effectuating the purposes of the Act.

(a) By cooperatives and other handlers for receiving plants handling costs and transportation charges when milk is di-
3436 verted in flush seasons to plants equipped to make products described in Class 3 (a) and (d), or plants equipped to make butter or cream and manufacture the skim milk, from receiving plants regularly engaged in shipping fluid milk to the marketing area, to protect markets; 20 cents per can receiving plant handling cost and plus reimbursement for transportation to such manufacturing plant at 4c per cwt. for first five miles or fraction thereof plus ¼¢ per cwt. per mile for the next 20 miles or fraction thereof, and ⅒ of 1¢ per cwt. per mile thereafter.

(b) By cooperatives and other handlers for extra expense involved in shipping milk, in short seasons to protect markets, by fulfilling market demands equitably as to all distributors from plants equipped for and which had during the preceding year been engaged in manufacturing to the extent of at least half of their total receipts, products described in Classes 3 (a) and (d) or making cream and manufacturing the skim milk; 15c per can in case of regular fluid shipments of outputs of such plants for a fixed period of not less than 20 days or 25c per can in case of fluid shipments of a fluctuating character, that is not for shipment of the entire output as fluid for a fixed period of 20 days or started for a fixed period of 20 days and then changed back to manufacturing before the expiration of said 20-day period.

SECTION 5. Outside Market Differential.—In the case of Class 1 milk used outside the marketing area, outside New York State, and outside of the counties listed under Class 3 (b), a differential may be applied which will adjust the Class 1 price on such milk to the average price of fluid milk in the market where used, as determined by the Market Administrator, but in no event shall a deduction be made which exceeds the difference between the Class 1 and 3 (b) prices hereunder, for the respective months.

Article V—Reports of Handlers

SECTION 1. Monthly Reports.—Each handler shall make a monthly report to the Market Administrator on or before the 10th day of each month with respect to milk or

preceding month, except in cases of purchases by handlers from collecting co-operatives of milk delivered by its members at such handler's receiving plant or plants, in which event the handlers shall report to the collecting co-operatives on or before the 8th day of the month and the co-operatives shall make such report to the Market Administrator on or before the 10th day of the month. Such reports shall show in the detail as follows:

1. The receipts at each plant from producers who are not handlers.
2. The receipts at each plant from any other handler, including any handler who is also a producer.
3. The quantity, if any, produced by the handler.
4. The manner in which the respective quantities of milk were sold or used, including sales to other handlers, for the purpose of classification, pursuant to Article III and pricing pursuant to Article IV.
5. The net blended price of the handler computed from the classifications and prices.
6. All such reports shall be made on forms supplied by the Market Administrator and shall contain all other data necessary to make this order fully effective.

SECTION 2. Verification of Reports.—In order that the Market Administrator may submit verified reports to the Secretary pursuant to Section 4 of Article II, each handler shall permit the Market Administrator or his representative, during the usual hours of business, to

(a) Verify the information contained in reports submitted by such handler pursuant to this Article, and

(b) Weigh, sample and test milk for butterfat.

Article VI—Determination of Uniform Price

SECTION 1. Computation and Announcement of Uniform Price.—The Market Administrator shall compute and announce the uniform price per cwt. of milk delivered during each delivery period in the following manner:

1. Verify the quantities of milk and the mathematical correctness of reports of handlers.
2. Determine the total quantity of milk of each handler from the reports of such handlers.
3. Determine the total quantity of Class 1 and 2 milk of each handler.
4. Determine the quantity of Class 1 and 2 milk used in the marketing area by each handler.
5. Determine the percent that 4 is of 3.
6. Determine the total quantity of Class 3 milk of each handler.
7. Apply the percent, determined in 5, to 6.
8. Add 7 to 4.
9. Add to 8 the amount of milk to which the Outside Market Differential applies.

10. Deduct from 9 the quantity of milk purchased from new producers in accordance with the second proviso of Section 3, Article VII.

11. Combine into one total the net quantities and values of milk of all handlers included in 10, by the application of the prices for milk containing 3.5% butterfat, at a receiving station 201–210 miles from New York City, as set forth in Article IV, to which shall be applied an adjustment equal to the difference between the amount of transportation and butterfat differentials at the rates provided in Article IV, Sections 2 and 3, for the respective classes and the amount of such differentials at the rate provided for Class 1 milk; and subject to the deduction of the following differentials:

(a) 1c per cwt. by handlers to be paid to co-operatives which do not collect, or operate plants, for performing services which are for the benefit of the industry in the market, and will aid in effectuating the purposes of the Act.

3438 (1) By obtaining or continuing the firm contractual relations with the producers delivering to the plant or plants covered by the respective cooperative so that the milk of such producers is subject to the exclusive sale by the respective cooperative for not less than monthly periods of time, and

(2) By obtaining firm contractual commitments, as to the purchase of such milk for monthly periods from the operator or operators of the plant or plants covered by the cooperative, providing not only for the payment for such milk as is accepted at the prices and under the terms and conditions of this order but also for the acceptance of all the milk involved during the full duration of the contractual periods and furthermore for its manufacture when not needed by the market in surplus seasons on the best possible basis taking into consideration the milk shed as a whole and general market demands and for the shipment of the milk even though it involves the discontinuance of manufacturing operations whenever it may be necessary in short seasons to furnish an adequate supply of fluid milk at reasonable prices to the market from within the confines of the milk shed and for its sale in such event at not more than the prices and handling charges fixed herein; provided, however, that nothing herein contained shall prevent application for service payments under Article 4, Section 5 (a) and (b) above as to any such operation as may be found qualified to receive same:

(3) By furnishing marketing information service to its producers and providing for verification of weights, sampling, and testing of milk purchased from said producers when and where necessary.

(b) 2½¢ per cwt. by cooperative which collect but do not operate plants, for performing the services set forth in (a) above and for performing additional services which are for the benefit of the industry in the market and will aid in effectuating the purposes of the Act.

(1) In providing in such contractual commitments of the plant operator or operators for it or them to report their dispositions of the milk to the respective cooperative in order that it in turn may report

to the Market Administrator as provided in Article V and for such cooperative to audit the operators' records to determine the correctness of such reports subject to the recheck by the Market Administrator hereunder, and

(2) Receiving such reports from the plant operator or operators and reporting therefrom to the Market Administrator as provided in Article V, and

(3) Making such audits, and

(4) Collecting from the operators and disbursing to the producers, and

(5) Guaranteeing payments to the Adjustment Fund in accordance with Article VII, Section 1;

(c) 5¢ per cwt. by cooperatives which collect and operate plants, for performing the services set forth in (a) and (b) above and for performing additional services which are for the benefit of the industry in the market, and will aid in effectuating the purposes of the Act.

(1) By holding under producer control receiving and handling facilities and in many cases manufacturing equipment, any part of which may be unused for varying periods of time due to production and sale conditions but which it is necessary to hold available to their own and other producers in order to provide flexibility for the industry in the interest of orderly marketing hereunder and in order that all the milk of such cooperative shall have a market at all times irrespective of favorable or unfavorable conditions of the markets for the products of surplus milk and in order to expand surplus operations quickly to support the fluid market by withdrawing milk from fluid sale when additional fluid shipments are started by condensery plant operators and separators for storage after the seasonal completions of their packs of their estimated requirements for fixed markets for case goods and storage over which estimates and resultant resumptions of fluid shipments producers have no control and in order that all other milk in emergencies may find a market, at least to the extent of such facilities, and

(2) By the creation of reserve funds to assure payments to the Adjustment Fund as guaranteed in (b) (5) of this paragraph and to insure prompt payment monthly to each producer of the cooperative association of his full distributive share of the proceeds of sale of milk by such association; provided that any cooperative making deductions under any of the provisions of this paragraph must be found qualified by the Secretary under Article I, paragraph 8, and actually performing, as determined by the Secretary, the services for which it is receiving or making deductions under (a), (b), or (c) of this paragraph.

12. Divide the total value of milk, as determined in 11, by the total quantity of milk in 11.

13. Subtract not less than four and not more than five cents for the purpose of retaining a cash balance in connection with the payments set forth in Article VII, Section 2.

14. Add an amount which will prorate any cash balance availab as a result of payments to the Market Administrator under pa graph 13 of this section the second proviso of Section 3, Article VI

15. On or before the 14th day after the end of each delivery perio mail to all handlers and publicly announce (a) such of these co putations as do not disclose information confidential pursuant to th act, (b) the blended price per cwt. which is the result of these co putations, and the Class 3 prices.

3440 Article VII—Payments for Milk

SECTION 1. Payments by Handlers to Market Administrator.—O or before the 16th day of the month, each handler shall pay to th Market Administrator, the amount by which the net blended valu of the milk of such handler covered hereby as based upon such r ports, exceeds the said Uniform Price as so determined by the Mark Administrator from such reports, after excluding therefrom butte fat, grade, transportation, and other differentials. The amount s paid shall be deposited in an account to be designated "Adjustme Fund" and withdrawals therefrom shall be made in accordance wi the provisions of Section 2 of this Article.

SECTION 2. Payments by Market Administrator.—On or before th 18th day of the month, the Market Administrator shall pay from the "Adjustment Fund" in trust, to each handler whose report show that the net blended value of the milk of such handler covered here as based upon such reports is less than the said Uniform Price as determined by the Market Administrator, the amount necessary t bring the net blended value of the milk of such handler covere hereby up to the Uniform Price.

SECTION 3. Payments by Handlers.—On or before the 20th day o the month, each handler other than cooperative associations, shal pay to each cooperative association and each producer for all milk covered hereby delivered by producers to such handler's receiving plant or plants the Uniform Price subject to a butterfat differentia of 4c for each $\frac{1}{10}$ of 1% of butterfat above or below 3.5% and sub ject to the transportation differentials as fixed in Article III, Section 3 and subject to the 1c deduction to be paid direct by handlers to bargaining co-operatives under Article VI, Section 1, paragraph 11 (a) and subject to any other deductions properly authorized by the producers and cooperatives representing them for payment to such cooperatives or any other person; provided, however, that no such deduction shall be made for payment directly or indirectly to the handler making the deductions; and provided, further, as to each producer who has not regularly delivered milk to a handler for a period of thirty (30) days prior to the effective date hereof each handler shall pay to such producer or his collecting co-operative association the Class 3 (c) price for all milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two (2) full co

months following the first day of the next succeeding month hall pay to the Market Administrator on such milk for addi- the "Adjustment Fund" any amount by which the net blended of all the milk of such handler exceeds the price paid for such y the handler.

ion 4. Location Differential.—Each handler, other than co- ive associations, shall pay to each co-operative association and roducer for all milk covered hereby, delivered by producers to andler's receiving plant or plants in the territories hereinafter ed, the respective differentials indicated for the various parts territory, in addition to, and at the same time as the payments nade under Section 3 of this Article.

20¢ per cwt. for milk testing 3.5% or over

Jersey Counties:

nterdon.	Morris.
merset.	Warren.
ssex.	Sussex.
nion.	Passaic.

York Counties:

estchester.	Dutchess.
tnam.	Orange.

ticut:

tchfield.

he following towns in Ulster County, N. Y.:

arbletown.	New Paltz.
urley.	Lloyd.
ingston.	Gardiner.
ster.	Plattekill.
sendale.	Marlboro.
opus.	Shawangunk.

10¢ per cwt. for all milk

Columbia Co., N. Y.
Berkshire Co., Mass.

ion 5. Saving Clause.—Nothing herein contained shall affect ne of payment for milk shipped by an operating co-operative tion or other handler to another handler which time of pay- is a matter for negotiation between such seller and buyer. rly, nothing herein contained shall be deemed as in derogation lification of the right of non-operating cooperatives to require rs to make payments on account in advance of the final adjust- ayments as provided in this Article.

ion 6. Adjustment of Overpayments and Underpayments.— the event of any overpayment of any handler to the Fiscal or to the Market Administrator through erroneous reports or ise, the Market Administrator shall make adjustment thereof

in the next succeeding month in the payment as hereinbefore provided in Article VI.

2. In the event of any underpayment by any handler to the Market Administrator, through erroneous reports or otherwise, said handler upon demand made by the Market Administrator shall immediately make payment of said underpayment to the Market Administrator.

Article VIII—Expense of Administration

SECTION 1. Payments by Handlers.—As a pro rata share of the expense of administration hereof, each handler shall, on or before the 20th of each month pay to the Market Administrator, a sum not exceeding 2¢ per cwt. on all milk handled by him and covered hereby according to Article V and VI. the exact amount to be determined by the Market Administrator subject to review by the Secretary. In case the handler pays to a collecting cooperative association for milk delivered by its producers to the handler's receiving plant or plants such payment shall be made by the handler to such co-operative association in addition to the payment for the milk as pro-
3442 vided herein at the prices fixed hereby and then paid over immediately by such cooperative association to the Market Administrator.

Article IX—Handlers Who Are Also Producers

SECTION 1. Milk Purchased From Producers.—In the case of a handler who is also a producer and has purchased milk from producers, the Market Administrator shall, in the computations set forth in Article V, first exclude the milk purchased by him in each class from other handlers, and then apportion the milk purchased by him from producers to each class according to the ratio which such handler's remaining total sales in each class bears to his remaining total sales in all classes.

Article X—Miscellaneous Provisions

SECTION 1. Suits by Market Administrator.—The Market Administrator may maintain a suit in his own name against any handler for the collection of any sum which the handler is required to pay to the Market Administrator hereunder, including the handler's pro rata share of expenses as set forth in Article V.

SECTION 2. Derogation.—Nothing contained in this order is or shall be construed to be in derogation or in modification of the rights of the Secretary or of the United States (a) to exercise any powers granted by the act or otherwise, and (b) in accordance with such powers to act in the premises whenever such action is deemed advisable.

SECTION 3. Duration of Immunities.—The benefits, privileges, and immunities conferred by virtue of this order shall cease upon its termination, except with respect to acts done under and during the exist-

e of this order, and the benefits, privileges, and immunities con-
red by this order upon any handler shall cease upon its termina-
, except with respect to acts done under and during the existence
his order.

ECTION 4. Action of State Authorities.—This order shall not be
lusive of orders or other regulations issued by the duly constituted
horities of any state, insofar as such orders or regulations are
ed or shall be issued relating primarily to milk not in interstate
oreign commerce.

ECTION 5. Unfair Competition.—It shall be an unfair method of
petition and an unfair trade practice for any handler, continu-
y or repeatedly, to sell milk, or any product thereof, in or for the
keting area at prices lower than the prices herein named as mini-
n prices, plus reasonable handling, processing, and transportation
ges, with the purpose or with the result that such handler sub-
tially increases its business of such kind in or for said area by
practices.

Article XI—Effective Time, Termination, and Suspension

ECTION 1. Effective Time.—This order shall become effective at
such time as the Secretary may declare above his signature at-
tached hereto, and shall continue in force until terminated in
one of the ways hereinafter specified.

ECTION 2. Suspension.—The Secretary may at any time suspend
order, by giving at least ten (10) days' notice by mean of a press
se or in any other manner which the Secretary may determine.

ECTION 3. Termination.—1. The Secretary may at any time termi-
this order, by giving at least ten (10) days' notice by means of
ess release or in any other manner which the Secretary may
rmine.

The Secretary shall terminate this order at the end of any month
ever he finds that such termination is favored by a majority of
oducers who during the preceding month have been engaged in
oduction for market of milk in the marketing area, or who,
ng such preceding month, have been engaged in the production
ale of milk in the marketing area; provided, that such majority
during such preceding month produced for market or produced
ale more than 50% of the volume of the milk produced for mar-
r produced for sale within the production area.

This order shall in any event terminate whenever the provisions
e act authorizing it cease to be in effect.

TION 4. Effect.—Unless otherwise provided by the Secretary in
otice of amendment, termination, or suspension of the provisions
f, the amendment, termination, or suspension shall not (a)
, waive, or terminate any right, duty, obligation, or liability
shall have arisen or may thereafter arise in connection with
ovision of this order; (b) release or waive any violation of
rder occurring prior to the effective date of such amendment,

termination, or suspension; or (c) affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violation.

SECTION 5. Continuing Power and Duty.—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the Market Administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The Market Administrator shall (a) continue in such capacity until discharged by the Secretary; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the Market Administrator or such person, to such person as the Secretary shall direct; and (c), if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the Market Administrator or such person pursuant to this order.

SECTION 6. Liquidation.—Upon the termination or suspension of this order, the Market Administrator shall, if so directed by the Secretary, liquidate the business of the Market Administrator's Office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

3444 Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the Market Administrator in liquidating the business of the Market Administrator's Office, shall be distributed by the Market Administrator to the contributing handlers and producers in an equitable manner.

3445 DO YOU HAVE ANY QUESTIONS ABOUT THE PROPOSED MILK MARKETING ORDER?

What Is It?

The proposed milk marketing order gives producers Federal and State aid in compelling all dealers to pay fixed minimum prices to all producers approved for the New York metropolitan market.

Why Will This Work When Milk Control Didn't?

There were two things wrong with Milk Control. It couldn't control milk from other states. It did nothing to stop producer groups fighting each other for fluid markets. These orders correct both these things. The Federal Order takes care of the out-of-state milk. The State couldn't do this but the Federal government can. These orders will divide fairly the benefits of the fluid markets among all producers. There will be no reason for producers fighting among themselves for the fluid markets.

t Will Stop "Distress" Milk?

ilk from fluid plants which have lost their regular markets, or produce and have no manufacturing facilities, no longer need be ped on the market at cut prices. The order makes a charge nst all milk for the extra expense of moving this surplus milk her country plants for manufacture.

This Widen the Milk Shed?

. This has nothing to do with approval of dairies. That will be done by City and State inspectors. In fact, the order goes oward assuring an adequate supply from the present milk shed aking a charge against all milk for the extra expense of shutting condenseries and other manufacturing operations so as to ship during short periods.

Pays for Administering the Order?

very dealer pays not more than 2c per hundred on all milk. This is the only charge for administration expense.

Will producers Get Their Checks at the Same Time as Now?

Nothing in the order changes time of payment, which will nue to be arranged between each group of producers and who pays them, except that each dealer must pay producers or their rative for each month's milk not later than the 20th of the next h.

the Order Have Classified Prices?

s, the same as Milk Control in this and other states and counties ll other federal orders. There are three simple classes. This only way to get the most out of the milk for the producer. A flat price cannot be fixed for milk for fluid shipment by one r and that same price paid for use as cream, condensed, or butter other dealer. A low flat price (blended basis) is the principal of chiseling.

y One Cooperative Favored Above Others?

The order recognizes three classes of cooperatives—1. bargain- 2. bargaining and collecting, 3. bargaining and collecting and ting. The services rendered by all these is made a charge st all milk. Each cooperative receives a contribution for its rt according to the class for which its operations qualify. The ratives which merely bargain get 1c per hundredweight on the they sell; those which bargain and collect get 2½c; and those perform complete cooperative services get 5c. Any cooperative lower classes can increase its services and qualify for a higher Unorganized producers may organize and qualify. There is rge against any other producers for the regular plant operating ses or distribution branch operating expenses of any cooperative.

Is the Order so Long?

basic principles are simple and could be stated briefly but it is ecause it contains so many legal safeguards against evasion.

Who Wrote It?

The producers through their Bargaining Agency, with some help from Federal and State agricultural officials.

3447 **Can the Producers Bargaining Agency or Any One Cooperative Dominate the Administration of the Order?**

No. The Market Administrator is appointed by Secretary Wallace and Commissioner Noyes and is subject to removal by them. The order provides just what he is to do. It contains exact details and leaves no room for favoritism.

Is This an Experiment?

Federal assistance is new in this milk shed, but has passed through the stages of trial and error in other milk sheds during the past four years. It has now developed into a successful and workable plan.

How Can the Order Be Adopted?

The order can be adopted only after public hearings and with the consent of two-thirds or more of the producers.

When Does It End?

The order ends any time a majority of producers demands that it be ended.

3448 Published by Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., May 1938.

3449 *Exhibit No. 23AA to stipulation*

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., August 29, 1938.

DEAR PRODUCER: Before you receive this letter, a Federal-State Milk Marketing Order, covering the Metropolitan New York Milk Market, will have been signed by the President. This Order will, no doubt, become effective September 1st.

To the casual observer, a wonderful battle has been won, but we, who have known the opposition, realize that the real battle is ahead. Through cooperative effort, a skirmish with the dealers has resulted in a producer victory that should give all confidence and which shows us the way for greater victories and a permanent living price for milk. This will be secured through the complete operation of a State-Federal Milk Marketing Order, backed up by strong producer cooperative associations. The farmers have proven the power of their united strength.

As you know, the dealers in Boston took the Boston Order into Court and have held up its full operation for over a year. Over two million of the farmers' money has been held up by the dealers. This means that 27–30 cents per hundredweight on all producers' milk

as been held up for a year. Dealers and dealer controlled coopera-ives are now threatening to do the same thing with our Order.

This, producers can stop by inducing dealers to consent to the peration of the Order as an agreement. Your dealer, by such con-ent, voluntarily refrains from using the Courts to block the Order. he fewer dealers who appeal to the Courts, the greater the benefits om the Order. We want results through compliance with the rder, not law suits. If all the dealers sign the Order as an agree-ent, it becomes completely effective at once.

You will be contributing greatly towards that end if you singly collectively with other producers insist that your dealer cooperate ith others in signing this Order at once. If you have not already one this, won't you please take care of it immediately?

Won't you also cooperate with me by giving your advice on ques-ons that you will find on the enclosed page? By answering these estions, and by giving other suggestions and advice, you will be lping all producers, as well as yourself, to secure a living price for ilk.

I am looking forward to receiving your reply.

Sincerely yours,

C. H. BALDWIN.

50 Questionnaire to be returned to C. H. Baldwin, Ex. Sec., Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., Room 118, Onondaga Hotel, Syracuse, N. Y.

1. Can you stand continued low prices while dealers argue this mat-r out in the courts? Yes ____ No ____

2. Do you want the Order to go into full effect at once? Yes ____ ____

3. In your opinion are farmers in your community ready for a vement to compel the buyers to sign the Order, pay the price and e up to its terms? Yes ____ No ____

4. If so, will you do as suggested in my letter? Yes ____ No ____

5. Shall the Bargaining Agency insist that your buyer sign the der? Yes ____ No ____

6. Will you support the Bargaining Agency in that move if others ll? Yes ____ No ____

7. In Boston the dealers tied up over two million dollars of the rmers' money in the courts. Do you think farmers will work to-ther to prevent dealers here from doing this? Yes ____ No ____

Signed _____

Address _____

Name of cooperative to which you belong, if any:

_____

Offer other suggestions in space below _____

_____

_____

_____

ote.—The information on this questionnaire will be held in the strictest confidence me, and your name will not be used in any way.

3451 *Exhibit No. 23BB to stipulation*

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., September 15, 1938.

DEAR PRODUCER: With this letter is sent two copies of three resolutions that were passed at the recent meeting of the delegate body of the Producers Bargaining Agency. Each has a very important relation to our surplus milk problem. If the intent and purpose of these resolutions are made effective, very important steps towards getting better prices for all milk will have been taken and put on a more permanent basis.

It is, therefore, suggested that you see that these resolutions are properly presented and acted upon by your local cooperative association and by any other farm organization of which you are a member. Resolutions passed by such organizations should first be presented by a committee to your assemblyman and senator in person, so that you may know that you have their active support. Copies should also be sent to the proper State officials with a letter telling of the action that has been taken. It would be well to advise the Dean of the State College of Agriculture at Ithaca and the Director of the State Experiment Station at Geneva of your interest in and support for more intensive work to find more uses for dairy products.

Active local support for these measures will help to build a strong, aggressive program for your local associations, will bind all farm organizations closer together and thus they will become a more united power working to get the last possible dollar for that "surplus" milk which in the past has dragged, or been the excuse for dragging, all milk prices to unbearable levels.

I know that your support will be given. I only ask, at this time, that it be given proptly and that we be notified as to what active support you will promise from your organizations.

Very truly yours,

C. H. BALDWIN.

3452 *Exhibit No. 23CC to stipulation*

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., September 16, 1938.

DEAR SECRETARY: Within a short time, you will receive from the Milk Market Administrator's office a questionnaire calling for considerable information in regard to your cooperative association, its policy, and its service to members who are under contract. You, of course, know that in order that producers cooperate with the Administrator to the fullest possible extent, every producer should be under contract. Now is the time to get producers under contract and to see that all records and papers of your cooperative association are in proper form.

nformation that will be called for on the questionnaires is
y in order that the Secretary of Agriculture can properly
s to the value of the service rendered by your cooperative
ion to the welfare of the entire industry. Based on this in-
on, the Secretary will decide whether your cooperative asso-
s to receive the 1¢, 2½¢, or 5¢ contributions that are allowed
tive associations for this service rendered.
ery necessary that these questionnaires be filled out promptly
y and it is for that reason that we are calling your attention
natter.
Bargaining Agency can be of any assistance to you along
, we shall be very glad to hear from you.
ours very truly,

C. H. BALDWIN.

Exhibit No. 23DD to stipulation

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., September 21, 1938.

SIR: Every effort is being made by the Producers Bargain-
ncy to obtain from the distributors full compliance with the
and State Order. Almost every dealer in the Metropolitan
has signed the Agreement. In some instances, it has been
y to exert producer pressure and the willingness of producers
rate in withholding or offering to withhold their milk until
aler signed has been encouraging and gratifying.
remains one loophole of considerable size which must be
before all major opportunities for chiselling have been elim-
That is the subject of a uniform handling charge. The en-
t of it is up to the producers and their cooperatives. If one
ive charges less than 23¢ per hundredweight handling
he dealer buying that milk has an unfair advantage over
r who is paying a 23¢ handling charge. Twenty-three cents
er hundredweight is a fair charge. It must be made the
and uniform charge throughout the Shed.
lieve that there should be an agreement on the part of every
ve in the Milkshed to charge not less than 23¢ and that the
ves should enforce a gentlemen's agreement to charge that

nclosing a resolution for adoption and signature by your
ve and return to us. I believe every group in the Shed
and make it its business to see that it is obeyed. If it is,
ntees to us a living handling charge for conducting our
s well as a living price for milk.
cooperation is earnestly requested.
ncerely yours,

C. H. BALDWIN.

3454 *Exhibit No. 23EE to stipulation*

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., October 18, 1938.

TO FARM LEADERS:

To this letter is attached copy of letter that was sent to nearly ten thousand producers of October 13.

It is sent to you for your information and any suggestions that may come to you as a result.

It must be apparent to everyone who knows the facts that a sound surplus control plan has been developed by the milk producers and with producer support and aggressive backing it can be made effective and helpful to all. It must be equally as evident that without producer support through strong cooperative associations the plan will fail.

To my mind the great danger lies in the apathy ("Let George do it" attitude) of many producers. The price that has been announced by Administrator Harmon for September milk is comparatively speaking very satisfactory and it will naturally tend to increase the unconcern. This lackadaisical attitude will be played upon by cunning representatives of some dealers. Sly, foxy brokers and their well-known stooges who have grown fat and comfortable as a result of conniving are now in huddles to decide upon the best play to take advantage of this common, well-known weakness among producers.

I expect that soon some individual or officer speaking for some organization reputed as representing some group of producers will be pulled to the front to make a break in the producer line. Naturally the planners of this movement hope that "weak sister" groups will respond to the urge of the brokers and will follow as a flock of sheep trail the first one to break away. Such action will result in confusion, drawn-out court actions, and a fall in milk prices.

The question is not who will be the one to attempt the break, but how can the producers be aroused to the danger! Every producer should be determined to keep his line united and should listen to no coaching or softly whispered promises from the opposing camp.

The ball is in the producer's hands. Won't you watch with me to check in the bud any disloyalty to the producer cause?

Again I ask how can the producers be aroused to the danger and made to see the need for each becoming an active part of this splendid producer movement. Your interest and cooperation we appreciate. Your suggestions are requested.

Yours very truly,

C. H. BALDWIN.

455

Exhibit No. FF to stipulation

[Copy]

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., November 17, 1938.

TO MEMBERS OF THE NATIONAL BUTTER CAMPAIGN COMMITTEE:

Before this, I believe you have received a letter from Mr. Charles . Holman, Secretary of the National Cooperative Milk Producers ederation, stating that you were one of those selected to represent ur County and your cooperative association in the National Butter mpaign.

I have just returned from a meeting of the Federation, which was ld at Cincinnati and which was attended by representatives of co- erative associations from all parts of the United States. The en- usiasm that was shown in discussing the National Butter Campaign dicated that throughout the United States producer representatives e going to take a very active interest in putting this compaign ross.

In New York State a large group of farm women are going to act a special committee to work in conjunction with the committee at is representing the various cooperative associations. As a result, ew York should do its full share in putting this surplus butter in e hands of the consumer.

Some definite responsibilities will have to be assumed by you as epresentative of your cooperative association and I have the follow- g suggestion to offer.

You will have to use your own initiative and your own plan for rrying out this suggestion or any policy that will accomplish the ne results. The idea is to get every producer to buy either a five- ten-pound package of butter during the first week of this cam- ign. Orders for this butter might be taken by you and those who working with you at the plant where milk is delivered, or you ght choose to write a letter to each of your members, enclosing dges to buy butter as suggested. One of our good cooperative lead- has suggested that each cooperative actually buy the butter and e it to the members as they deliver their milk, taking pay for same m their milk checks. This butter should be purchased from some your local storekeepers, dividing the business up among those who cooperating in this special campaign. By buying butter in larger antities, producers will be setting a good example. We can all nomize by using liberal quantities of butter at present prices.

Remember that, if we can put this surplus butter into commercial annels at this time, it will have a beneficial effect upon the price of classes of milk under the Federal and State Order.

This drive should include a campaign to discourage the use of oleo or any butter substitutes, especially during this time when good butter is so very cheap.

Please report to me as to your plans so that I may in turn report to Mr. Holman.

Sincerely yours,

(signed) C. H. BALDWIN.

3456 *Exhibit No. 23 GG to stipulation*

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., October 29, 1938.

DEAR PRODUCER: Since you received my letter of October 13, many important events in connection with the operation of the Federal-State Marketing Order have taken place. Many serious problems, which demanded prompt and forceful action, were properly disposed of by producer action through their cooperative associations. The Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., has been alert and has thrown the united strength of the organized producers, who make up the Agency, to support the Order and its enforcement. Problems are continually arising that threaten the welfare of each and every dairyman and it is necessary that all have the facts so that each, to a greater extent, can put his strength and intelligent work in the organization that represents united farmer action. It is an aid towards this end that this letter is sent.

As in the first letter, you will find enclosed a reprint of the Agency's advertisement in the October 22 issue of the American Agriculturist. This advertisement is informative and states clearly the basic facts. It gives the big general problem that faces us and quite properly gives you, as a member of a cooperative association that is supporting the Order, credit for the results obtained thus far. That is where credit belongs and, as you compare the milk check you have just received with the previous check, you have reasons to feel proud of the fact that you are a part of the power that has brought the change about. You rightfully should take credit to yourself in proportion to the support that you have given to this movement.

I urge that you read the attached page carefully, then look at the improved price that your milk check shows and ask yourself if you are going to let anyone drive the price of your milk again into the ground without first having to account to you personally. I know that your answer is that of 60,000 other well-informed dairymen—an emphatic No.

I do not like to be continually yelling, *Wolf! Wolf!! Wolf!!!* Yet no one can possibly be aware of even a small part of the plans of the dairymen's enemies without knowing that the wrecking crew is already at work. The Order, which you built, rests on rock founda-

on and is, in principle, as sound throughout as steel. But equally
e true, it does not please those who have had unfair advantages over
mpetitors and who for years have been responsible for keeping the
rices of all milk at starvation levels. These old enemies are now
ery busy whispering soft promises into the ears of those who will
sten, while they connive very cunningly to tear your Marketing
rder apart by court action or make it worthless by making it impos-
ble for the cooperative associations, through the Bargaining
gency, to carry on the practical work that is necessary if enforce-
ment is made effective.

56 It does not perhaps seem reasonable, yet I honestly believe
that some people have no hearts at all, or have hearts of stone.
it were not so, they would not insist that they are entitled to un-
ir advantages over competitors. They would starve all farm peo-
e and cripple all business to regain an unfair advantage over com-
titors which they have long held and, as a result, have been able
pile up more and more unearned wealth. These heartless individ-
ls, to whatever class they happen to belong, have been, from the
ginning, and are still, watching with their stooges for the best
ints of attack and are scheming and combining forces for that
rpose. They are active: they are now combining brain powers,
sources, and all possible strength to wreck your marketing plan.
ou, therefore, if you do your part, must be equally as active, and
ually as willing to combine your ability with the ability of other
oducers by making your cooperative association a united group,
cognized as producer owned and controlled, and in a position to
ttribute your full share to the cause.

The Federal-State Marketing Order recognizes cooperative asso-
tions and makes provisions for cooperating with those that truly
resent producers. There is no reason whatsoever for any pro-
cer not being an active member of one of these cooperative associa-
ns. Every producer controlled cooperative association should sup-
rt the strict enforcement of the Order.

Those who attended the delegate meeting held at Syracuse this
ek heard representatives of both State and Federal Governments
press their willingness to cooperate with cooperative associations
bringing about any necessary changes so that they can get all the
efits that are intended under the Order, and thus do their full
re towards seeing that producers work to support the cause.

The Bargaining Agency wants to be of service and if, at any time,
cooperative or any individual producer feels that any of us can
of service in helping you perfect your cooperative association, we
nt to hear from you.

caution you that continuation of better prices depends upon you.
u must feel a responsibility as an individual for doing your full
re. You must check the attacks of your enemies who are making

a vicious attack on your plan. In your hands lies the responsibility for maintaining a "living price for milk."

Sincerely yours,

C. H. Baldwin
C. H. BALDWIN.

CHB:B.
Enc.

3457 *Exhibit No. 23HH to stipulation.*

METROPOLITAN COOPERATIVE MILK PRODUCERS

BARGAINING AGENCY, INC.,
Syracuse, N. Y., November 10, 1933.

DEAR PRODUCER: With this letter is sent statistical information and a study of milk prices in New York State under Federal and State Orders, which is worthy of careful study. We secured sufficient copies of this material so that it can be sent to a number of those who have done much to help put the Order into effect and thus bring about the stability of market and better prices that dairymen are now enjoying.

We urge that you make use of the material that is enclosed and thus be in a better position to help those who do not understand conditions as well as you.

Very truly yours,

C. H. BALDWIN.
Executive Secretary.

CHB/DVS.

3458 *Exhibit No. 23II to stipulation.*

METROPOLITAN COOPERATIVE MILK PRODUCERS.
BARGAINING AGENCY, INC.,
Syracuse, N. Y., September 17, 1934.

DEAR PRODUCER: On or about June 8, 1934, Hegeman Farms, Inc., laboring under what it believed were onerous conditions imposed upon it by the provisions of the Milk Control Law, was instrumental in setting up a new corporation known as the Central New York Cooperative Association, Inc., composed of the producers at that time selling milk to Hegeman. By this process Hegeman Farms relieved itself of all responsibility to pay Control Board prices and placed upon the producers full responsibility for the amount of return to them. The farmers under this arrangement agreed to furnish the milk, pay for the processing at 20¢ per can, stand all losses which might be incurred in distribution and employ seven officers of Hegeman Farms to conduct the country plant and city distributing business for them at salaries of $150 per week each. Under the agreement, the farmers saddled themselves with all the risks of the business but guaranteed to Hegeman Farms, continued

operation of its business with no possibility for loss to its former officers.

This arrangement has continued for several years, whether satisfactorily or not to producers apparently unknown, as there is little indication that the average producer is aware of the contents of the agreement nor of the liability he is under. While this scheme resorted to under Milk Control may have achieved moderate results, it is unlikely that this unusual set-up can return to producers under the Federal and State Orders, an amount per cwt. for milk equal to that received by other producers. After the uniform price paid to producers throughout the milk shed is received by Central New York Cooperative Association, Inc., it must deduct from it all the items of expensive overhead now being charged by Hegeman Farms and the resulting return to producers will be small.

That these deductible items of expense are considerable is amply borne out by the facts in the case. I quote from Findings of Facts made August 30, 1934, by Kenneth F. Fee, Division of Milk Control in the Matter of Hegeman Farms Corporation, Hamilton Milk & Cream Company, Inc., and the Central New York Cooperative Association, Inc., as follows:

"The first meeting of the incorporators was held on June 18, 1934, and at that time bylaws were adopted. These bylaws provided, among other things, that the management of the affairs of the corporation be vested with the Board of Directors; that the Assistant Treasurer, Henry Breyer (formerly Secretary of Hegeman Farms Corporation) shall have charge of all funds, shall sign all checks, drafts, and notes; that there shall be four Assistant Secretaries each of whom is authorized to countersign checks, etc.

1459 "The directors approved resolutions authorizing the employment of the following persons at the salaries indicated:

Name and title:	Weekly salary
Henry Breyer, Assistant Treasurer	$150.00
Benjamin M. Wisch, Assistant Secretary	150.00
Benjamin Greenberg, Assistant Secretary	150.00
Irving Krout, Assistant Secretary	150.00
Irving Abramson, Assistant Secretary	150.00
Robert Schlifsky	150.00
Benjamin Cheifetz	150.00

The facts further indicate that while Hegeman Farms transferred the stock of Hegeman Farms Products, Inc., and the stock of Hamilton Milk & Cream Co., a subsidiary owned by it, to the Central New York Cooperative Association, it had taken the unusual precaution of first transferring all of the assets of both companies to a new corporation organized for that purpose, namely Hegton Milk Corporation, so that both companies were empty shells when their stock was transferred to the farmers. In support of this I quote again from Mr. Fee's findings as follows:

"It appears from documentary evidence that all of the assets of the Hamilton Milk & Cream Co. as well as the assets of the Hegeman Farms Corporation were recently transferred to the Hegton Milk Corporation, and that after this transfer of assets took place the

capital stock of Hegeman Farms Corporation and the capital stock of the Hamilton Milk & Cream Company, Inc., was transferred to the Central New York Cooperative Association, Inc. and placed in escrow with Mr. Haskell."

After the consummation of the transfer above referred to, the Central New York Cooperative entered into an agreement under which you are still operating whereby the farmers leased the plants and equipment transferred by Hegeman to the new corporation, Hegton Milk Corporation, I quote again from the findings above referred to:

"The directors approved of the leasing, until June 30, 1935, of the facilities of the Hegton Milk Corporation, constituting the plants and equipment formerly owned by Hegeman Farms Corporation and by Hamilton Milk & Cream Company, Inc. For the use of these facilities a rental of 20¢ per can of milk handled is to be paid. According to an affidavit of Benjamin Greenberg, in January 1934, the entire cost of handling milk at the upstate plants was less than 16¢ per can.

"The contract between producers and the cooperative, which contract was approved by the directors, provides: For the payment to producers of a price which shall be based upon the amount received for said milk less the expense of handling, hauling, marketing, and distributing and less all other incidental expenses incurred in conducting the cooperative corporation of the first part, including all expense of every name and nature."

Mr. Fee's conclusions as to the character of this business are summed up in the following words:

"The conclusion that the inspiration for the formation of this cooperative association originated with the former officers of Hegeman Farms Corporation is inescapable. The producers have doubtless consented to go along with the plans only because they feared that if they did not do so they would lose their present milk market.

3420 "In addition to the risks of possible losses in producing milk, which they have always taken, these producers are now assuming risks incurred in its distribution in a market torn by fierce competition. While these producers have nominal control of the distributing end of the business, it will in fact be managed by the former officers of a corporation which for some reason has not in the past returned the legally prescribed prices. The plan is designed to provide these former officers with substantial salaries and a good return upon their investment, without the usual risks."

In conclusion, permit me to say that if the producers now members of the Central New York Cooperative, with full knowledge of all the facts, desire to continue the arrangement now in force, we have no desire to oppose their wishes altho we believe that the returns to your producers are bound to be lower than the return to other producers. If after knowledge of the facts you believe that some more equitable arrangement should be demanded, we stand ready to assist you in procuring it.

A new producer's cooperative is in process of organization by Hegeman producers, many of whom have signed contracts with it. A eting of all Hegeman producers has been called by the Board of rectors of the new cooperative at the Court House, Cortland, Y., September 20th at 8 P. M. At this meeting there will be a l and complete discussion of your situation. You are earnestly ited to attend and take part.

Very truly yours,

EDMUND F. COOKE,
Counsel for Metropolitan Cooperative
Milk Producers Bargaining Agency, Inc.

Exhibit No. 23 to the Stipulation

MILK PRODUCERS' MARKET NEWS—DECEMBER

U. S. COURT REFUSES TO INTERFERE WITH MILK MARKETING PROGRAM

RACUSE, Nov. 21.—There will be no let up in activities of the tropolitan Co-operative Milk Producer's Bargaining Agency to ain full compliance with the Federal-State milk marketing pro- m, declared Charles H. Baldwin, Executive Secretary, today. Ir. Baldwin made this statement following a conference with his rney, Edmund F. Cooke, and other lawyers who argued against application by Jetter Dairy Company to restrain Mr. Baldwin, Bargaining Agency, and the Dairymen's League Cooperative ociation before United States Judge Frank Cooper in Albany urday.

he Jetter Company sought to restrain these defendants and tropolitan Market administrator E. M. Harmon and officials of State Department of Agriculture and Markets from enforcing marketing program which was instituted September 1 under The gers-Allen law and the Agricultural Adjustment Act.

Judge Cooper made it plain," said Mr. Baldwin, "that he was going to rule on the constitutional questions raised by Jetter hout trial, and that he would issue no restraining order applying uch questions. He refused to restrain the administration and en- cement of the orders by State and Federal officials.

An important point raised by the plaintiff was that the Bar- ning Agency has been keeping producers informed as to which lers failed to comply with the regulations of the marketing pro- m, particularly in regard to payments to the Market Administra- Judge Cooper said that the Bargaining Agency, the Dairymen's gue, the Administrator or any one else has a right to state ether or not a dealer has made proper payments.

That is the crux of the whole matter. It is plain that producers' anizations have a duty to perform for farmers, and it is equally in that the court expects us to perform that duty.

"Judge Cooper specifically stated that he did not intend to restrain the Administrator from collecting from Jetter, and that he did not intend to interfere with this marketing arrangement pending final determination of the constitutionality of the law and validity of the marketing orders issued thereunder.

"The Jetter case marks a new milestone in the progress of New York Milk Shed dairy farmers. Never before have dealers sought to enjoin farmers, although there have been cases where dairymen have had to seek protection of the courts from the acts of dealers. Starting of this case seems to indicate the desperate desire of dealers to wreck this program and frighten producers into acceptance of less money for their milk.

"The effect, however, will be the opposite. Indignation is running high among farmers all through the State, and I believe they will now be more insistent than before that every dealer comply in every respect with this marketing program, which has already added more than $2,500,000 to dairymen's income.

"Farmers are fully aware of the truth of statements by Attorney Cooke for the Bargaining Agency and Seward A. Miller, of the Dairymen's League who told Judge Cooper that under this program farmers for the first time saw hope of becoming economically safe. They pointed out that this program merely gives farmers what labor has long enjoyed—the right to set and obtain a living price for their product, and that dealers having failed to block the program are now seeking court assistance to prevent its being made effective."

3471 MILK DEALERS WARNED TO RIGHT INDUSTRY

SYRACUSE.—New York state milk distributors were warned yesterday by a producers' bargaining agency executive that "the public demands that the industry right itself or be righted."

The admonition was sounded by Charles Baldwin, executive secretary of the Metropolitan Co-operative Milk Producers Bargaining Agency, in an address before the joint conventions of the New York State Milk Distributors, Inc., and the New York Dairy Boosters Association.

"If the industry does not soon do something to put itself in a better light before the public," Baldwin said, "I believe we can expect changes which will, in the long run, create no more efficiency, but which will put more and more complicated regulations upon distributors."

Baldwin told his audience of 300 distributors and dairymen that the new federal-state milk marketing order, designed to fix minimum prices to be paid producers for their milk "cannot be expected to be perfect," and predicted that "time will prove that changes are necessary."

"It is the producers, working through their bargaining agency, that will perfect these changes just as they developed the original order," he added.

is these same producers, working co-operatively through their erative associations, who will see that the intent of the order is ed out. Without strong co-operative associations supporting and ng to enforce the order, its provisions would be of little use."
dwin declared that through their bargaining agencies producers listributors can "work together to bring about better understand- nd harmony in the whole industry."

HARMON SPEAKS AT BUFFALO

lk dealers in New York state must make their profits from ssing and distributing instead of methods of purchasing from ucers, Erskine M. Harmon, federal-state marketing administrator he New York city milkshed, declared in an address before the Farm Bureau convention here.
another convention speech, R. W. Blackburn, secretary of the ican Farm Bureau Federation, credited National "mobilization" rmers for beneficial legislation. He declared that money spent rm programs by the federal government since 1933 has been f the most potent factors in bringing about recovery.
e directed-profit regulation for milk dealers, Administrator on said, is one of the two outstanding principles involved in gricultural marketing act under which 26 markets are now ting.
e second principle, Harmon asserted, is that all producers are are equitably in the sales of the market, regardless of the use eir product by the dealer.
other words," he said, "every producer is to have his share e surplus burden. This is accomplished through the producer ment fund, and what we know as the market-wide pool."
nting out that the industry may free itself of the plan by a ated vote, Harmon classified the marketing agreement as an riment" which depends upon the industry itself for success.
would be folly to claim this is the perfect plan," he said. have had many marketing plans before. Whether the present ter than any other only time will tell. Frankly, it is an ment.
ly time will tell whether the plan will work out satisfactorily e entire industry, so that the state and federal agencies will isfied to continue the assistance they are giving."
producers in the Canastota area turned out to a mass meeting High School on the evening of Nov. 22. Mr. Harmon spoke gth on the present situation in the milk shed.
e of the P. B. A. boys will get their fingers "Burnt a Plenty" y don't stop playing around with a few trouble makers who pposed to the Federal Order and the Rogers-Allen law. If it stopped, your writer will start a page titled "Things We Don't

3477 *Exhibit No. 23A to stipulation*

MILK PRODUCERS' MARKET NEWS—MAY

PRODUCERS, ATTENTION

How much longer are we willing to milk cows for nothing! For seven years our market has been riddled. Our prices have been ruinous. With 65,000 of us fighting for fluid markets we have killed our own business. Today everyone feels sorry for us: politicians, editors, soapbox orators, demigods, in fact everyone with an axe to grind is holding it on our grindstone.

Last year the farm organizations of the milk shed made a study of this milk problem. As a result we secured the Rogers-Allen Milk Law. To-day more than 50,000 producers are working under that law to build a living price for milk. We were successful during the fall and winter in bargaining for fair prices. To-day, with surplus flooding the market, these 50,000 producers are powerless to control prices without a plan to control surplus.

Such a plan has been built and is ready for your inspection. Hearing will be held during the week of May 16th on the plan which is in the form of a State and Federal Marketing Agreement. This plan will bring every dealer in the market right up to the rack and force him to pay a stated price for our milk. No dairyman has to sell for a penny less because, under the plan, every dairyman is protected.

Dealers will fight this plan with their last ounce of blood. They will come to you and call you "Dear Friend" and try to fill you full of lies and misinformation about the plan. Check their statements with the information in the enclosed booklet. Make them point out the parts which they say will pauperize or regiment you. No individual farmer is regulated in any way. There is no production control of any kind. You do not have to make any reports. No government agents will visit you. This plan controls dealers, not producers. It protects producers. Don't let any dealer or dealer's stooge tell you any different.

This may be dairymen's last stand, our last chance to handle our own business. We have muffed it so long, that to-day the Constitutional Convention in Albany is considering making milk a public utility. Would you like to work under some Public Service commission selected by voters who are 93% consumers. At the polls you are outvoted 10 to 1. Think!

Ask your dealer friend why he is opposed to this plan. Check his reasons against the best information you can get. Ask yourself why the dealer should be interested in your welfare. He has ground you down in poverty and now poses as your friend. Isn't it about

e we started using our horse sense? Let's get wise to ourselves
l then let's get tough.
We can win with your help. Will you help?

2 THE PROPOSED MILK MARKETING ORDER

What Is It?

The proposed milk marketing order is producer price fixing by leral and State orders. It compels all dealers to pay fixed minim prices to all producers approved for the New York metropolitan rket.

Why Will This Work When Milk Control Didn't?

There were two things wrong with Milk Control. It couldn't con- milk from other States. It did nothing to stop producer groups ting each other for fluid markets. These orders correct both se things. The Federal order takes care of the out-of-State milk. e State couldn't do this but the Federal Government can. These ers will divide fairly the benefits of the fluid markets among all ducers. There will be no reason for producers fighting among nselves for the fluid markets.

Will This Widen the Milk Shed?

No. This has nothing to do with approval of dairies. That will l be done by City and State inspectors.

Who Pays for This?

Every dealer pays not more than 2c per hundred on all milk. This he only charge for Administration expense.

Will Producers Get Their Checks at the Same Time as Now?

Yes. Nothing in the order changes time of payment.

Is Any One Co-operative Favored Above Others?

No. The order establishes three classes of co-operatives—1. barning, 2. bargaining and collecting, 3. bargaining and collecting l operating. The services rendered by all these is made a charge inst all milk. Each co-operative receives a contribution for its port according to the class for which its operations qualify. The operatives which merely bargain get 1c per hundredweight on the k they sell; those which bargain and collect get 2½c; and those ch perform complete co-operative services get 5c. Any co-operve in the lower classes can increase its services and qualify for a her class.

Who Wrote It?

The Producers' Bargaining Agency, with some help from Federal and State agricultural officials.

Can the Producers' Bargaining Agency or Any One Co-operative Dominate the Administration of the Order?

No. The Market Administrator is appointed by Secretary Wallace and Commissioner Noyes and is subject to removal by them. The order provides just what he is to do. It contains exact details and leaves no room for favoritism.

Is This an Experiment?

Federal assistance is new in this milk shed, but has passed through the stages of trial and error in other milk sheds during the past four years. It has now developed into a successful and workable plan.

How Can the Order Be Adopted?

The order can be adopted only after public hearings and with the consent of two-thirds or more of the producers.

When Does It End?

The order ends any time a majority of producers demands that it be ended.

3485 *Exhibit No. 23B to stipulation*

MILK PRODUCERS' MARKET NEWS—FEBRUARY

AAA OFFICIAL CONFERS WITH AGENCY GROUP

WASHINGTON.—A group of New York milk producers conferred with Dr. G. W. Gaumnetz, chief of the agricultural adjustment administration's dairy section, concerning possible federal action to aid the dairy industry in their state.

Headed by Homer S. Rolfe, of Ogdensburg, president of the metropolitan co-operative milk producers' bargaining agency, the
3495 producers discussed steps necessary to establish federal marketing control in New York.

Rolfe said no commitments were planned by the group but expressed belief federal aid would be necessary to "preserve the marketing structure" of New York's $2,000,000,000 dairy industry.

Several of the group criticized Mayor LaGuardia of New York city, who recently placed milk on sale at nine cents a quart in the city. They contended his action threatened the whole price structure in the state.

olfe said his organization felt federal control of the New York shed would be necessary "because some producers are underselling narket."

olfe said the group expected to continue discussions with Dr. mnetz this afternoon.

e upstate producer emphasized the delegation was here merely information." He said it would report to the metropolitan co-ative members before determining any course of action.

n producers accompanied Rolfe. They were Leon Chapin, North gor; J. C. Treat, Honcoye Falls; E. C. Bardin, West Winfield; Laidlaw, Gouverneur; Ralph Norton, Boonville; E. R. Skillman, hamton; Richard Child, Amsterdam; Alfred Williams, Franklin-; J. A. Coulter, Watertown; and Joseph Davis, Little Marsh, Pa.

PHILADELPHIA REQUESTS FEDERAL ORDER

he Agricultural Adjustment Administration has been asked to e into the Philadelphia market to regulate the price of interstate . This action was taken by the Executive Committee at a special ting held on December 22, and formal written request was sent etter to Dr. E. W. Gaumnitz, Chief of the Dairy Section of the icultural Adjustment Administration, on December 23.

his move was the outgrowth of a conference held on December 22, ch was arranged by the Pennsylvania Milk Control Commission was participated in by that Commission, the New Jersey Board Milk Control, the Dairy Section of the Agricultural Adjustment inistration, the Executive Committee and officers of your own perative, and representatives of the Allied Dairy Farmers' Asso-ion, Chester County Dairymen's Association, and the United mers' Association.

Gaumnitz Outlines Procedure

he procedure to be followed was outlined by Dr. Gaumnitz and sists of four points as follows:

. The Federal Government proceed jointly with the states in the elopment of a plan for consideration at a public hearing.

. Establishment of uniform orders by the Pennsylvania and New sey control agencies and the AAA so that uniform producer prices uld prevail throughout the area supplying milk to the market, se orders to be preceded by a joint public hearing at which all erested parties may appear.

. Federal regulation would be confined to milk in interstate com-rce.

. If a Federal order is issued, administration of it should be ely coordinated with the administration of orders of the New sey and Pennsylvania control agencies.

At the close of the conference, Howard G. Eisaman, Chairman of Pennsylvania Milk Control Commission, stated that substantial

progress had been accomplished and further conferences will be held in the immediate future to the end that the interstate phase of milk control might be brought under adequate control at the earliest possible date.

The need for Federal regulation has been felt for considerable time. Previous to October 1935, the majority of the milk dealers who were operating in both Pennsylvania and out-of-state were paying the same price for milk at all points within the same mile zone from Philadelphia. At that time, however, an order issued by the Pennsylvania Milk Control Board established prices at receiving stations in Pennsylvania which took into consideration the average actual cost of operating receiving stations and actual hauling costs to Philadelphia. Although milk was bought at Pennsylvania stations on this schedule the same differential as before was used in calculating prices at receiving stations outside of the state.

Even before that a few dealers who obtained milk principally outside the state were paying less than the established price for the market.

In checking the files of the Milk Producers' Review, we discover that producers selling through receiving stations in Delaware and Maryland had received prices which ranged from 3 to 20 cents per hundred pounds less than producers supplying milk to receiving stations operated by the same dealers in similar mile zones in Pennsylvania had received.

Lower Price Out of State

A. H. Lauterbach, general manager of the Inter-State, outlined to the conference some of the facts of the situation and discussed trends which are developing. It was pointed out that some of the smaller dealers are getting more and more of their milk from out of the state and that additional dealers are threatening to get a part of their supply from some other state in order to escape Control Commission regulations and meet their competition. There have been instances of Pennsylvania dealers going to New Jersey to get milk and New Jersey dealers coming to Pennsylvania, with the farmers in their own states being laid off.

This situation is made possible because the control boards of the respective states can regulate the price on only the milk which originates and is sold within their own state, having no control over milk which crosses state lines.

There have been frequent demands by producers, especially in Maryland and Delaware, that action be taken to correct the difference in price that producers there receive as compared with Pennsylvania producers. It is feared that unless the price is stabilized there will be an eventual breakdown in the market, with many Pennsylvania producers having a price but no market, while the out-of-state producers would have a market at a lower price.

Senator Weldon Heyburn, Delaware County, concurred in the need for some type of regulation in order to stabilize the milk market and prevent probable loss of markets for our own producers.

It has been pointed out that consumers got no benefit from the lower price paid out-of-state producers.

See Need for Federal Order

Numerous conferences have been held with milk dealers in order to adjust these differences in producer prices. Some progress resulted and the difference in price now being paid is less than it was a year or more ago. However, some dealers show no desire to cooperate and never appear at conferences on the subject. It was felt that the only way to obtain uniformity is to put a Federal marketing agreement or order into effect.

It is generally felt that if a Federal order is to be effective it must be identical, as far as producers' prices are concerned, with orders issued by the state control agencies. In order to obtain a Federal marketing agreement, two-thirds of the producers in a market must be in favor of the action. Should the milk dealers refuse to sign an agreement, then an order may be issued which must be requested by producers representing three-fourths of the milk supplied the market. A Federal marketing order may be cancelled by request of a majority of the producers in the market. In every case a producers' organization may speak for all its members.

A Federal order would cover producer prices only and then only on milk which crosses state lines into the marketing area. The price to producers for milk within the state would be set by the respective state control agency. The states would also have the power of establishing prices charged wholesale buyers and consumers.

Plans are under way to hold a hearing in the Philadelphia area as soon as possible. It is expected that some investigation will be made first in order to show the need for Federal regulation and, on the basis of the facts thus found, the hearing will proceed. Prices included in any Federal agreement or order will be set according to facts as determined after careful study. If, as hoped, concurrent orders are issued by the AAA and the state control agencies, the Class I price will be uniform to all producers supplying Philadelphia with milk, with differentials, of course, for freight, Grade A bonuses, etc. Likewise, prices in other classifications will be uniform.

The proposed level production plan must also be considered in connection with the Federal regulation. Here, again, the Federal order must be uniform with state orders so as to put all producers in the milk shed on the same basis.

The administration of the concurrent orders, it is hoped, will be placed under one head and with the arrangements contemplated it is expected that cost of administration will be relatively low.

3497 *Exhibit No. 23C to stipulation*

MILK PRODUCERS' MARKET NEWS—MARCH

BARGAINING AGENCY MEETS

Snow and ice, along with the blizzard, failed to keep your directors home on Monday, February 28th, as they met in an all day session at the Hotel Onondaga, Syracuse.

Matters of great importance to every member of the Cooperative, who make up the Bargaining Agency were discussed. The meeting lasted far into the night and small groups gathered together, discussing various angles of the proposed program which is based on the following fundamental principles:

1. An equal purchase price to be paid by all dealers for milk for the same use.
2. An equal share to each producer of the benefits of the fluid outlets.
3. An equal share by each producer in the burden of the surplus and the expense of controlling it.
4. Reasonable contribution to those having surplus facilities for the use of them seasonally for market protection.
5. The effectuation of the foregoing principles in such a manner as will perpetuate and encourage cooperatives.

The directors also discussed matters pertaining to the welfare of your organizations and reports were given them from various sections of the New York Metropolitan area, which revealed the present conditions, as to prices, activities, for and against the Bargaining Agency, and plans were outlined for many meetings which will be held with various groups, so that the ranks of the Bargaining Agency members can be solidified.

On Tuesday, March 1st, meeting in the same City, delegates to the number of over 100, gathered together with the officers and in the two sessions, matters of great importance were discussed and approved.

The delegates voted for the continuance of the present milk price schedule through March. These prices called for $2.20 per hundred pounds for fluid milk on a 3.5% basis; fluid cream continues at $2.06; while the price of milk were the entire output of a country plant is taken still remains at $2.10.

President Homer Rolfe acted as chairman for the two sessions, and Congressman Edmund Cooke was given the job of presenting to those present the recommendations of the Executive Board and the directors on the proposed State-Federal Marketing Assistance plan.

Our only regret is that every member of the Bargaining Agency was not present to listen to the explanation that Mr. Cooke gave on the new proposed program. He declared that the officers and delegates of the Bargaining Agency were charged with the leadership that they must not fail to undertake. He also stated that no great

things have ever been done, unless it has been done in a spirit of a compromise.

Step by step, Mr. Cooke led the delegates and officers and a few guests that were present through the maze of difficulties that have faced the officers of the Bargaining Agency in their efforts to stabilize the industry of the great State of New York and adjacent areas in Vermont and Pennsylvania. A much clearer conception of the vast amount of under ground opposition to any plan or attempt made by the Bargaining Agency to better the conditions of the producers was given to all present.

The present situation and the opposition that has been set up against the Rogers-Allen law by certain disgruntled people, was openly discussed and Mr. Cooke carefully explained just how matters of this kind can be overcome, and how in the long run the Producers' Bargaining Agency will prove to the milk industry of the State that their program is the right one, and to date no one has ever offered anything that could take its place.

A number of the delegates present explained in detail as to how certain dealers were juggling the prices as set by the combined meeting of the producers and dealers for the milk sold in January and February by the producers to these dealers. In several instances the schemes that have been tried out were very raw, and many of our producer members, as well as the fieldmen, are on the alert watching for such tricks which can be classified simply as those practiced like "chizzlers."

The delegates unanimously approved of the recommendations made by the directors as to the continuance of the present price schedule on milk. This schedule is subject to the reopening by either agency at any time on reasonable notice; and the Bargaining Agency Grievance Committee was instructed to endeavor to keep Alternate No. 2 in the price agreement, for as long a period as possible, pending the next negotiations.

Another recommendation of the directors group that was approved by the delegates was that no cooperative in making future contracts with dealers should do so without including in such contracts, a statement to the effect that said contract be subject to State and Federal orders, if and when such orders are issued.

Executive Secretary Mr. Baldwin outlined to the delegates the plan of a number of public meetings, where all of these important matters will be discussed, and in addition there will be special broadcasts, and your country newspapers will be supplied with down to the minute information, while special issues of the Market News will be sent out, keeping you fully informed of developments as they occur.

The delegate body unanimously adopted a resolution commending the efforts of Senator George F. Rogers and Assemblyman Howard N. Allen in seeking to procure by legislations, means to further protect the producers.

A specially prepared report on the market conditions in New York City was given to the delegates, and it revealed some startling conditions as to the prices of milk and the attempt of certain upstate dealers to break down the price by offering milk at a much lower price than has been set throughout the milk shed. This report revealed conditions that are facing certain groups of North Country producers and how they are being compelled to take a price far less than what the producers of the Associated groups in the Bargaining Agency are receiving.

All in all, the delegates meeting was another one of the gathering which are frequently held by the Producers' Bargaining Agency, and when a visitor is with us, they generally comment on the character, appearance, and ability of the gentlemen that have been chosen to represent the various Cooperatives and who gather together and discuss their individual or group problems, and as a general rule, differences are ironed out by those that have developed into a leadership that is second to none in the milk industry in these United States.

3498 DAIRYMEN WILL BENEFIT IF NO HEED IS PAID TO TALK OF POLITICIANS

ITHACA, Feb. 18 (Editorial correspondence).—Keep the politician's foot out of the milk bucket and the dairy farmer will benefit.

Agitation now is being carried on by a number of politicians who were disappointed in the results shown by the Ernst & Ernst audit and others who have special axes to grind.

Its result will be increased consumer resistance and smaller returns to the dairy farmer.

Prominently displayed on the campus here are notices of a talk by a Communist leader of the state on distribution of milk. It shows the qualifications of another "expert" on the milk question from the political side.

Dairy farmers chuckle at the promise of Attorney-General Bennett that he will show excessive profits by milk distributors. They are inclined to believe he went off half cocked and that the would-be Democratic candidate for governor will have some trouble proving his point.

Studies made here by marketing experts—and their studies go back as far as 1865, just as the civil war came to a close—indicate a cost of distributing milk in the metropolitan area of approximately five cents a quart. This is about the cost found by the Ernst & Ernst audit made for the department of agriculture and markets. The profit revealed was a fraction of a cent a quart, actually about one-third of a cent.

Farmers discount 90 per cent of the talk by politicians and believe that a moratorium on it would be a good thing in that it would stop the misleading information which makes for consumer resistance and instability in the dairy industry from which the farmer suffers in the form of reduced returns.

mers particularly are opposed to the groups which agitate for
of the Rogers-Allen law.
y realize that it brought definite help to them during the first
of operation and should be continued with improvement or
es as time goes on if found necessary.
bargaining agency set up under the law has proved helpful
est results for the farmer will be obtained by increasing the
t of cooperation for which it provides, so that the farmers
ave a stronger voice.
re also is need for agreements among farmers for the differ-
ates serving the metropolitan market, so that interstate ship-
of milk will not upset the price structure. These things will
he basis of the dairy farmers' program this year.
ater cooperation in the state is provided by the Rogers-Allen
Greater cooperation among farmers of all states in the milk
s provided for by the federal amendment to the farm con-
on law making agreements among interstate producers to the
narket legal.
y farmers desire progress to be made along these lines and will
pier if political interruption is kept to a minimum. They hope
dit of profits will help to bring stability to the industry by
g the consumer that the agitation which demands a reduction
retail price of two or three cents a quart is entirely unsound and
ible and that, in fact, the consumer is not being made a

hould lead to a situation where distribution costs and profits
own accurately. Upon this knowledge can be established a
y of return to producer and cost to consumer that is highly
ial to a great industry.—R. L. V.

MR. SEXAUER SPEAKS

following address was delivered at the Farm and Home Week
ca, New York, Feb. 18, 1938.

The Milk Situation

scussion on milk by a representative of farmers which does
l with prices to farmers is a waste of farmers' time and money.
ears ago I discussed at some length the report of the Pitcher
ttee. This Committee, as you will recall, was appointed by
slature to investigate the milk situation during 1932. It made
t exhaustive investigation ever conducted; it issued one of the
reports; it made the most definite recommendations of any
tee which has ever investigated the industry.
t report is long but the recommendations are clear and concise.
of the fact that in 1932 we were in the depth of the depres-
d there were some temporary emergencies which needed im-
attention the report would be as pertinent today as at that

time. This Committee's report is so sound that I am impelled to quote a few paragraphs from it. The Committee spent nine months in its investigation. It held thirteen public and several private hearings. Its report dealt with the problems of the industry in two ways, first with the immediate emergency which then faced dairymen, and second the broad basic economic and psychological problems inherent in the great industry.

They recognized that the plight of dairymen was the result of causes reaching into the realms of economic organization trade practices, and the peculiarities of the industry. They outlined the causes of the depression of 1933 and they pointed out the relationship between the general economic depression and the conditions dairymen were then faced with. But they also stated,

"The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control"

and then they discussed problems of surplus and cow cycles, and made this statement,

"A satisfactory stabilization of prices for fluid milk requires . . . that the burden of surplus milk be shared equally by all producers and by all distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

The Committee recommended as an emergency measure the establishment of a temporary milk control board with broad powers to regulate and stabilize the milk industry, but they said this board should also foster and promote more complete organization of producers. This was the recommendation to meet the emergency. For four years a law based upon that recommendation continued upon the statute books of this state. This last year the Milk Control Law passed on its way.

The Pitcher Committee also recommended a permanent program of handling permanent or continuing problems of the industry. Most people lost sight of this. Their suggestions for handling this phase of the problem were:

1—"Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization."

2—"Definite action should be taken without delay * * * to initiate and perfect a plan and recommend remedial legislation by which a more perfect union of all milk producers both within the state and within the milk shed may be attained, and * * * so as to effect a fair, just, equitable, and legal relation between the producer, distributor, and consumers of milk and milk products, * * *."

The question before us then is; what progress has been made toward carrying out the recommendations for the permanent handling of the problem? The emergency program was carried out. A milk control law was passed. In this state it lasted four years and then

ast spring was not re-enacted. In the meantime the emergency had retty well passed. Basic commodity prices had arisen, unemployment had declined, business activity had increased, and consumer urchasing power was such that each year had seen an increase in he consumption of milk over the previous year. Upon elimination f the milk control law as such last spring the market again went nto a tailspin. This was not because of an emergency condition, but s outlined by the Pitcher Committee in its report, was because of he "peculiar problems inherent to the industry":

"Sec. 4. The fluid milk industry is affected by factors of instability eculiar to itself which call for special methods of control."

heir recommendations for a permanent program were again p for consideration.

The question before us is—

1st, How far have we progressed in the passage of legislation to llow producers to work together through their organizations to andle surplus and

2nd, How far have we progressed in perfecting and passing emedial legislation by which a more perfect union of all milk proucers both within the state and within the milk shed may be attained, nd by which the states of New York, New Jersey, Pennsylvania, laryland, Massachusetts, Vermont, and Connecticut * * * may ooperate * * * to effect a fair, just, equitable, and legal relaon between the producer, distributor, and consumers of milk and ilk products."

At this point we can take up a discussion of legislation passed this ast year and the extent to which dairy farmers through their oranizations have utilized that legislation for the purpose of raising nd maintaining milk prices. Two pieces of legislation have been assed:

A. Rogers-Allen Law.

B. Amendment to the Marketing Agreement Section of A. A. A.

This Rogers-Allen Law was drafted and passed for the purpose f carrying into practical operation the recommendations of the itcher Committee made in 1933. It allows cooperative organizations oth within and without the state to join together in bargaining for price for milk. It allows them to organize to handle surplus if hey so desire. It provides for a cooperative working arrangement etween New York State and other states and between New York tate and the Federal Governme .t. It allows negotiations of prices etween producer groups and distributor groups. These are all in ccordance with the Pitcher Committee's recommendations. In other ords the provisions of the Rogers-Allen Law which allow producers o get together for the purpose of negotiating with distributors, which llow them to get together for the purpose of handling their surplus, hich allow this state to cooperate with other states and which allow he state to cooperate with the federal government, are in accordance ith the recommendations of the Pitcher Committee, had their inption with that report, and were supported by the dairy industry

as a part of the program to put the recommendations of the Pitcher Committee into effect.

By inference at least the Pitcher Committee also recommended that federal legislation be passed which would allow the federal government to cooperate with the state along the same lines and upon the same program. During this past year amendments to the marketing agreement section of the A. A. A. were passed which gave to the Secretary of Agriculture many of the same powers that the Rogers-Allen Law gave to the Commissioner of Agriculture and Markets.

These two pieces of legislation fitted together carry forward as far as remedial legislation is concerned the recommendations of the Pitcher Committee. Just how have dairy farmers of the New York Milk Shed taken advantage of this legislation?

The Rogers-Allen Law provided that cooperative organizations of whatever kind or character now existing within the Milk Shed, or hereafter to be formed, can work together for the purposes of negotiating with distributors or handling surplus. Some people feel that this is a League idea. I believe the Rogers-Allen Law is a sufficiently good document that I should like to take credit for the basic ideas contained therein. However, common honesty compels me to give credit to others. I want to take this opportunity to read to you a recommendation made by a witness before the Pitcher Committee during the period in which they were taking testimony.

"The recommendation I would make would be, first, revise our Co-operative Law in the State, and provide in that law that farm organizations with the title of cooperative, should be organized from the ground up; * * * Each association send a delegate to a central body, and that body create an executive committee to sell milk to take care of surplus, if their is any; do anything that the members ask that they do, through their organization, * * * in that plan it would not be necessary to disturb any group of dairymen that exists now, the Dairymen's League, the Sheffield Producers, the Unity, and the Rutland Plan, or any other that is organized to handle milk, they could go right into it as a unit. The organization could be very easily perfected without any danger of the anti-trust law, and in fact could be made one organization and not disturb anyone that had a preference to remain in the organization they have now."

That is an excellent description of the Metropolitan Cooperative Milk Producers' Bargaining Agency and how it operates. The recommendation was made on September 29, 1932, by Mr. John J. Dillon, appearing before the Pitcher Committee at Carmel, New York.

The transformation of these ideas into a working document, I must admit, is very largely the work of the Dairymen's League and there seems to be some logical reason why this should be so. The Dairymen's League Cooperative Association has had twenty years experience in dealing with the problems of membership, negotiations, and marketing.

Pioneering as we have in the cooperative field for twenty years there plainly is in the Dairymen's League the greatest all-around legal background on this problem that exists in the dairy industry. As it combines the judgment of a bunch of hard-headed farmers with the experience of an able legal staff and the resourcefulness brought about by twenty years experience in negotiating with distributors, it is not surprising that legislation on milk bears something of the stamp of the Dairymen's League.

During the past eight months since the Rogers-Allen Law was passed and signed by the Governor over one hundred groups of farmers ranging in size from 50 to 35,000 have indicated their willingness and desire to work together for a common purpose. This does not mean that all these groups are well-integrated organizations with capital and experience. It does mean, however, that the magnet of common interest contained in this law has drawn these groups together for the purpose of working jointly on their problem.

The going has been tough. Some dealers have not changed their attitude toward producers or producers' organizations. Many of them still want to make money buying cheap rather than by sound merchandizing. There is no reason to believe that they will change unless forced to. The same distributors who broke down the unity of dairy farmers under the Cooperative Law are working as diligently to break down the unity of cooperatives under the Rogers-Allen Law. They are using the same tactics to prevent cooperation among the cooperatives as they once used to prevent cooperation among producers.

Cooperatives today have more freedom under this law, and there are still provisions in this law to assist them in maintaining prices that have not yet been called into use. The state has not entirely laid down its responsibility of assisting in the handling of the problem. Under the Rogers-Allen Law, rather than stepping into the picture as an autocrat to handle the problem regardless of the will of producers, it today stands aside as a kindly mentor awaiting such time as the large majority of the producers signify their desire for the assistance of the state and the kind of assistance they want.

Under the Rogers-Allen Law at the request of producers the state can step into the picture and exercise all the powers of protecting producers' prices that it previously exercised under the Milk Control Law, but it is presumed that it will only exercise those powers when a sufficient number of the producers are organized to handle a large part of the problem themselves, and the state will be required only to cooperate with this group in order that the problem as a whole may be equally as well handled.

But these powers of the state are not all the powers that today can be called into being on the part of the cooperatives. Under the federal law the federal government is authorized to do all the things so far as interstate milk is concerned that the state is authorized to do as far as intrastate milk is concerned. But the federal government also

stands aside until such time as a large majority of the producers say that they want the federal government to assist them in handling those parts of the problem which cooperatives themselves are unable to handle. And like a kindly mentor it, too, must step aside at such a time as a majority of the producers request it.

So today we have a situation within this Milk Shed where the recommendations of the Pitcher Committe for the handling of the permanent phases of the problem have been carried out as far as
3510 legislation is concerned. Cooperatives are now working together under this legislation to carry out the provisions of the remedial legislation.

This legislation is largely permissive, available to producers when they organize to use it and of themselves make use of it. Powers of state and federal governments never before made available are there for the asking if they, the producers, develop their own program. It is an opportunity for self-government combined with governmental assistance seldom, if ever, granted an industry.

More people in diverse groups have come together in a shorter time under this law than I have ever heard of before.

From July 1937 to January 1938, working under the Rogers-Allen Law alone and using only a part of the rights and privileges which it grants, Dairymen's League members have received $800,000 more for their milk than a year ago under State Milk Control. The benefit to all dairymen of the New York Milk Shed, in my opinion, will total more than $2,000,000 for that period. Still greater benefits will come to the dairy farmers of the New York Milk Shed when and if they learn to operate more effectively under this law and learn to use all of its provisions.

3513 *Exhibit No. 23D to stipulation*

MILK PRODUCERS' MARKET NEWS—APRIL

BARGAINING AGENCY MEETING

Once again on Friday morning, March 25th, officials, delegates, and visitors gathered in Syracuse and discussed the demands for a reduction in the prices of milk and cream and matters of importance relative to the proposed Federal Assistance plan.

Chairman Rolfe, in opening the morning session held at Hotel Onondaga, went into detail of the meeting held a few days previously with the committee from the Dealers Bargaining Agency.

At this meeting the dealers bluntly told our committee that the uncontrolled milk that was being brought into the New York Market, was rapidly demoralizing the entire price structure.

Chairman Rolfe stated that, after an all-day discussion, the dealer group finally offered to pay $2.00 for milk for fluid distribution to the retail trade and $1.75 for fluid cream for retail distribution. This is a reduction of 20c per hundred for fluid milk and 25c for milk for fluid cream, and is the third reduction since January 1st.

Chairman Rolfe stated that the committee was presenting to the del-
ates present these suggested prices and following his remark there
s a wild skirmish on the floor between those in favor of the reduc-
n and many who felt that it was unwise to accept such a reduction
this time.

Seemingly the bone of contention was the proposed elimination of
ternate No. 2, which set the price for milk where a dealer pur-
ased the entire output of the plant.

Quite a number of the co-operatives present expressed dissatisfac-
n at the proposed elimination of this section and among the speak-
s who discussed the matter was Chairman Rolfe, E. J. Friers, Dele-
te Dunn, William Mather, Delegate Mason, Stanley Piseck, F. H.
ilds, Delegate Kinney, Delegate DuMont, Delegate Markofski,
nie Sheldon, Warren Davey, Mr. Strobeck, Alfred J. Williams,
d J. C. Treat.

Several of the delegates were a little harsh in their condemnation
the work that the directors have done, but a great many of the
legates present rally to the support of the delegates and, after
oper explanations were made, the meeting turned into one of the
ster type and everything went along nicely.

Chairman Rolfe told those present that the Bargaining Agency
uld be just as strong as the Farmers made it, and he urged a closer
-operation out in the field so that the twenty-five percent of the
oducers, who are not in the Bargaining Agency, would eventually
e up and thus benefits for the entire milkshed could be secured.

When the vote was taken by the delegates to approve the new price
hedule, it was almost unanimous and, when Mr. Sexauer, as Presi-
nt of the Dairymen's League, cast the vote for the many thousands
producers who belong to the Bargaining Agency, he read a state-
nt which is given in another section of the Market News.

Mr. Sexauer talked to the delegates and visitors present in a man-
r that won for him hearty applause at the conclusion of his talk.
e spoke as an individual and discussed the Bargaining Agency from
l angles, disclosing the weakness and praising the strong attitude
ken on many subjects of vital importance to the producer members.
r. Sexauer urged that a strong program be immediately prepared
ong militant lines and in case that at any time it was necessary
fall back on this reserve program, that all groups would be ready
face any emergency and, even if it meant a strike, we should all be
a position to carry out any program the special committee should
cide upon.

Edmund Cooke, the attorney for the Bargaining Agency, once
ain discussed the proposed Federal Assistance Plan, which is now
ving the rough spots ironed out of it. Going into detail as to the
erpretation of the proposed act, he once again presented a clear
ture to the delegates and visitors, and it seems to your writer that
e is a man most capable of handling the legal affairs of your
rgaining Agency.

During the afternoon a number of "Good Will" talks were given and finally one of our guests, Mr. Davis of the Dairymen's League, brought in several boxes of fine New York State apples and it was late in the afternoon before Chairman Rolfe adjourned the meeting.

The special committee, headed by Chairman Rolfe, who have been handling the details in regards to the proposed Federal Assistance plan, were in Washington, conferring with federal officials on March 28th and 29th. A tentative draft of a fluid milk marketing agreement for the New York City area producers was outlined at the conference, and, after matters relative to the proposed plan were discussed, both sides issued a statement at Washington in which certain information relative to the proposal was given to the press.

This proposal contemplates establishment of uniform interstate and intra-state prices and regulations in New York City, Nassau,
3528 and Westchester Counties. The price provisions would apply only to producers who would share in the proceeds of fluid-milk sales under a pooling arrangement.

NOTE.—Just as soon as this plan has met the approval of the Federal Officials, we will present it to our readers complete, and Chairman Rolfe, with the assistance of Executive Secretary Baldwin and the fieldmen, have arranged many meetings among the members, in which the plan will be discussed in detail.

It is planned by the Federal Officials to hold a series of hearings on the proposed order and every producer in the state who supplies milk to the New York City market will be given an opportunity of learning the details of the proposal.

3515 NEWS NOTES FROM MR. BALDWIN'S OFFICE

Meetings are being held all over the milk shed for the purpose of discussing the principles of the proposed marketing agreement.

On February 24th, the Directors of the Portville, Steamburg, and Leon Cooperatives met in Salamanca. These Directors agreed unanimously that Federal assistance was necessary in order to give all the inspected producers in the milk shed the advantages of a surplus control plan.

On March 10th, the Directors of six cooperatives met at Granville, N. Y. These Directors represented the Rupert, Metrowee Valley, Slate Valley, Fair Haven, Otter Valley, and Bennington County Cooperatives. The purpose of the meeting was to discuss the Federal Agreement, and to make plans for other meetings at which these Directors can explain the principles of the Agreement to all the members of the Cooperatives. Farmers have taken a long step forward when representatives of many groups come together for a single purpose.

The Producers of the East Freetown Cooperative met on March 8th. The principles of the Federal Marketing agreement were ex-

plained and a resolution was adopted approving of these principles.

Members of the Otselic Valley Cooperative met at the High School n Cincinnatus on March 8th. In the discussion following the explanation of the surplus control plan, it was pointed out that owing o the refusal of some groups to cooperate in voluntary agreement hat Federal assistance was the only way that the five fundamental narketing principles could be established in a marketing program.

The producers of the Frankfort Cooperative met on March 10th. The principles of the Surplus Control Program were explained and a number of producers signed contracts.

At a meeting of the High School Agriculture teachers of St. Lawrence County, held at Briar Hill on March 9th, the Bargaining Agency program was explained. There was a very thorough round able discussion of the principles that have been agreed upon as essential to a sound marketing plan.

On March 14, a group of Future Farmers of America met at Goshen, N. Y., for an accounting of the past year's work, and to listen to a discussion of the program of the Bargaining Agency and he need of a surplus control plan. These young men invited their fathers to meet with them. A better understanding of the fundamental principles of sound marketing will enable these young farmers to take their place in helping to build a better agricultural program for the future.

At Slate Hill, producers met to discuss the surplus control plan and to formulate a program which will bring the cooperative associations of Orange County closer together.

The Directors of the Oriskany Valley, Marshall, Bridgewater, and Kirkland Cooperatives met in the Grange Hall at Paris Hill, on March 14th. The proposed Federal Marketing Agreement was thoroughly discussed. These Directors were agreed on the principles of the Marketing Agreement, and felt that Federal assistance must be called upon to compel all dealers to pay a uniform price for fluid milk.

A meeting of the Fultonville Cooperative Association was held on March 14th at Fultonville, N. Y. The producers of this Cooperative voted to purchase the milk plant in order to have full control of milk produced by its members. This Cooperative becomes one of the leaders in a development that will be of great value to all producers in the New York Milk Shed.

A group of producers of the Conesus Cooperative Association met at Bristol Center on March 15th. Congressman Cooke explained the proposed surplus control plan, and explained how State and Federal assistance could be used in working out a sound marketing program. On the following night, another group of producers of the Conesus Cooperative met at Holcomb, N. Y., to discuss the progress of the surplus control plan. On March 16th, the Business Men of Afton, N. Y., under the leadership of Daniel Grant, invited the farmers in this area to a meeting which was held at the High School. The purpose of the meeting was to discuss the condition of the milk in-

dustry and to explain the proposed federal marketing agreement. It was generally agreed that Federal assistance must be called upon if producers are to receive a Living Price for Milk. The farmers at this meeting, as at many of the other meetings which have been held, were anxious to bring Federal assistance into the New York market as soon as possible in order to prevent the complete breakdown of prices.

A meeting of the Directors of Clockville and Conastota Cooperatives was held at the home of Mr. Roy Turner at Clockville on March 18th. These meetings where two or more Cooperatives get together are an indication of the growing tendency of all producers to work together. More meetings of this type would be beneficial.

On March 17, the Kiwanis Club of Ticonderoga, N. Y., invited a number of dairy farmers to their luncheon meeting. A representative of the Bargaining Agency explained what the organized farmers are doing to develop a sound marketing program. With the business men and farmers working together in this way, better understanding is assured.

3523 MR. SEXAUER'S STATEMENT MADE AT LAST DELEGATE MEETING WHEN NEW PRICES WERE APPROVED

That the Dairymen's League Cooperative Association, Inc., reluctantly permits its delegate to acquiesce in the establishment of a $2.0[illegible] price of milk for use in fluid retail markets, and $1.75 per cwt. for milk used for fluid retail cream in the retail markets in New York City, but in doing so it wishes to point out

1st: That the establishment of such prices affects not to exceed 30% of the total amount of milk sold in the New York City market; and

2nd: That the negotiations establish a price for only milk sold by Sheffield producers and the Dairymen's League Cooperative Association, Inc., and only a part of their milk; and

3rd: That the fluid milk and milk for fluid cream used in the wholesale market in New York City is left absolutely without price; and

4th: That this wholesale market is now open and completely free and on a competitive basis and that this action release every member of the Producers' Bargaining Agency to sell milk for wholesale purposes at such prices as they see fit; and

5th: That any material continuation of this condition will result in prices to producers as low or lower than they were last year; and further

That this section in voting favorably is conditional upon the Producers' Bargaining Agency developing a program either through State and Federal assistance thru marketing order, or if that becomes impossible a marketing program which has as its objective the maintenance of fair prices to producers, the forcing of distributors to pay equal prices for milk for same uses, equity of returns to producers, together with compensation for the handling of surplus milk for

rket protection, and that the Executive Committee and Board of rectors be instructed immediately to begin to lay the ground work such a program in order that should State and Federal assistance l to be put into effect, the Bargaining Agency will have a program ich will protect the market of each and all of its members.

9 *Exhibit No. 23E to stipulation*

MILK PRODUCERS' MARKET NEWS—JUNE

Federal-State Hearings Draw Huge Crowds

housands of producers, dealers and officials of various State and leral groups were in attendance at the hearings held in Albany, lone, Syracuse, Elmira and New York City.

large majority of the producers who testified at these various tings were in favor of a Federal order and presented interesting imony, coupled with facts and figures that made an impression ll who attended the meetings.

t Albany, the 1,100 that were present listened to many of our lers in the Bargaining Agency present a word picture of the ditions in the industry, what had taken place in the past year and t was needed so that the producer could finally have a feeling security in knowing that he would receive a fair price for his k, a proper classification and the elimination of the surplus head- e which has faced him year after year.

lany dealers and their representatives were present at Albany we also noticed that individuals from groups opposing this order e quite busy in the hall, or on the outside passing out literature ch attacked the Federal order and its proponents.

he Malone hearing in attendance was the largest to date, and at time, over 2,300 persons were crowded in the Armory to listen to testimony given by the great many interested persons.

he opposition to the order in the North Country either got cold , or they could not coordinate their facts, because the real leaders have continually fought the Producers' Bargaining Agency, ed to speak and several of them even failed to show up at the ting.

ne producer from the Western part of New York, who is said to on the pay roll of the Dairy Farmers' Union and who is not even he New York City market, talked longest and loudest, but it was consensus of opinion that if this gentleman had continued to talk ther meetings, he would have helped put over the Federal order grand style. Another gentleman who is said to be an attorney in North Country, spoke at length and at the start he revealed he not own a dairy or had any actual connection with the produc- of milk.

nother producer from Gouverneur made several accusations inst our efficient Executive Secretary, Mr. Charles H. Baldwin.

and it was quite evident that the speaker was attempting to rouse the producers present, but his efforts fell flat.

We might mention at this time that all who testified did so under oath, and it would be a joke that was not so funny if several of these gentlemen were "called on the carpet" and asked to furnish data to back up what statements they made.

At Malone it was quite evident that a vast majority of the best type of producers were fully in accord with the Producers' Bargaining Agency program and the attempt to stir up trouble fell flat. This was probably due to the fine testimony that was given by Earl Laidlaw, Leon Chapin, and the masterful handling of the various testimony by Attorney Cooke, followed by the friendly remarks made by Commisisoner of Agriculture Mr. Noyes, at the conclusion of the days proceedings.

The next hearing was held May 18th, at Syracuse and once again the producers were in a large majority of the 1,500 present, and it was quite evident that most of the group were in sympathy with our attempt to secure a stabilized milk market for them.

Producer after producer gave testimony as to why they favored the proposed Federal order and the opposition, mainly composed of attorneys, talked at length, but we feel that their eloquence was not sufficient to change the minds of any of those present.

Leaving Syracuse, the caravan went to Elmira and on May 19th, over 1,800 producers gathered to listen and applaud those that spoke in behalf of the proposed order.

The opposition that appeared at this meeting was such that one could hardly consider their remarks in connection with the proposed order. All in all, it was one of the banner days of the hearings where the producers expressed themselves in accord with the proposed agreement.

Our next stop was New York City and on Friday, May 20th, approximately 400 producers, dealers, and consumer representatives gathered in a hot, stuffy room at the State Office Building. Once again the proponents of the order were given an opportunity to express themselves and they occupied most of the morning in so doing. Due to the terrific heat and the lack of space, the afternoon hearing was moved to the spacious ball room at Hotel Commodore. Here over 900 persons listened to testimony of various nature for and against the bill. The outstanding surprise of this session was that the consumers group, under the leadership of Dr. Caroline Whitney, and Attorney Meyer Parodnick, their testimony was such that they actually favored the proposals in the bill and the only objections made were on one section which they claim might permit price fixing to the consumer.

The hearing adjourned on Friday until Tuesday, May 23rd, and once again we met at the State Office Building where, on the first day, the hearing master, Mr. Gifford, permitted the dealer groups to present their case. It was quite evident that the dealer groups

presentatives at every meeting previously held and made many which were incorporated into their testimony given at this g.

nly speaking, the dealer groups, headed by the Sheffield Farms any, objected to practically every part of the proposed order e famous trio of Mr. McKay, Mr. Eastlack and Mr. Rubenfeld, d by Attorneys Sklar and Tiffany practically occupied the during the entire day. It seemed quite strange to some of present how this group of shrewd business men could come into hearings and claim they knew very little about the order and ld take from four to seven weeks more to make a study of the s testimony and then ask for the privilege of making examina- f said testimony.

—Producers—remember if these hearings are carried along eks by this procedure, don't forget that the low price of milk ontinues, and someone gets the benefit, and you continue to the low prices for your products.

opposition came into this meeting fully prepared, and several during the day it was noticed that the dealers who were testi- attempted to ridicule the efforts of the Bargaining Agency, Board of Directors, along with the assistance of State and al officials, prepared the proposed Federal order.

the conclusion of the day's hearings, announcement was made he hearings on Wednesday would be transferred to the Lawyer's at 42 West 44th Street. There were a great many who desired heard and in addition to the New York testimony, the possi- s of the hearings being reconvened to up-State was not remote. we will not be able to give our readers facts concerning other gs, we would suggest that they carefully read the testimony s printed in this issue of the Market News and judge for them- . The suggestion is that you carefully read the full testimony by Dr. K. Schaul, the Secretary of the Sheffield Producers' iation. Facts in Dr. Schaul's testimony are such that you can your own conclusions as to why the producers should approve ote their approval of this proposed order.

MR. BALDWIN'S MESSAGE TO YOU

er having worked for twenty-five years with various groups of rs one quite naturally knows well many farm people from all of the Milk Shed. The Federal-State hearings which I at- l last week gave me an opportunity to see more of these friends ld acquaintances than I ever before saw and visited with in such rt period. They assembled at the hearings with one thought in —to learn how they can do their best and their bit in bringing stability and orderly marketing of milk, thus assuring them a price month after month and year after year. It was my ure to talk with many of these real producers of milk on the

big question that is soon to be decided, and I believe as a result I know their thoughts. Based upon my observation and experience of the past week I summarize them as follows:

Dairy farmers who are depending upon the sale of milk for a living and who are doing their own thinking are 99.44% in favor of Federal and State assistance.

They recall the experiment of price fixing under State control and realize the necessity for joint State and Federal cooperation in bringing about orderly marketing in a milk shed composed of parts of several states.

They realize the necessity for strict and honest enforcement of any order affecting a milk shed.

They have complete confidence in Commissioner Noyes and Secretary Wallace to pick a man as administrator who is not mixed up in any faction, and who will administer the rules that are written and approved by the producers fearlessly and honestly.

They are all determined to have a share in fluid markets.

They know that uncontrolled shipments to fluid markets of milk and cream in excess of requirements destroy everyone's price.

They agree that producers cannot live on present prices, and they say that under present conditions prices will continue to go lower.

They agree that all qualified producers should have equal share in the fluid markets and all should share equally in taking care of the surplus.

They are agreed on the five fundamental principles upon which the present tentative order is written, and the one universal question asked me during the past is, "When Do You Think We Can Vote on This Agreement and When Can It Be Put Into Effect?"

It is true there were those who opposed the agreement.

There were individuals who honestly wanted to know and who desired minor changes in the order. Some wanted more information on certain points to make sure that the agreement as written does cover the five fundamentals in a way that is fair and just to all producers. These producers went from the hearings well satisfied and will help in a forceful, constructive way. I admire these producers for "being from Missouri and having to be shown," as producers have a right to be suspicious of almost everything after having received the treatment that they have received from some dealers in the past.

Dealers quite generally opposed the producers' efforts.

True, there are others who are not licensed dealers who opposed the agreement in a general way. I shall not attempt to classify them, but I urge every dairy farmer to do so and to investigate carefully their record for evidence of constructive action in the past and to determine for themselves for whom they are working at the present time. Perhaps a list of those who opposed the order on general principles can be secured from those who conducted the hearings.

My message to producers today consists of the following warning: I Am Firmly Convinced That Producers Are Not Going To Have This Agreement or Any Agreement That Will Be Enforced by

deral and State Authorities and Give Producers Control of the ce That They Receive for Milk Without One of the Stiffest Fights at Producers Have Ever Seen. The Five Fundamental Principles e Too Sound and the Agreement Which Will Put Them Into ect Is Too Constructive and Too Helpful to Producers To Be sily Secured. The Whole Plan Can Be Lost due to Producer difference. This Agreement Will Be Approved Only If Pro-ers Generally Vote and Express Their Own Personal Convictions. The opposition will see that all weak sisters are voted. The deal-field men, and their hirelings will take care of that.

t is, therefore, up to every producer to see that he gets out their e for what he believes is for the best interest of the producers. suggestion is that on the day the vote is taken that every pro-er take time off and carry to the poles with him at least two other ghbor producers. I Appeal to the Women Folk on the Dairy rms Who Work so Hard and Who Suffer More Than Others, Due the Low Price Producers Are Now Receiving, To See That All o Are Qualified To Vote Do So When This Important Election y Comes.

CONGRESSMAN COOKE'S MESSAGE

To Be Well Born is to Be Successful

I agree with the old proverb and by all reasonable standards of mparison, I think one must conclude that the Rogers-Allen bill was ll born. As the joint product of distinguished farm leaders and soned, experienced legislators, approved by a Governor whose rction to duty and righteousness is generally acclaimed, it is en-ed as law to take an earned and dignified place in the esteem and dgment of the people. It was no one-man bill, I assert again. It s not expression of men obsessed with the idea that one man's ir must prevail or ruin be created. It was the result of study, in-tigation and orderly intelligence, the best thought of thousands of n people in the state, and the efforts selfishly put forth by a few weaken faith in the wisdom of its provisions, deserve the contempt h which they are meeting."

A LETTER FROM STATE GRANGE MASTER COOPER

MAY 3, 1938.

MASTERS AND SECRETARIES OF SUBORDINATE AND POMONA GRANGES.

DEAR PATRONS: As you know, the Conference Board of Farm ganizations, of which our Grange is a part, developed the Rogers-len Bill," which became a law and under which the Metropolitan rketing Agency was formed.

More than 50,000 dairymen were drawn together in this agency, rough their co-operatives. Starting in June 1937 this agency de-

veloped so fast that the price of milk increased from about $1.6 in June to $2.63 in November, the highest level in seven years. Then came the surplus season and because the organization was young and incomplete and no adequate solution had been developed to handle the surplus problem, prices fell and continued to fall low as the surplus increased.

Today the Agency has a surplus control plan ready for dairymen to inspect. This plan is drawn in the form of a State and Federal Marketing agreement. It is drawn up within the provisions of the Rogers-Allen Law. The framers of this law wisely foresaw that possibly the voluntary cooperation of producers would not be enough to safeguard markets and might require some assistance from governmental agencies.

This question is of vital interest to dairymen throughout the state and as so many of our Grange members are dairymen we are inclosing a booklet which contains the tentative plan in full, together with an explanation of how it would work.

Milk has always been a controversial subject. Everyone has a right to his views, but since the Grange sponsored the Rogers-Allen Law, since we advocated its continuance without change at our last Annual Meeting by resolution, and since the price of milk is so very vital to our members, we are asking that at least one Lecture Hour be devoted to a thorough study of this plan, not with a view to passing resolutions or taking any stand as a Grange but that our dairymen members of the Grange may be fully informed and be ready to vote after hearings are held. (Worthy Secretary, after you have read this letter will you kindly hand it with the booklet to the Lecturer of your Grange? Thank you.)

Patrons, let us try to keep the old differences of opinion in the background long enough, at least, to make an intelligent and calm examination of this plan. Let's examine it on its merits and decide for ourselves as to its value to dairymen in their dire need.

Fraternally yours in the Grange spirit of true cooperation,

(signed) RAYMOND COOPER,
State Master.

3534 LEON A. CHAPIN—REMARKS AT MALONE, N. Y.:

MAY 17TH, 1938.

The surplus problem is more acute in this section than in any other in the milk shed. This is so because of the type of production and because this section is so remote from the market.

Summer production is easily adapted to this section. As a consequence production in June, according to the State's figures for 1935, was three times that of January.

Late March freshening predominates in this area so that production is very high in June, holds up well through August, and has its low point in January and February. This naturally brings a tremendous surplus in June and results in shipments of milk and

uid cream out of this section in June of about 19% of the total olume produced. At the same time the percentage for the state s a whole is nearly 52%. With 81% of the production in these orthern counties being manufactured in June, it is easily apparent at the producer is vitally interested in the control of surplus isposal.

Nor is this problem confined to the month of June. In November, r instance, only about 75% of the milk moves in Classes 1 and 2, hile nearly 90% of the total production of the State is so used. The foregoing figures are for all plants in this area including heese factories. Because cheese and butter disposal is higher in this erritory than in the rest of the State, we have removed from both he figures for the area and from the figures for the State, the uantity of milk used for each of these purposes and have figured he disposal in terms of classification percentage after eliminating he cheese and butter factor.

Doing so we find that for the year of 1935 only 47% of the balance as moved in Classes 1 and 2, whereas the total for the State under ike conditions was 78%.

This is not an unnatural situation. Our location far from the narket makes it more economic to hold milk off the market and nanufacture it, than it would be to do so in more adjacent areas.

What we need in this section, from an industry standpoint, is not change in the percentage of milk and cream shipped but rather ome method whereby the returns from surplus operations may be o controlled that the producer is assured of the greatest possible eturn.

3539 MR. SEXAUER SPEAKING AT ALBANY HEARING

Producers need state and federal help to correct abuses.

Courts and investigating bodies have recognized surplus problems give dealers advantage and,

Have recommended equalization and stronger cooperatives.

Proposed agreement sets up machinery to do the job.

Some weaknesses in the proposal but they can be offset by coop- eration.

Producers must control surplus.

3540 LET EVERY DAIRY FARMER DEMAND A LIVING PRICE FOR MILK—NOW IS THE TIME TO APPLY THE FULL POWER OF THE ROGERS-ALLEN LAW

Chiseling dealers and other selfish interests are saying that the Rogers-Allen Law has failed. They want it completely out of the way, so that they can go on buying surplus milk at cheaper than fluid prices and keep prices to farmers down. That's the only way they can be sure of continuing their big profits.

THE ROGERS-ALLEN LAW HAS NOT FAILED

The Rogers-Allen Law, as a matter of fact, hasn't even been fully tried. Only the first of its three provisions has been used by the farmer to help in keeping milk prices up.

The first provision of the Rogers-Allen Law was put into effect immediately after the law was passed. It makes it legal for farmers, through their cooperatives, to join together in a producers bargaining agency, and through the agency to bargain with a dealers agency to set the prices for fluid milk.

In spite of the fact that not all farmers and dealers joined their respective bargaining agencies, the producers bargaining agency obtained price increases for the farmers every month from June to December last year, hitting the highest peak in prices since 1931. But some chiseling dealers, disregarding the terms of their own dealers agreement, went out and bought up distress fluid milk and sold it in the fluid market at cut prices, forcing all milk prices down.

The second part of the Rogers-Allen Law provides for negotiation between farmers and dealers to control the surplus.

This second part of the law could not work because not all dealers could be made to observe the agreements of the dealers bargaining agency.

Third—The Rogers-Allen Law further provides that if ALL farmers and ALL dealers couldn't get together to control the surplus, the State and Federal Governments could, upon request, step in and make it impossible for chiseling dealers to operate.

This third provision of the Rogers-Allen Law is now planned to be put into operation. A plan of Federal and State assistance to help the farmer control the milk market has been drawn up with the aid of officials from the Federal and State Departments of Agriculture.

Federal and State assistance will put the milk market control in the hands of the farmer for the first time. It will give the farmer Federal and State backing in his efforts to get a LIVING PRICE FOR MILK.

Everyone who stands to profit by disorganizatio among farmers will oppose Federal and State assistance. Every farmer who

Don't Let Milk Prices Drop!

thoroughly understands this plan will be for it.

With control of the surplus in the hands of the farmers—with support given by both Federal and State Governments, the farmers will be on the way to getting a living price for milk. Without this Federal and State support—without taking advantage of all the provisions allowed under the Rogers-Allen Law, milk prices to the farmers must go down.

Understand and support the request for Federal and State help. The proposed marketing agreement will give farmers these things:

1. It will take the surplus out of reach of chiseling dealers. They will no longer be able to push your milk checks down in order to make larger profits.

2. It will give every dairy farmer an equal share of the benefits of the fluid market and make it unnecessary for farmers to compete with each other for marketing advantages.

3. It will spread the burden of the surplus so as not to be unfair to any producer.

4. It will keep the control of milk out of the hands of politicians and unscrupulous dealers and definitely put control in the hands of farmers themselves.

5. It will accomplish these things on the basis of fair play to all—the producers, distributors and consumers.

541 *Exhibit No. 23f to stipulation*

MILK PRODUCERS' MARKET NEWS—JULY

MILK PLAN CAN BE MADE TO WORK SAYS COMMISSIONER HOLTON V. NOYES

"This plan can be made to work," said Commissioner of Agriculture and Markets Holton V. Noyes of the proposed federal-state marketing agreement which would establish government control of producer prices. Mr. Noyes spoke before dairymen and cheese manufacturers at Canton and he qualified his statement by terming the plan workable "if the defects disclosed at the hearings are corrected, and if it has the wholehearted cooperation of at least a majority of the producers.

"If I am assured these conditions are met I should have no hesitancy in recommending to our dairymen that the plan is worthy of trial and holds the possibility of leading to more stable, more profitable, and more satisfactory conditions in our great and important dairy industry."

Mr. Noyes incidentally cited "misrepresentation, deliberate or unintentional" and the "frequent impossibility of sufficiently complete publication of official utterances." Said he:

"As we move forward to work out a solution of our milk problem along permanent lines we are faced with the necessity for immediate action to meet present distressing conditions. I do not need to tell you that prices are below cost of production; that market conditions are chaotic; that efforts by the industry, under the machinery provided by the Legislature, have proved ineffective. Your milk check tells the story more forcefully than anything I can say. What is the solution?

"As you know, representatives of the federal and state governments have journeyed about the state in recent weeks holding hearings on a proposed federal-state marketing agreement which would establish government control of producer prices. It has been our

experience in this matter that human nature behaves no differ on a subject so serious as this than it does on any other matter.

"I refer to misrepresentation, deliberate or unintentional. One the few conditions about my own or any other public office that early found most irritating is the too frequent impossibility obtaining accurate or sufficiently complete publication of an utterance to convey its real meaning. I am not saying this in criticism of the press as such, or of any representatives of the press particular. I know that newspapers each day have probably times as much news material as they can publish and that inevitably there must be much omitted and that which is used must be condensed.

"In this process of condensation or omission I find the greatest reason for my criticism. What I want the public to know and what consider it important that they should know, I realize, often may be what the editor thinks is unimportant from his viewpoint. And of course, it is for him to decide what his publication will publish. But whatever the cause and whoever is to be blamed, the effect is always the same—to increase misunderstanding and distrust, because complete information is denied. And then again, we must remember the political or economic beliefs of the publisher may exert an equally effective censorship in preventing or curtailing publication of complete and necessary information on any public question. This practice, I regret to say, seems rather to have increased than decreased in recent years.

"It is this situation which provides fertile field for the growth and spread of deliberate misrepresentation, either by the dissemination of half truth or withholding of full truth, both of which have the same ultimate effect. The present discussion of this marketing agreement is a good example of what I mean.

"Some of those who oppose it have not been content to do so in the open by sound factual objection. They have preferred to seek its defeat rather by capitalizing the present trend of American popular opinion against dictatorship of any kind. The plan, they charge, represents another attempt by the state and federal governments to extend their control to the State's dairy industry. This is untrue. The original request for intervention of both governments to control producer prices under this plan had, under the national agricultural administration law and under our own state Rogers-Allen law, to come voluntarily from the producers themselves by petition. It is the producers who must vote to establish this control. The producers themselves can at any time end if it does not work satisfactorily.

"We shall soon be prepared to vote upon this marketing agreement. The law permits cooperative associations to vote their membership collectively upon this question. But I have maintained that the issue so seriously concerns the individual farmer that he alone should give the answer by individual vote. Unless the vote is individual, I

see how we can, with any accuracy, measure the individual
t that exists for the plan and therefore how much individual
ation may be expected to make it effective. That is another
reason with me why I have insisted upon an individual vote.
is plan, or any other for industry or governmental regulation
dairy industry, can never be made to work effectively unless
the support and cooperation of the dairymen. This coopera-
as denied under industry control in the early thirties; it was
d under State control; it has been lacking under the recent
ttempt at industry control. The effectiveness of all previous
to solve the problems of the dairy industry has been de-
stroyed or impaired by non-cooperation. I am no prophet of
disaster but I should be wanting in courage and frankness if I
failed to warn you here and now that non-cooperation can ruin
esent plan as it has the others.

a majority of the producers is not prepared to give full and
e cooperation to this plan and to register it by individual vote,
by what right morally, or legally can any official presume to
l the entire membership of his organization favorably on the
r? And how can cooperation, so vitally necessary to the plan's
s, be expected unless a majority favor it? An individual vote
e plan carries with it a moral obligation to support and cooper-
making it successful. That moral obligation is not specific
binding otherwise.

oresee another possibility in connection with the vote upon this
on which I feel obligated to point out. The provisions of the
al law require a majority of 66⅔ per cent for or against. Our
law requires 75%. It is not inconceivable that a percentage
oducers may vote for the plan in sufficient numbers to meet the
al requirement but insufficiently to comply with the state law.
such case, we could establish only federal control and such con-
ould apply only to milk in interstate commerce. Milk moving
n the state would not be controlled. If this should happen, it
belief that it would be unworkable and without benefit.

is important, therefore, in my opinion, that if this plan is to be
ive it must be voted for in its entirety or defeated in its en-
. This is a matter on which there can be no compromise. It
be all or nothing. Which it shall be is a matter for the dairy-
themselves to decide.

s for my personal opinion, I repeat what I have said before on
al occasions: This plan can be made to work, if the defects
ed at the hearings are corrected, and if it has the whole-
ed cooperation of at least a majority of the producers. If I
ssured that these conditions are met, I should have no hesitancy
commending to our dairymen that the plan is worthy of a trial
holds the possibility of leading to more stable, more profitable,
more satisfactory conditions in our great and important dairy
stry."

3542 WHEN DO WE VOTE?

By Charles Baldwin

When do we vote? When do we vote? This question still echoes and rings in my ears after having completed a trip from one end of the Metropolitan Milk Shed to the other. Over and over again the question is being asked daily by dairymen who would be utterly discouraged were it not for the hope that very soon their Federal and their State governments will join hands and give them the help that will insure to all a "Living Price for Milk." How long the smouldering fires of indignation towards forces that are responsible for delay can be held in check, no one dare prophesy. Hope that their governments will not fail them and faith in their organizations and their leaderships is causing a calm like that which frequently precedes a storm.

You remember how you used to count the days before Christmas, you remember your behavior, you knew the date, it was fixed, and you how long the hours and how slow the days before that day of joy. There is a similarity of feeling as dairymen look forward to the day when they can vote on Federal and State assistance. There is a difference, however, in that the date for voting is still unknown, still a sort of Will-o-the-wisp. What would we think of one who would move the date of Christmas backward weeks or months when the children had been wishing and waiting for that day? Would the children be discouraged and lose faith in those who were responsible for causing the day to be changed? What would the children do if they had the power and could lay their hands on that one?

What do you think of that greedy power that has been squeezing the farmers and deliberately causing that voting day to be put off week after week, and perhaps month after month, while dairymen and their families go without? What would dairymen, if they had the power, do if they could get their hands on it? With pointing finger dairymen are demanding, "When do we vote and have a living price for milk!"

Personally I love people. There is good in all and they differ so widely that knowing people is most interesting and fascinating. Last week I visited with many old friends. I heard many sad personal interest stories, some of which bring tears to the eyes of any human being. Quite naturally some milk dealers could not understand. Combinations of wealth set up wholly for the purpose of making dividends have no heart and with them the almighty dollar is their god. There is no soul in that power which would purposely cause unnecessary hardships to dairymen through delay in voting. Officials and employees working for corporations set up to make profits on watered stock have difficult jobs, and it must be remembered that they must keep this strangle hold on dairymen if they are able to make the returns that are demanded and hold their positions.

Never before have I seen such expectation and oneness of thought as I saw on the trip of last week. Never before have I seen more

reason for dairymen to be utterly discouraged than I saw last week, scorching hot weather, burned pastures and meadows, lack of labor, and lack of necessities due to the low price for milk. The hope that soon they will have what they are asking for (equal share of the fluid market and a living price for milk) is buoying most of them up. I am sorry to say, however, that while on this trip I read of several dairymen who have decided to quit living and leave the battle to those left behind. They apparently lost faith that the dairymen would ever get a square deal. The big majority, however, are optimistic in that they believe soon they will be given the assistance that they are pleading for in order that they may free themselves from bondage from which they themselves have not been able to free themselves. Delay, however, even though it may be caused by well financed and cleverly handled corporations working under cover, may at any time cause a condition which no human being wants to see. That is why patient and serious minded milk producers ask, "When do we vote?"

3550 BARGAINING AGENCY HAPPENINGS

Down in New York City there is a columnist by the name of Winchell on the New York Mirror. On June 27th of this year the following item appeared in his column: "State Attorney General Bennett's office will rock the front pages about Sept. 1 with a report on the milk sitch-ee-ay-shun in N. Y."—Directors Warren Davey and Ralph Norton have just returned from a trip to Boston where they made a study of the situation in that area.—Mr. Baldwin and his staff of fieldmen are quite busy making personal contacts with the producers and holding group meetings.—The order of business now days is the careful explaining of the proposed Federal order.—It is estimated that the officers and directors of the P. B. A. have held over 150 meetings during the past month with producers.—The milk situation in New York City is so bad that we know of places where milk is being sold at 5c per quart.—Milk situation at Scranton, Pa., is bad and dealers ask for 2c reduction.—Fieldman J. Cooper is recovering nicely from his operation and is now able to be back on the job.—No one can deny that Ernie Sheldon, of Little Falls, is not working for the complete success of the P. B. A.—Requests for copies of the Market News are coming in from all parts of these United States.—One director suggests that the best way to fully explain the new proposed Federal order is to hold group meetings of not more than five producers.—Sometimes it is necessary to throw bouquets at a person, and this time it is Frank Smith, the North Country field man for the P. B. A. He is doing a fine job and we want to let Frank know that many producers who are members of the P. B. A., and, yes, members of the union, are saying nice things about him.—President Rolfe and Attorney Cooke ran into some opposition over in Pennsylvania, but the combination of these two gentlemen easily overcame this opposition after they had carefully explained the sections of the proposed order that were not understood.—We understand that four or five hundred producers

in Pennsylvania, who are members of the Interstate Co-operative, have decided among themselves to complete a new set up and seek admission to the P. B. A.—Remember, producers, that we are always willing to publish articles that you send in.—We would also like to have the Secretaries of various Co-operatives send us a news letter of happenings in their own group. Do this and they will be published in the following issue.

3553 *Exhibit No. 23G. to stipulation*

MILK PRODUCERS' MARKET NEWS—SEPTEMBER

PRODUCERS, IT IS NOW UP TO YOU

The producers in the area supplying milk to New York City have, by their majority vote, decided that the State-Federal Marketing plan is a logical one, and they desire to give it a trial. Probably every producer, whether he voted or not, gave consideration to the problems that face the industry at this time, and it is regrettable that all of them did not see fit to vote on such an important matter, affecting their families and their very livelihood.

We are fully aware of the insidious propaganda that was used to advise producers not to go to the polling places and express themselves. This propaganda sprang up in many places, and if by chance anything should happen to harm this order in the future, the blame can be solely placed upon the heads of a few unscrupulous dealers, leaders of a minority farmers group, which is set up to be nothing more than a racket and several writers, as well as a publisher who claims he has the God-given right to speak for the producers.

The time is here when we must speak bluntly about these things and not be "too polite." These people went all over the milk shed, holding meetings and advising the producers not to vote, and at some of the meetings, when some one got up to ask a question, they were then called hecklers. This thing occurred in a series of meetings at which Mr. Dillon and Mr. Burghold spoke and later on, Mr. Dillon and his farm journal referred to several that were present as hecklers. Call us what he may, we were present and so were four or five others from the Milk Producers' Bargaining Agency. For months we have listened to the long-winded talks as given by this well-known editor and not once have we ever listened to a program that would actually work in the milk shed. Instead the substance of most of the talks has been a bitter attack against one of the larger members of the P. B. A. We have been called tools of the milk trust, and all that sort of thing, but it is [illegible] writer's sincere opinion that if no one connected with the Bargaining Agency had gone out into the field and done one item of work for the success of this order, it would have been voted in, because the producers would have, after listening to Mr. Dillon or Mr. Burghold, decided that what they had to offer compared in no way with the proposed State-Federal Order, which was whipped

shape, not by the milk trust, but by at least fifty persons con-
ed with the industry up-State. Even several who assisted us in
aring the first drafts of the order fell by the wayside, and towards
end of the campaign came out in the open and fought the order.
these gentlemen, all we can say that is you made a big mistake
the farmers by their vote thought the same way.
uring the campaign to convince you producers that the Federal
er was the logical way to stabilize the milk industry, the Dairy
mers Union, Mr. Dillon, Mr. Burghold, and a few others had a
derful opportunity to join with the others and work for the
ess of a program that would put more money into the pockets of
producers. Instead, these gentlemen, who control the destinies of
Farmers Union and the others, bitterly campaigned against the
r and it appears that they have one idea in mind, and that is to
tinually stir up trouble in the milk shed. What is the motive
k of the actions of these gentlemen? Is it to secure subscriptions,
for personal gain? We are not going to attempt to answer this
ter, but our answer to these gentlemen is that over 86% of the
ducers who voted, thought the program, as originated by the
k Producers Bargaining Agency, a good one.
You producers have spoken and now the order is in effect. It is
duty of every producer to help in every way he possibly can to
that all provisions of the order are carried out and, too, watch this
ll minority of troublemakers and see to it that they are kept
their place, and whenever you find one of them sticking his nose
the picture and trying to disrupt what you have approved, then
ood idea is to swat that nose and talk afterwards.
This order is going to mean hundreds of dollars to each one of you,
d it means that if all of us put our shoulders to the wheel and keep
icing the situation, we can go along and have a well-regulated
lk shed and forget about the continuous headaches that have pre-
minated over a period of years in up-State New York and the
ier sections.—V. R. TOMPKINS.

54 Mr. Baldwin Speaks

SYRACUSE, N. Y., August 26, 1938.—Last night and this morning I
oned to nearly one hundred dairy farmers, each of whom repre-
nts a group of producers who have worked long and hard for the
eparation and adoption of a sound surplus milk control plan.
ese men collectively developed the Federal-State Milk Marketing
der in its tentative form and upon which hearings were held.
ese men knew last night that milk producers had overwhelmingly
ted to approve of the adoption of the Federal-State Order (a
rplus control plan).
It is the same group of men to whom I have often phoned during
e past year, yet from their voices one would never judge them to be
e same. A new day has dawned for the dairy farmers and col-
ctively they see the way to securing a living price for milk. There

was determination in their voices this time and the spirit that exists throughout the producing area today will not tolerate interference on the part of milk dealers with the free and full operation of the plan that the producers have developed and which the Federal and State Governments have agreed to administer to the fullest possible extent.

This determination, to which I have referred, must be put to a helpful purpose. The cooperative association, which each represents, must be made stronger. Where no cooperative association exists, strong producer controlled cooperative associations must be built. All groups must continue to work together with greater determination and with the one purpose in mind to collectively, through cooperative effort and with assistance from the State and Federal Government where that is needed, secure permanently a living price for milk. To that purpose, let every milk producer in the metropolitan milk shed dedicate himself.

3555 PRESIDENT ROLFE URGES MILK FIRMS TO SIGN ORDER

The milk dealers who distribute more than 6,000,000 pounds of milk to New York's millions each day were urged by Homer S. Rolfe to sign the state-federal milk-marketing and price-fixing order and "thereby dispel the apprehension that there may be a long court contest."

"Any dealer not willing to sign would presumably have intentions of planning to disregard or contest the program," said Rolfe, who returned to Syracuse from Washington, D. C., where the order was formally signed by Secretary Wallace and President Roosevelt.

He issued a statement outlining the stand of the agency in which he said in part:

"The sound judgment of our national and state officials in enactment of the agricultural marketing agreement act and the Roger-Allen law, enabling the federal and state governments to render assistance in the regulation and stabilization of the distressing situation existing in the metropolitan milk shed, is confirmed by the almost unanimous approval accorded the milk order by producers.

"The experience and knowledge of the government representatives who gave invaluable aid in the drafting of the order, have provided a just and equitable instrument for the protection of the rights of consumers, distributors, and producers. The public interest demands that this order, prepared and intended to correct an unbalanced economic condition among thousands of farmers, be given a fair trial. If it succeeds, it will have widespread influence in dispelling generally the depressed conditions in agriculture, commerce, and industry, in northeastern United States.

"The Metropolitan Producers' Bargaining Agency assumed leadership in the effort to secure federal and state assistance. It could not have succeeded without the sympathetic and intelligent aid of both the secretary of agriculture and the commissioner of agriculture and

ets. The order is the achievement of an earnest co-operation be-
n the three agencies. Its success depends, in large degree, upon
inued harmony of action. The Producers' Bargaining Agency
ges to both governments the united efforts of its members in aid
ne successful administration of the order."

YES! THE MARKETING ORDER HAS BEEN ADOPTED! BUT NOW—MORE THAN EVER—FARMERS NEED STRONG COOPERATIVES!

airy farmers of the New York Milk Shed have voted overwhelm-
y in favor of the Federal and State Milk Marketing Order. This
ns Federal and State assistance will be brought to the aid of the
ne in his fight for a Living Price for Milk.
ut that doesn't mean the fight is won. Some dealers will throw
y possible obstacle in the path of smooth operation of the order.
y may refuse to abide by its requirements, or try to drag the order
the courts on a score of technical grounds. They will do any-
g and everything to hold up the successful operation of the order
a Living Price for Milk for the Farmer.
hat's why New York Milk Shed dairy farmers need to cooperate
as never before! Producer cooperation is necessary to make the
eral and State Marketing Order 100% effective! This order is a
e of machinery for the use of dairy farmers. And farmers must
k together to make it work. This means one thing—stronger
perative marketing organizations, and closer cooperation through
Metropolitan Bargaining Agency.
Congratulations! On behalf of the Metropolitan Bargaining
ency we wish to congratulate every dairy farmer, every farm
der, every public official, every newspaper and radio station con-
uting to the successful campaign to get the Federal and State
rketing Order for New York Milk Shed farmers. This Agency
preciates the fine spirit of cooperation shown by all friends of the
mer during the long struggle to win Federal and State help in
battle for a Living Price for Milk.—THE METROPOLITAN COOPERA-
E MILK PRODUCERS BARGAINING AGENCY.

Exhibit No. 23H to stipulation

MILK PRODUCERS' MARKET NEWS—OCTOBER

BARGAINING AGENCY PRODUCERS

Market Administrator, Mr. Harmon, on Friday, October 14th, re-
sed the prices for your milk for the first month under the new
deral and State Marketing Order.
Throughout the area there were thousands who actually believed
at the initial price would be considerably lower than what was
t under the new arrangement.

Whatever your individual feelings are in this matter you may consider that a number of unusual situations existed in our milk shed, which created conditions for Mr. Harmon, Commissioner Noyes and the officers of the Milk Producers' Bargaining Agency, that seemed at times impossible to overcome.

A few days ago members of the Executive Committee of your Bargaining Agency met in Syracuse and outlined a work program for the coming year. Harmony prevailed and each member of the committee gave serious thought and study to each section of the program which, based on the coming months, has just one idea in mind, and that is, to improve conditions and help you get the most possible money for your milk check.

To say that any one individual or group is working harder on this program than another, would not be telling the truth. All are co-operating and Mr. Baldwin, our Executive Secretary, issued a complete program of instructions to the fieldmen, which calls for unified efforts and intensive work among all member cooperatives, so that each producer will sign his or her contract with the Bargaining Agency.

The Executive Committee also hired Mr. Edmund Cooke as full-time Counsel for the Bargaining Agency and he will devote his entire time assisting the cooperatives throughout the milk shed, advising them on their individual problems as they may arise.

It is only fair to say that Mr. Noyes and Mr. Edward Gaynor of the State Department are working in complete harmony and assisting the officials in signing up the cooperatives who yet have not come in under the banner of the Federal and State Marketing Program.

Elsewhere in this issue of the Market News we will tell you of the work that has been carried on by the fieldmen and officials of the Bargaining Agency during the past few weeks. It has been the desire of the Executive Committee to fully cooperate with the delegate body on every matter that is of vital importance to all members of the Bargaining Agency. This has made necessary the holding of many small meetings and thousands of miles of travel in all sections covered by the Marketing Order, as there are a thousand and one small details springing up almost every hour of the day and night.

Please bear in mind that our able Secretary, J. C. Treat, who is in charge of the "MINUTE MEN," is doing a fine job and these men, who are distributed throughout the milk shed, are on the watch at all times for disturbances, chiseling, and other items that are not for the best interests of your producers.

There are times when we must talk plainly with each other in regards to matters which concern our livelihood. At this time the occasion has arisen where it is necessary to tell you of something that is going on, which has all the appearances of an attempt to stir up trouble and possibly create another bad situation in the New York

Milk Shed. It has come to our attention that the editor of l known farm journal, who has continuously fought the Bar- ng Agency and the new Marketing Order, is sending out a onnaire to all members of the State Assembly and Senate, g their opinion of the Rogers Allen Law. This questionnaire that possibly the Assembly and Senate might desire to repeal w. Stop a minute and think over what I have just told you. re we have, after months of hard work, a Bargaining Agency has a membership of 75% of the producers in the State. This cy, with the help of the better type of farmers and also the Department of Agriculture, combined and worked hard to have leral Marketing Order put into action in an effort to settle the ic conditions that face the milk industry of the State. No r had this been done, the opponents, including this publisher, d another campaign and our suspicions are that the sending of questionnaire to the members of the Assembly, is just another f their tricks to overthrow, which 86% of you producers ap- d recently by your vote.

y we suggest to each and every individual producer that they themselves a committee of one to keep a watch on everything comes up in their respective territory that is not for the best sts of the Bargaining Agency. After all, it is your Agency the officers can only carry out your wishes to the best of their y.

e could have prepared this article with English just a little er than what is given here, but we feel that it should be written manner that each one of you could thoroughly understand.

ere is no one man, or group of men, large enough in the New Milk Shed to tear down what 60,000 farmers have built in the sixteen months.

member that in the last issue of the Market News, on the front , your writer advised you producers to watch out for the small rity of trouble makers and see to it that they are kept in their e. We also suggested that whenever you find one of them stick- their nose in the picture and trying to disrupt what you have oved, then a good idea is to swat the nose and talk afterwards. appears that very seen the nose swatting time would be the order siness.

METROPOLITAN COOPERATIVE MILK PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y., September 21, 1938.

EAR SIR: Every effort is being made by the Producers Bargaining ncy to obtain from the distributors full compliance with the Fed- and State Order. Almost every dealer in the Metropolitan market signed the Agreement. In some instances it has been necessary to t producer pressure and the willingness of producers to cooperate

in withholding or offering to withhold their milk until their dealer signed has been encouraging and gratifying.

There remains one loophole of considerable size which must be blocked before all major opportunities for chiselling have been eliminated. That is the subject of a uniform handling charge. The enforcement of it is up to the producers and their cooperatives. If one cooperative charges less than 23¢ per hundredweight handling charge, the dealer buying that milk has an unfair advantage over the dealer who is paying a 23¢ handling charge. Twenty-three cents ($.23) per hundredweight is a fair charge. It must be made the standard and uniform charge throughout the Shed.

We believe that there should be an agreement on the part of every cooperative in the Milkshed to charge not less than 23¢, and that the cooperatives should enforce a gentlemen's agreement to charge this price.

I am enclosing a resolution for adoption and signature by your cooperative and return to us. I believe every group in the Shed will sign and make it its business to see that it is obeyed. If it is, it guarantees to us a living handling charge for conducting our plants, as well as a living price for milk.

Your cooperation is earnestly requested.

Sincerely yours,

J. C. TREAT.

WE LIKE TO RECEIVE LETTERS LIKE THESE

OCTOBER 10, 1938.

MILK PRODUCERS' MARKET NEWS,
Metuchen, New Jersey.

DEAR SIR: I am enclosing lists of all members of the Slate Hill Milk Producers' Cooperative, Inc., as requested by our President, Mr. George M. Miller, so you can mail a copy of your paper direct to each member as listed.

Thank you in advance. I remain,

Yours truly,

ROBERT BRADNER, *Sec.*,
Warwick, N. Y., R. F. D. No. 2.

3572 FARMER' UNION LEADER BACKS MARKET ORDER

Assurance of the support of the Dairy Farmers' Union to the state-federal milk marketing order was given to Charles H. Baldwin, executive secretary of the Metropolitan Milk Producers Bargaining Agency, by Charles Dumont of Malone, leader in the dairy union and one of the founders of two recently built cooperative milk plants.

"The North Country farmers are determined the milk marketing order will go through," Dumont declared, "It provides the only sensible policy whereby each producer can receive his share from the fluid market."

The Dairy Farmers' Union, in which he is a leader, now has approximately 15,000 members throughout the state.

During the past year Dumont has organized North Country farmers and been influential in construction by them of two cooperative plants. The new plants serve farmers in northern Franklin and Clinton counties.

The sentiment among producers throughout the North Country is overwhelmingly in favor of the milk marketing order, Dumont told Baldwin, as they see in it their only hope of obtaining a decent living from their farms. They realize, he said, that the order setup is only getting under way, but they will stick with it through thick and thin until it bears fruit.

2576 PRESSURE IS PUT ON MILK DEALERS

SYRACUSE, N. Y., Oct. 13 (AP).—Milk Producers supplying the New York City markets began withholding milk today from dealers failing to abide by provisions of the federal-state marketing agreement.

The producers diverted 1,300 cans from a New York dealer who E. M. Harmon, administrator of the agreement, said failed to file the first monthly report of milk sales.

Homer S. Rolfe, president of the Metropolitan Cooperative Milk Producers Bargaining Agency, said the agency ordered the milk diverted from the dealer to cheese plants. The agency, he added, will pay the difference between the cheese plant price and the price they would have received from the dealer.

DRIPPINGS FROM THE MILK CAN

Executive Secretary Mr. Baldwin recently made a trip to Alabama. Upon his return we noticed that he used the expression "you-all."

J. Treat entertained a number of guests at a game dinner at his home at Honeoye Falls. After the dinner, J. was wandering around looking for Chicken thieves when he ran up against the electric fence and spoiled his disposition.

Ralph Norton and Warren Davey are thinking about chartering a boat to go North and find the land of the midnight sun.

Director Dumont in the North Country is doing some very fine work, and evidently it has reflected on his brother who has now come out for the new Federal Order. Congratulations to both of you.

Felix Piseck, our scrappy fieldman, recently passed a skunk on the road. After proceeding for many miles, the sweet odor from Mr. Skunk still followed the car and in desperation he speeded up, tried to get away from it, but of no avail. A traffic officer in one of the North Country towns stopped him and they discovered that Mr. Skunk was wedged in the spring of the car. "A rose under any other name smells just as sweet," said Felix.

Some mighty fine work has been carried on at Bridgewater, Cannonsville, by the leaders in the past few weeks. Over in Pennsylvania, fieldman Mahood and Charlie Smith of the Market News are stirring things up and we are receiving some mighty fine help from the producers in that area.

An orchid to Eddie Gaynor, of Leonardsville, who is doing some mighty fine work in assisting the groups working for the success of the Federal Order. We want to welcome the Young-Mayber Cooperative Association, one of the new members of the Bargaining Agency. They start off with over 200 members.

If at any time something bothers you in regards to the Bargaining Agency, or you see something going on that is not for the best interest of the producer members of the P. B. A., simply call Syracuse 2-8906 and Secretary Treat will do the rest.

It is remarkable the manner in which the dealers and the cooperatives are signing up under the new Federal Order. We have a list in our possession which is growing smaller each day, and this list comprises those who have not signed up as yet.

Congratulations are in order to Dr. Shaul, the able secretary of the Sheffield Producers' Association. He is doing a splendid job with the Sheffield Producers' News, and we took the liberty to use one of his articles in this issue. An orchid to you Doc.

Very glad to hear that E. K. Tompkins and the Dolgeville group have signed up. Sometime ago when all of the wrangling was going on in regards to surplus, this group took matters in their own hands and handled their own surplus at their plant. Keep up the good work.

We are sorry to inform our readers that the New York Guernsey Cooperative have decided for the time being to go along on their own. Somehow or other it always seemed natural to have Ben Rikert in our meetings and for those who are not acquainted with Ben, let me tell you that he is one of the hardest working fellows in the milk business. Remember, Ben—there is always a place for you at the family table.

Another fellow that has been missed of late in our meetings is Lloyd Anderson of the Crowley group and his able co-workers, McLean, Skillman, and Thompson. We trust that before the snow flies heavy, they will be back taking an active part in the deliberations of the Bargaining Agency.

3577 The Bargaining Agency, plus Treat, plus Baldwin, plus Andover Cooperative, created a headache for what large New York dealer?

Secretaries of all Cooperatives.—We have added nearly 2,000 names to the individual mailing lists since the last issue was sent out. If you have not already sent in your list, do so at once and you will no longer be bothered with the bundles of Market News and the trouble of distributing same.

Some time ago we published an article entitled—"Hot Stuff," and it had to do with the Consumer problem in New York City. To date

we find that papers in other parts of the country evidently liked the tone of it, because six different organizations have used same.

Recently President Rolfe was in New York and a beggar approached him and asked Homer for a half-dollar to get where his family was. Big-hearted Homer gave the man the half, then asked the beggar where his family was.

"At the movies," said the beggar, as he walked hurriedly away.

Our attorney, Ed Cooke, is fond of lobsters and recently, while in New York, he went into one of the lobster palaces and ordered one for a meal. The waiter brought the lobster in and one of the claws was missing.

Cooke, curious asked: "What has happened here?"

Waiter: "It was in a fight out in the kitchen."

Cooke: "Then bring me the winner," as he pushed the one-clawed lobster back from his plate.

3581 *Exhibit No. 24 to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., MARCH 8, 1938

APPROVE PRELIMINARY DRAFT OF MARKETING ORDER

Delegates of 50,000 Producers in Cooperatives Take First Step Toward Federal Assistance

Approval of work done by the Directors of the Metropolitan Co-operative Milk Producers' Bargaining Agency toward enlisting federal and state aid to bring dairy farmers a living price for milk was voted by delegates at Syracuse March 1.

Unanimous Vote on Marketing Order

By unanimous vote the delegates approved a preliminary draft of a proposed marketing order and reiterated the five fundamental principles upon which the final order is to be based. These principles are:

1—An equal purchase price to be paid by all dealers for milk for the same use.

2—An equal share to each producer of the benefits of the fluid markets.

3—An equal share by each producer in the burden of the surplus and the expense of controlling it.

4—Reasonable contribution to those having surplus facilities for the use of them seasonally for market protection.

5—The effectuation of the foregoing principles in such a manner as will perpetuate and encourage cooperatives.

Edmund F. Cooke of Buffalo, attorney for the Producers' Bargaining Agency, outlined to the delegates the preliminary draft of the proposed order. Copy of that is now in the office of Secretary of Agriculture Henry A. Wallace at Washington. Department of Agri-

culture men are redrafting it into the form necessary to meet legal requirements. The same thing is being done in the office of Commissioner Holton V. Noyes at Albany. A representative of the federal government is also in Albany gathering statistics and other data essential to the order.

Price Break Postponed

Mr. Cooke explained that while a break in farmers' milk prices has been avoided for the present, that there is no doubt but that prices will go lower. The tendency is down, he said, and the division of forces among farmers is being utilized by dealers to force returns lower and lower.

"There is only one way," said Mr. Cooke, "to obtain and assure 3582 continuance of a living price for milk. That is to make full use of the Rogers-Allen law and the federal laws at our disposal."

Mr. Cooke declared that when the proposed order is in final form every dairy farmer in the territory will have an opportunity to vote on it. Public hearings will be held throughout the state by Secretary Wallace, and arrangements will be made whereby every producer will have opportunity to cast his vote for the order.

Gaumnitz Statement

Stressing the importance of developing "a real marketing program," Dr. E. W. Gaumnitz, Chief of the Dairy Section, Department of Agriculture, in a prepared statement distributed to the delegates, said in part:

"The responsibility of the various groups in the market, relative to their marketing problems, does not cease upon their requesting an order.

"Under the Agricultural Marketing Agreement Act of 1937, producers must approve the issuance of an order, and, furthermore, producers may request that an order be terminated at any time. Fundamentally, it is their order—not ours.

"Some people feel, perhaps, that the government is interested in assuming control of as many marketing functions as possible; this is not the case.

"Our experience has indicated that cooperation in a market is a strong factor in the success of an order. First, strong producer cooperative associations contribute materially to the success of an order. Secondly, we always endeavor to work with the state. That is, we feel that the best interests of all can be served by cooperation between federal and state governments.

"In connection with this question of cooperatives, for example, we definitely want to give full consideration to cooperatives, that is, real producer cooperatives. This involves the question as to how cooperatives are to be handled in the market. Some provisions must be included in the order regarding this point."

3397 *Exhibit No. 24 A to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., MAY 17, 1938

LOW PRICES SHOW NEED FOR MARKETING AGREEMENT

Need for a federal-state milk marketing agreement was impressed on some dairy farmers by returns they received for March milk. Reports reaching the Metropolitan Cooperative Milk Producers' Bargaining Agency last week showed some producers receiving the lowest returns they have ever known.

Some producers in one northern New York group were reported receiving as little as 61 cents per hundredweight for milk. Their price was $1 a hundred pounds for milk. That was the price regardless of butterfat test. From that was made trucking and handling charge deductions which in some cases left the farmer 61 cents.

In a community on the edge of the central New York area returns were at the rate of $1.15 per hundredweight, it was said. Another group was reported receiving $1.26.

Some farmers were reported having trouble getting any return. Their buying dealers being far behind schedule in sending checks.

CHAOTIC MARKET LOWERS MILK RETURN

New York Price Cutting More General as Supplies Increase

As reported on another page, the average net pool return to League members for milk delivered during April is $1.43 per 100 pounds. The principal reason for this lowered return as compared with March and February is the chaotic condition that has existed in the wholesale New York Metropolitan market ever since before the flush season began. This condition has grown steadily worse through April and May because of increasing volumes of surplus milk in the hands of dealers without any facilities for handling it except to force it on the fluid market at any price.

The only price that has remained at the established level is the retail Class 1 milk delivered to homes in the New York metropolitan area and a relatively small percentage of the total volume of milk produced by members of the Association is sold in this way.

Today more than half of all milk sold in the New York metropolitan district is handled through stores. Much of this milk for the past two months has been sold out of stores at prices as low as 6 and
3603 7 cents a quart where the regular price at present is 9 cents. This cut price supply comes into the city in tank cars without any destination and is offered for sale in competition with other milk in the wholesale trade. These lowered returns are further concrete evidence that producers always have to bear the burden of chiseling in the market.

With no control of increasing surplus volumes the price of Class I milk has been forced down since December last from $2.63 to $2. In January it was $2.40 and in February and March $2.20. Since March 28 there have been no established prices on milk and cream for wholesale purposes in the metropolitan market. During the last four months there has also been a 30-cent per 100-pound drop in the price of milk going into cream and almost as much in the returns from condensed milk and in the prices of butter and cheese.

There is one favorable factor in a comparison of milk returns for April 1938 with April 1937. Based on prices before the war, League members' returns last year for April milk were 8 per cent above the prewar levels. However, the dairy ration at that time was 53 per cent above prewar, and other farm products were selling for 27 per cent above prewar. Thus milk prices then were in a very unfavorable relationship with dairy ration and other farm prices.

On the other hand, while the milk return for this April was 2 per cent below prewar, the dairy ration was 7 per cent below and other farm products 5 per cent below. Thus from April 1937 to April 1938, feeds and other things farmers sell went down considerably faster than did the returns for milk.

After all, this is no justification for the April return because farmers are not getting enough for anything produced on the farm today to pay their bills. The records show that the things farmers have to buy are still 25 per cent above what they were in the base prewar period. Farm commodities have gone down much faster than have the commodities which farmers buy. These reduced returns for all farm products means reduced purchases by farmers for farm supplies, machinery, etc.

Reports from some sections of the milk shed on April milk returns show a wide variation of price returns, some independent groups getting as little as $1 per 100.

3613 *Exhibit No. 24B to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., MAY 24, 1938

Listen for spot news broadcasts of Federal-State marketing hearings this week over your local and near-by stations. These broadcasts will go on at unannounced periods—whenever there is important news

THOUSANDS ATTEND MILK SHED HEARINGS

New York Hearings Reveal Dealers, Consumers, and Their Allies Massing Forces Against Producer Plan

Five days of public hearings on the proposed Federal-State milk marketing agreement wound up in New York Friday, May 20, with the Metropolitan hearing indicating a distinct line of cleavage between farmer opinion and that of dealers and consumers regarding the plan

John J. Dillon grasped opportunity at the New York hearing to maintain his record of opposing all constructive movements by farmers. He made a typical speech from the witness chair, denouncing the Metropolitan Cooperative Milk Producers' Bargaining Agency, the proposed order, and other farmer ' organizations.

His memory failed, however, when under cross examination excerpts of his testimony before the Pitcher Committee in 1932 were read. He then urged creation of an organization along lines close to those followed in creating the Bargaining Agency. Upon being questioned, however, he said he did not remember that part of the testimony, but he proceeded to demonstrate that he remembered other testimony given on the same occasion.

The New York hearing came after four days of up-state hearings in which farmers had paraded to the witness stand to approve the proposal and urge its adoption. The Metropolitan hearing, however, was almost a solid mass of objection, including a consumer witness who declared "some farmers are too lazy to get out and make a decent living," and who stated at another time, "some farmers couldn't run a peanut stand and make money." He was saved from what promised to be ruthless cross examination when the Hearing Master ruled
3615 that his testimony was merely opinion, and indicated it was not very important.

Witnesses identifying themselves with various consumer organizations vied with each other for occupancy of the witness stand to find fault with various sections of the program.

After Franz Childs, of Amsterdam, testified adoption of the program would mean three and a quarter to five million dollars more income for farmers and denounced consumer opposition, the same consumer witnesses went clamoring to the stand to testify to their kindly feelings, friendliness, and keen interest in farmers' welfare.

Additional Hearings this Week

Friday's session ended the scheduled hearings, but additional hearings began Monday morning, May 23, in New York. Two or three more days were likely, with possibility of one more up-state hearing.

The New York hearing had to be moved from the State Office Building to the Commodore Hotel because the crowd could not be accommodated in the smaller quarters.

Dealers were present by the score. Their lawyers, many of whom were present, made no move to put in testimony at Friday's session. Some thought they were delaying to give their legal batteries opportunity to digest reports of stenographers who had covered up-state hearings. Possibly the delay in putting in objection was part of stratagem by which they allowed consumer opposition to build up defense walls before the legal experts enter with their bag of tricks.

Spokesmen for some small groups of producers in New Jersey opposed certain sections of the document. So did a Westchester County

Spokesmen for the New York Mercantile Exchange found fault with one section, evidently because reference was made to possibility of butter price manipulation. The Milk Consumers' Protective Committee, the Consumers' Union, and Settlement Workers had criticism.

The New York hearing made it plain that tremendous opposition is going to be filed against the attempt to improve dairymen's income.

HEARINGS START AT ALBANY WITH LITTLE OPPOSITION

Dealers Sit on Side Lines and Make Notes

With the exception of a dealer-employed lawyer and a man who identified himself as secretary of the Communist party, no opposition to the proposed federal-state milk-marketing agreement was recorded at the first of last week's five hearings. On the contrary, nearly two score witnesses, farmers and farm leaders, came to the witness stand to stamp approval upon the plan.

1,000 Farmers Present

Getting away to a slow start because of the necessity of laying out the procedure to be followed and the reading of formal documents by Hearing Master G. J. Gifford, of Indiana, special representative of the United States Department of Agriculture, the Albany hearing on May 16 lasted until after 10 at night.

More than 1,000 persons attended the hearing. Close to 150 dealers, lawyers, and employees of dealers were there. It was evident that the dealers' lawyers were there to gather material regarding the support for the plan with the intent of laying down a barrage of opposition at a later hearing.

First opposition came when Lloyd C. Anderson, of Binghamton, attorney for the Crowley Milk Company and the Crowley Producers' Association, leaped to the front when the hearing was opened with objections to its being held. He went through a long rigmarole of objections, claiming that the Secretary of Agriculture and the Commissioner of Agriculture and Markets had "no power or jurisdiction" to hold the hearing. Continuing, he claimed the hearing premature, that proper preliminary procedure had not been complied with.

The dealers' lawyer, although he said he was testifying as attorney for producers, slapped the civic pride of five important New York state cities when he stated that farmers were being deprived of their right to be heard because the hearings were being held in "remote places." Hearings were held in Albany, Malone, Syracuse, Elmira, and New York City. He said, too, that the order had been kept secret. Later Edmund C. Cooke, Bargaining Agency attorney, testified that close to 100,000 printed copies had been distributed.

Mr. Anderson said he spoke for Crowley Producers, an organization of 1,200 farmers, but admitted that only 25 per cent of them would be affected by a federal marketing order.

Next opposition came during the afternoon session, when the Communist, who had made himself generally objectionable during the day with his questions to witnesses, many of which were ruled out, took the stand. He made a good Communist speech while attempting to tear the order apart. Cries of "throw him out" were heard just before he left the stand.

Dairy Leaders Favor Proposed Plan

The Albany hearing was distinctive for the numerous dairy leaders who testified in favor of the proposed agreement.

(Full text of some witnesses' testimony appears elsewhere in this issue of the Dairymen's League News.)

Lynn E. Maynard, president of the Philadelphia Milk Producers' Cooperative Association, said that in all his experience he had never seen the shipper price structure in a more demoralized condition than at present."

"Last year," said Mr. Maynard, "due to the confusion from the discontinuance of milk control, there was a somewhat similar situation, but it did not seem to be as bad.

"At this time in New York, although theoretically the shipper price is based on the Sheffield blend, it is difficult to get any handling charges, and there is no chance at all of collecting for extra butterfat. In many cases the price offered even compels the taking of losses on transportation costs."

Speaking from personal experience in marketing milk under a federal order similar to that proposed for the New York market, Ernest Sheldon, manager of the Little Falls Dairy Company, gave an o. k. to the plan. He said:

"I have the experience of owning a farm which ships to the Boston market under the federal order in that territory, and I want to say in the strongest possible way that, in spite of the attempts by dealers to block the Administrator in the New England territory, I believe the order has done a lot of good in bettering returns to producers. I am convinced from my experience in both sections that the only remedy for the chaotic conditions existing in the New York milk shed is the one proposed by the Producers' Bargaining Agency."

Henry S. Manley, of the Producers' Bargaining Agency attorneys' committee, former counsel to the Milk Control Board, testified as to the area covered by the order and the reasons for boundary lines specified in the plan.

Homer S. Rolfe, president of the Producers' Agency, gave testimony regarding the necessity of the classified price plan.

Jay C. Treat, president of the Conesus Cooperative, testified on the same subject.

Dr. Kenneth Shaul, a director in the Sheffield Producers' Cooperative Association, declared purpose of the plan is "to work out a fair price under which all producers will gain." His testimony indicated past experience has been that while some producers got more than

others, none received a worthwhile price for milk. This, he said, would be remedied by the federal-state plan, and added:

"The proposed plan will not take anything away from any producer or group or producers, but will mean a substantial gain for all of them. It will mean higher returns for all producers instead of a preferred position for some."

Warren E. Davey, president of Coventry Dairymen's League Cooperative Association, favored the order and pointed out the benefits accruing to producers generally when plants are owned by producer organizations especially in handling surplus.

Others who testified as representatives of cooperative groups included Ralph N. Norton, president Boonville Farms Cooperative; Sherrill Huffcut, president Circleville Milk Producers Cooperative; and Roswell Kinney, director of Sheffield Producers' Cooperative Association.

MANY NORTH COUNTRY FARMERS FOR PLAN

Farmers' Union Speakers Oppose—Noyes Says Agree

A long parade of farmer witnesses testifying to the need for and their anxious desire that a federal-state milk marketing agreement be made effective featured the second hearing on the proposed plan at Malone, May 17.

Against this was the loud, critical, destructive attitude of speakers who identified themselves with the Dairy Farmers Union.

Holton V. Noyes, Commissioner of Agriculture and Markets, in a brief speech at the close of the Malone hearing, which was attended by close to 3,000 persons, voiced his firm belief that the proposed order "could be made to work."

Stating that there are a few minor points in the suggested
3621 agreement that he would like to see changed, Commissioner Noyes said:

"I believe this order can be made to work, provided a few slight changes are made, and provided that a good administrator is selected, which I believe can be done, and provided that farmers give it their support."

The Commissioner prefaced this remark with a statement to the effect that he had discussed with representatives of the Secretary of Agriculture, who will select the administrator, the qualifications of that individual. He indicated that it was practically agreed that such administrator should be a person who has not had any connection with the milk business in this territory.

Record North Country Crowd Present

The Malone hearing started promptly at 9:30 in the morning with around 2,000 persons in the big state armory. The crowd grew throughout the morning session, and the afternoon session brought a

peak attendance despite the fact that skies were clear, warm sun was shining down, and it was an ideal day for farmers to press spring work.

Earl Laidlaw, of Gouverneur, representing the Gouverneur Cooperative Dairymen's Association, voiced approval of the proposed agreement.

"Our cooperative has made an honest effort to work with the other cooperatives in the Producers' Bargaining Agency," said Mr. Laidlaw. "We sought to force payment of a fair price for milk through a voluntary effort by the different cooperatives working through a single bargaining agency.

"We feel that we have been but partially successful—not because the better class of dealers were not willing to pay fair prices, and not because the majority of dairymen were not willing through their different cooperatives to support a sound plan, but because a small percentage of the producers were willing to turn their milk over to a few irresponsible, destructive dealers at prices much below our suggested Class 1 and 2 price.

"This was done in an effort by a minority of the industry so as to move all their milk in the upper class market, and in so doing crowd someone else out, with the resulting disturbance that a practice of this kind is bound to bring about."

Stating that he has had 30 years experience in milk marketing and that he has no illusions as to what will and what will not work, Mr. Laidlaw continued:

"I have no faith in a plan of selling which is not based on an equalized plan of payment to producers, subject, of course, to freight and butterfat differentials; and subject also to each cooperative having to care for its own debts; and also subject to their own inefficiencies due to lack of volume, poor management, or any other cause which the industry as a whole should not be called upon to bear.

"I also have no faith in a plant that does not contemplate sending every dealer into the market with his milk costing him the same price paid by his competitors.

"Price cutting by dairymen and dealer price cutting on milk they have obtained from price cutting dairymen is at the bottom of most of this continual trouble in the dairy business."

In conclusion Mr. Laidlaw declared that the proposed agreement "will compel dealers to make money out of selling milk instead of out of buying it."

Other Cooperative Leaders Testify

Sherrill Hufcut, president of the Circleville Milk Producers' Cooperative, Inc., who had journeyed 300 miles from his home in the rich fluid territory of Orange County to tell the North Country farmers, who long distance from the metropolis makes their market mostly a surplus operation, approved the plan.

"I came up here to tell you men," said Mr. Hufcut, "that despite my being within 70 miles of the world's best fluid milk market, which thus provides me a preferential location, I am all for this plan. My fluid

market is of no great value to me if the price is constantly being depressed because you farmers are striving to get a share of that fluid market. I am willing to share my fluid market with you. I am willing to share with you the burden of surplus. That is why I am for this agreement."

C. R. Leach, Enosburg Falls, Vermont, member of a cooperative with 126 members, testified as to the economic necessity for the plan.

"We have $10,661 of unpaid taxes, three farms have just been sold for taxes, and more are threatened. Our youth is leaving the farm because they can't make a living and because they see no future to it. This proposed agreement is the only thing that can bring farmers a living price for milk."

Lester Dumont, of Malone, an officer of the Malone Cooperative Association, declared his organization 100 per cent for the plan. For April milk, he said, they got $1.31 per hundredweight.

W. A. Mather, Adams Producers' Cooperative Association, was for the plan because "it is fair to all."

Howard F. Jones, Gouverneur; R. C. Harper, Waddington; and A. C. Pilger, Batavia, which is near Buffalo, were the principal opposition witnesses. They testified in the afternoon. Harper and Pilger have long been identified with the Farmers' Union. All were in general opposition to the order and made long, impassioned speeches that brought loud applause from their followers.

Among the witnesses at the afternoon session favoring the plan were E. C. Jenkins, of Winthrop, one of the North Country's big dairymen, with a herd of 43 head.

"An emergency exists," he said. "It is time that we get together instead of fighting over little details. I do not believe the federal government is anxious to come in here, but we ought to be anxious to have them. We ought to try this plan, and if it does not work we can have another hearing and vote it out."

I. B. Mitchell, of Lafargeville, declared that he and other dairymen of the Lafargeville Milk Producers Corporation "have confidence in the ability of the men who wrote this order. We have confidence that the federal and state governments would not submit it to us unless it were for our benefit. Therefore we are for it."

Testimony for the day closed when Frank Crary, of Canton, told how the proposed agreement was created. For months, he said, it was discussed by delegates of the Producers' Bargaining Agency, who instructed the Board of Directors to prepare a plan. This, he said, was done through a committee.

TESTIMONY AT SYRACUSE STRONG FOR AGREEMENT

Many Producers Testify After Hearing Master Calls Halt on Lawyer Spouting Contest

Opponents of the proposed federal-state milk marketing agreement sent their wrecking crew into action at the third hearing, which was held in Syracuse, May 18.

A crowd of 1,500 dairy farmers turned out for the Syracuse hear-
. Half of them walked out in disgust in mid-afternoon after
yers spouting for the opposition had wasted most of the afternoon
ng with each other in what appeared to be a contest to see which
ld grab the most publicity.

Most of the morning session was taken up with the legal prelimi-
ies that marked the opening of each day's hearing. Included was
presentation by counsel for the Metropolitan Cooperative Milk
oducers' Bargaining Agency of a résumé of the proponents' case.
is was a necessity at each hearing to comply with government regu-
ons. This was followed by a few brief proponent witnesses testify-
as to the need of various sections of the plan. Among these was
nley Piseck, who favored the plan, but wanted a higher price
edule.

The Syracuse evening session, which lasted until 9 o'clock,
etching the day's hearing out to twelve hours, was a real farmer
sion. It was then that opposition witnesses voiced views that
ught from Hearing Master G. J. Gifford a statement for the record
erting that Uncle Sam is not trying to jam any agreement down the
oats of farmers. A tally of the day's witnesses showed them two to
for the proposed plan.

(Full text of Judge Gifford's statement appears elsewhere in this
ue of the Dairymen's League News.)

A string of dairy farmers took the stand for three to ten minutes to
ce in the record facts of the suffering among rural people due to
low milk prices. Outstanding in this testimony was that of loyal
irymen's League members, who expressed resentment of insinuations
t they were controlled or coerced by officials.

Fred Palmer, of Depauville, said:

"Some of today's witnesses have tried to leave the impression that
irymen's League members are coerced. I have been a League mem-
r many years and I have never seen any acts of coercion. Our prob-
ns are discussed in meetings. The more they are discussed and the
re criticism there is the better our directors like it. I am perfectly
tisfied that Dairymen's League members are going to vote on this
tter as they want to."

Opening his remarks with a statement that "We have listened to the
alers' lawyers' filibuster all day," Marshall Minolo, of Pulaski, a
ung man four years out of agricultural vocational school, said he
d chosen dairying as a "life work," and added, "But I am beginning
doubt the wisdom of my choice. Low milk returns," he said, "are
scouraging to farm youth."

Fred H. Hewitt, of Mexico, was brief, but effective. He said:

"It may be refreshing to you gentlemen to find someone who is for
e Bargaining Agency. I am for it all the way."

Milton D. Dexter, of Dexter, dramatically pictured the rural scene
hen he said:

"Farmers' wives are going without the necessities of life."

Mrs. Sette Buhrig, Canastota, made it plain that to her the idea of consumer objection to milk prices is a myth. "I have lived in cities and on farms," she said. "I have lived in New York, Boston, Baltimore, Washington, and Chicago. Milk prices were raised by the distributors from time to time. But I never heard consumers making much complaint.

"I believe in the American system," said Mrs. Buhrig, "and ordinarily do not favor government interference in business. But we must have a living price for milk. We ought to get it, and quit worrying about consumers. This plan of government assistance has promise of help for farmers. I favor it."

Soon after the afternoon session began Frank N. Decker, a Syracuse lawyer, who testified that he owned a dairy farm, went on and began his testimony with the statement that he was "neither for or against" the agreement. He proceeded, however, to tear it apart, finding fault with the document as a whole and in many parts.

Then came R. C. Harper, of Waddington, who had testified and made a lengthy speech at Malone the previous day, at which time he stated he was speaking for the Dairy Farmers Union of St. Lawrence county. Harper went into his oration and kept going until the crowd began showing signs of restlessness.

Lloyd C. Anderson, lawyer for the Crowley Milk Company, who says he speaks for members of Crowley Milk Producers' Association, popped up next. Time meant nothing to Mr. Anderson. In fact, he said he could talk for days against the proposal, and before he relinquished the witness stand some began to think that he intended to do just that. To report what Mr. Anderson found wrong with it would take reams of paper. There is nothing to report on what he said in favor of it.

When Attorney Anderson surrendered the witness stand, Edmund C. Cooke, counsel to the Producers' Bargaining Agency, in courtesy to the farmers who wanted to testify, waived his right to cross examine the Binghamton lawyer.

Some farmers yelled out to go ahead and cross examine, evidently being anxious for it. That was not done, however, as already hundreds of farmers were quitting the meeting, one shouting, "it's time to go home and milk the cows."

Farmers Finally Got a Chance

Then came a line of farmer witnesses testifying in favor of the proposal. Outstanding among these was Charles H. Riley, of Cayuga county, who described the misery among farm people. He told of farmers driven to suicide because they could not make a living for themselves and families at present low milk prices. He told of widows supporting parents and raising children by their own labor in working dairy farms. He told of unpaid mortgage interest and overdue taxes. Of women in overalls and children improperly clothed.

Irs. Kirk H. Meyers, of Cato, Onondaga county, a woman with ege degrees, who milks her own cows, plants and harvests the crops, l she wanted the order put into effect.

I go to the store with a shopping list," she said, "but I can only buy bare necessities because my milk check is too small to buy all that need."

Farmers cannot live, she said, when the price for milk goes below $2.

ester Tucker, of Marathon, said:

We farmers have failed to solve our marketing problem. We re- e to get together and work together. Our enemies tell us this is inentation. I don't believe that; but if it is, I prefer that to vation."

ther farmers speaking for the measure were F. H. Childs, of sterdam; M. C. Bond, of the College of Agriculture at Cornell iversity; Ralph Goff, of Wampsville; Hilton D. Harris, of Water- e; and Orrin Wilcox, of Theresa.

5 HISTORY OF THE SURPLUS PROBLEM

Weaknesses of the Proposed Order

here are seven basic weaknesses in the proposed plan, which are ollows:

. Lack of control of surplus handlers' premium fluid sales in rtages;

. Lack of control of diversions;

. Loading pool through inspection of additional sources;

. Lack of pricing on milk for shipment to North Jersey and other dental markets from New York approved plants;

. Inability to handle storage cream problem so as to properly tect market without inequitable distribution of possible losses;

. Consumer pressure against governmental price changes; and

. Inability to bring about general operating efficiency.

hese are not the fault of the wording of the plan, but as we are ised by attorneys, these weaknesses arise from our system of gov- ment under which government assistance can only be exercised stitutionally and legally through very specific, rigid, inelastic, carefully limited delegations of power to administrative agencies.

Neces ity in Spite of Weaknesses—United Support Through Cooperatives Will Offset Weaknesses

t may be asked why try to get these orders in view of the weak- ses outlined. One reason why the recognition of these weaknesses uld not stop us from trying to get tne orders is because there is a ong possibility that united producer activity, collateral to the erations of the Administrator under the orders, may result in pping dealers from availing themselves of these weaknesses in an

endeavor to evade the orders. But I cannot too strongly emphasize the fact that the orders MUST provide for the carrying out of the congressional and legislative mandates of encouraging and fostering cooperatives, or such activity by united producers cannot even be started with any hope of success in strengthening and supporting the administration of the orders.

The laws were passed and the order drafted for the purpose of protecting producers' income. They regulate distributors. It is too much to expect the support of distributors. Undoubtedly they will oppose its application and endeavor to obstruct its operation. If there are no large united groups of farmers to protect producers' interests and support and assist in its operation, success can hardly be hoped for under this plan. Thus the cooperative differentials provided in the orders are essential to the program. Without such provisions the effective support of producer co-operatives cannot be given and without co-operatives united producer action is objectless and futile.

3637 *Exhibit No. 24-C to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., MAY 31, 1938

DEALERS SEEK TO DELAY ORDER—FARMERS PRESS FOR ACTION

Demand "Middlemen" End Obstructive Tactics or Producers May Take Matters in Their Own Hands—Hearings Recessed to Albany For Early Wind-up

Closing on a compelling note of producer protest against dealers' maneuvering, obstructive tactics and attempts to delay, three and a half days of hearings on the proposed federal-state milk marketing plan in New York City was recessed May 26 to resume at Albany Friday, June 3.

All through last week's two and a half days of hearings dealers and their lawyers had sprinkled the record with testimony that they would require much time in which to examine the record of previous hearings and prepare their complete case. With this as a background, they argued for long delay before additional hearings should be held when Glenn J. Gifford, Hearing Master, had heard the last witness and prepared to recess.

Cooke Demands End of Obstructive Tactics

Sensing that opponents would fight for long delay, Edmund C. Cooke, former Buffalo Congressman, who, as counsel for the Metropolitan Cooperative Milk Producers' Bargaining Agency, had skillfully woven into the record the story of farmer need for help, laid down a strenuous bombardment in the last 30 minutes of hearing. In a brunt attack he sent a trio of concluding witnesses led by Charles

Baldwin, former state commissioner of agriculture and markets, e stand. Next was J. C. Treat, head of the Conesus Cooperative: ast witness was E. C. Bardin, of West Winfield, veteran dairy ner, and leader of the Saquoit Valley cooperative. Stern visaged speaking in a calm, but forceful voice, Mr. Bardin shattered the rinthine logic that had been woven by the adroit dealers' lawyers ain delay.

Bardin Says Farmers Won't Wait Long

've been listening to these dealers—the middlemen—opposing this npt to obtain a living price for milk," said Mr. Bardin.
think when we go back and tell the farmers up in the country t this opposition by the dealers they will be all the more for this

've never seen such a scramble by any group for an imaginary as has been going on here.
believe in this order, and I'll fight for it to the last ditch.
think this is the best thing for the dealers that has come up in s. They are always telling us that all they care for is that all ers pay the same price for milk. Well, here is something that res just that, and I can't see any harm in their all paying pro- ers the same price. But that isn't what they want. They want ntages. They want to chisel. Well, farmers aren't going to d for it. These dealers down here are sitting on a keg of dynamite don't know it.
You can't get by on dollar milk. You heard yesterday that unless thing is done quickly for farmers there may be the worst strike milk shed has ever known. I don't know but what it would be a l thing right now. Milk isn't worth much to us farmers at present es, and maybe we might as well pour it out on the ground—it's l fertilizer."

ttorney Cooke concluded the argument for proponents with a plea quick resumption and completion of hearings. He pointed out it is farmers who are vitally effected, that it is they who are ering from low returns for milk, and asserted that farmers and r representatives stood ready to work day and night, and that holidays should not interfere with much-needed progress.

Still the dealers' lawyers were for delay to give them more time to examine records and prepare their case in greater de- —this despite their having spent long days in tearing the proposed r apart. In benevolent tones they pointed out that they had testi- to their anxious desire "to sit down with farmers and consumers the government and straighten out this order." It was the old nd table idea, tried many times by patient farmers and without efit. Albany was too far away and the dealers wanted any addi- al hearings that were held kept in New York.

Judge Gifford Recesses to Albany June 3

Hearing Master Gifford listened politely and patiently and when all had been heard announced that he would resume hearings in Albany June 3.

The New York hearings resumed in the State Office Building, Tuesday, May 24. Again, the hearing room there was too small and the hearing had to be moved. The spacious auditorium of the New York Bar Association Building was used for Wednesday and Thursday sessions. There the very atmosphere was different. A fine, stately building, the auditorium dignified in its high court appointments, the fine paintings and statues of distinguished jurists that lined the walls giving a feeling of justice.

From the very beginning it was apparent that metropolitan dealers, collectively and individually, were pretty much against the order. The sessions were in contrast to those of the previous week in the upstate milk-producing country. The farmer witnesses of the week before were replaced by correctly attired, clever, quick-thinking dealers and their suave, persuasive attorneys; among the latter a former attorney general of New Jersey.

Early in the opening session the Metropolitan Milk Distributors Bargaining Agency went to the witness stand. The story of this Agency, which started last July with 30 dealer members to bargain with the Producers' Bargaining Agency, was told. Distributors Agency membership is now only four dealers, it was shown. Though not entered as evidence, the shrinkage of membership from 30 to 4 is the story of present low milk prices. Dealers quit the Agency so they could go out and bargain with farmers in small groups to escape the pressure of the Producers' Agency. The old trick of playing one group against another.

Dealers Up to Old Tricks

The four members of the Dealers' Agency rotated to and from the witness stand. Each, with his set piece of testimony. Each finding fault with the proposed plan in one way or another. The final result: practically nothing about the plan was satisfactory.

After this group had laden the record with objections came the lawyer-spokesman for one of the big distributors: one that is a unit in a national combine that never has been friendly toward farmers' real cooperative efforts.

This witness proclaimed his client "prepared to enter into a marketing agreement" possessing four definite characteristics. These included that it "be fair to producers, fair to distributors, not unfairly burdensome to consumers," and that it be "executed under such circumstances as to justify the expectation that it can and will be enforced comprehensively and with an even hand."

nice, cordial gesture to which was added the statement that the
r "is not convinced that the proposed agreement and order meet
tandards enumerated."

eading that "time has not permitted" a "complete analysis" of the
ement and its "defects," the witness read into the record 18 type-
en pages of fault finding, criticism, and objection.

its broad sweep to please all groups the document said, "we are
interested in the attitude of consumers," adding:

onsumers should not be left in doubt that higher prices to be paid
roducers * * * will necessarily result in an increase in the
of milk to consumers." Continuing the statement said: "Dis-
faction on the part of consumers would result in sales resistance,
this is highly undesirable both from the standpoint of producers
handlers."

llowing on the witness stand was the spokesman for another large
ibuting concern. He frankly admitted the existing problems and
eed for a constructive program. He gave approval to the basic
ipals upon which the program has been drawn and voiced desire
lp solve existing problems. In conclusion the witness concurred
e statements recorded by the Distributors' Bargaining Agency.

Long Parade of Dealers and Attorneys

hrough the balance of Tuesday and all of Wednesday it was a
de of lesser lights from among New York's 300 dealers and their
neys. Their stories differed only in the language used to express
selves. All were anxious to help farmers, but all found a lot of
gs wrong with the proposed program. Lawyers argued at length
technicalities and the definitions of words.

onsumer groups had their representatives on hand to testify to
anxious desire that farmers have larger returns. Some of them
loudly critical of dealers, and they were emphatic that they want
milk at lower prices.

rong opposition was recorded against the marketing plan. Some
points in the document were brought to light. Amendments
already been submitted on some of these. The opposition is ex-
ed to enter further protests at the hearing beginning in Albany
3. These may be augumented by briefs filed at the close of
ings.

hen the record of the hearings has been transcribed it will go to
etary of Agriculture Henry A. Wallace and Holton V. Noyes,
missioner of Agriculture and Markets, for examination to deter-
whether need and necessity for a marketing order has been estab-
d. Upon their findings will depend whether a revised order shall
ubmitted to farmers for a vote.

3653 *Exhibit No. 24D to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., JUNE 21, 1938

LEAGUE PLEDGES COOPERATION—WARNS DEALERS

Will Consider Extension of Distribution Direct to Consumers If Dealers Block Producers' Plans

Gaumnitz and Brandt Guest Speakers at Big Annual Meeting

League farmers, meeting in Syracuse last week for the 18th annual membership gathering of the Dairymen's League Cooperative Association, Inc., served plain notice upon milk dealers that if they defeat or delay the proposed marketing agreement for the New York market Dairymen's League producers will consider extending their own distribution operations clear through to consumers in the New York Metropolitan area.

This militant declaration of the organization came in the form of a resolution, recommended by the Resolutions Committee and unanimously adopted by the nearly 3,000 members present at the close of the Thursday morning session. It marked the high point of this year's annual meeting, as the great gathering of League men and women sensed that here was a call to battle—a battle to obtain and protect a living price for milk, if present plans of the producers were upset by dealer opposition.

Warning Climaxes Stirring Annual Message

This significant warning to dealers came as a very forceful climax to the stirring messages brought to members by President Fred H. Sexauer in his annual report. Mr. Sexauer traced the desperate efforts of the dealers during the past year, sometimes in combination with a farm-paper editor and sometimes through the control of producers, to block cooperative progress of dairymen.

"Farmers will not stand this for too long," said Mr. Sexauer. "If dealers will not work cooperatively with cooperative organizations to handle these market problems, consumers can well demand that they (the dealers) be regulated so that they cannot play both ends, the producer and the consumer, for the benefit of the middle."

"It is unfortunate," said the League president, "that the conservative, forward-looking distributor gets squeezed because of the destructive, chiseling practices of some. Producers' organizations cannot be expected to sacrifice the interests of producers if distributors cannot work together for the benefit of all—producers, consumers, and distributors."

President Sexauer concluded his annual report with the prediction that if there could be continued progress with a continuing better understanding among producers, a better knowledge of the problems and greater cooperation, then dairymen could expect real progress during the next year.

League Pledge Repeated

Mr. Sexauer repeated the pledge made in his annual report a year ago—that the League would cooperate with others on any sound program and "that an unscrupulous majority of dealers must not be allowed to deprive farmers of a living price for milk."

In the Home Department meeting on Wednesday afternoon, Mr. Sexauer described the deprivation and the distressing conditions among farm families as a result of the low price for milk over a long period of years, and very emphatically declared that the milk industry needed an overhauling from beginning to end "for the purpose of laying a foundation of understanding in order to build groundwork upon which farmers will be brought together."

The Warning Resolution

The resolution warning dealers that continued opposition might force the League into direct distribution to consumers was as follows:

Whereas in the early days farmers delivered their milk to city consumers, but in due time the growth of the cities made it necessary to bring milk from longer and still longer distances, as a result of which there appeared middlemen, who, buying milk in the country and selling it in the cities, induced conditions which in due time resulted in the prices received by farmers being ruinously low; and

Whereas during the long period in which the farmers have sought by organization to place themselves in a position where they could obtain living prices for milk, their efforts have been continually opposed by middlemen, in part by open and honorable methods and in part by insidious methods; and

Whereas by the enactment of Federal and State laws farmers' cooperatives are authorized to associate themselves together in a bargaining agency and to effectuate a milk marketing agreement, with the assistance of Federal and State authorities, having as its objective not only living prices to farmers but equal prices to competing middlemen; and

Whereas there is now pending a marketing agreement applicable throughout the territory supplying the metropolitan market which, if effectuated and operated in accord with its spirit and purpose, will result in farmers receiving fair prices, and to prevent destructive and unfair price cutting in the cities; and

Whereas middlemen are jointly and collectively endeavoring by methods both fair and unfair to prevent farmers from obtaining such a marketing agreement: Therefore be it

Resolved, That if middlemen succeed in defeating the adoption of such marketing agreement, or, if adopted, if they succeed, either by litigation or other vexatious tactics, to prevent its full, free, and fair operation, that we recommend to the members of this organization, and to its directors and officers, that they consider the expediency of farmers taking back the right which they have never surrendered of themselves, supplying city consumers with milk, and that to this end the Board of Directors at once cause an investigation to be made to ascertain if funds can be obtained so as to finance such enlarged operation without unduly burdening the Association members; and if the Directors find that such action is necessary and feasible, they proceed accordingly; and be it further

Resolved, That in so doing they endeavor, by seeking cooperation with consumers' groups, by adopting new and improved methods of handling and marketing, and by seeking necessary regulatory legislation, reduce the spread between the prices received by farmers and paid by consumers, and to the end that both producers and consumers may be better served.

3677 *Exhibit No. 24-E to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., AUGUST 16, 1938

EXPLANATION OF FEDERAL-STATE MARKETING PLAN

In last week's issue of the News we printed verbatim final draft of the proposed Federal marketing order which is now before producers for final decision by ballot on August 18, 19, and 20. The New York State Commissioner of Agriculture and Markets will issue an order to be voted on at the same time. The same provisions are included in both the state and federal orders.

This joint Federal-State milk marketing plan asked for an originally proposed by the Metropolitan Cooperative Milk producers Bargaining Agency, Inc., representing about 40,000 producers in the milk shed, is not mandatory in any sense. It is like a piece of machinery for farmers to use, and it can't be put into operation unless enough dairy farmers vote favorably on it.

The plan itself is primarily a producer plan providing for federal and state aid to make it effective. It will not regulate the production of milk, nor can any producers be required to do anything under its provisions. It does regulate the handlers of milk.

However, its provisions are fair to all concerned—handlers, consumers, and producers. Its purpose is to bring to producers only a fair and living price for milk.

Following is an explanation of the main provisions of the plan now before producers for a vote next Thursday, Friday, and Saturday. Complete text of the final draft of this plan was printed in the News last week:

Purpose of the Program

The marketing agreement program for regulating the handling of lk in the New York metropolitan marketing area is designed to:
. Establish uniform prices for milk sold by producers to handlers the metropolitan market;
2. Assure uniform returns to producers for milk sold in the mar-ing area regardless of the handler to whom the milk was sold or use made of the milk by the individual handler;
3. Assure each producer a fair share of fluid milk market; and
4. Provide for the control of surplus milk supplies so that the bur-n is borne fairly by all producers interested in the metropolitan rket, and enable the use of surplus so that it will bring the highest urn to producers.

Principal Provisions

The marketing agreement program which is now before producers d handlers for final consideration incorporates changes and sug-stions which were made by industry spokesmen and others at the blic hearings. No changes have been made in the basic idea of the ogram.

The main provisions of the program provide for:
1. The selection of a market administrator by the Secretary of riculture and the Commissioner of Agriculture and Markets to minister the program;
2. The classification of milk received from producers at handlers' ants into nine classes, according to the use made of that milk;
3. The establishment of minimum prices which handlers are re-ired to pay producers for each class of milk according to its use;
4. A method for determining uniform prices which handlers are pay producers through the operation of a market-wide pool to as-re each producer his fair share of the fluid milk market; and
5. The filing of periodic reports by handlers to the market ad-nistrator showing deliveries and tests of milk received from pro-cers and from other sources, the use made of this milk, and pay-ents made to producers. The market administrator is given thority to check and verify the accuracy of all reports made to m by handlers.

Producers to Decide

Whether the Federal-State program for regulating the handling milk in the New York metropolitan marketing area goes into fect, rests largely with the producers themselves. The decision of oducers whose votes are expressed in the referendum to be held ill indicate whether dairymen favor the issuance of the order and ill determine whether it will be possible to put the order into actual eration.

The order cannot regulate the production of milk, nor can any oducer be required to do anything under its provisions. A pro-

ducer is defined as any person who produces milk which is delivered to a handler at a plant approved by any health authority in the metropolitan marketing area.

A handler is defined in the order as any person who engages in the handling of milk received at a plant approved by any health authority in the metropolitan marketing area. The definition specifically includes any cooperative association that operates plants or any cooperative association which causes milk to be delivered to plants of handlers and collects payments for such milk. The definition specifically excludes those persons who neither receive milk from producers nor handle milk which is sold in the metropolitan marketing area.

Joint State and Federal Administration

The program would be administered by a market administrator named by the Secretary of Agriculture and the Commissioner of Agriculture and Markets. The market administrator would administer both the Federal and the State orders, thus making it possible for the Federal and State Governments to operate jointly.

The order provides for the selection of the market administrator. It defines his powers and duties. The order requires the market administrator to furnish a bond to guarantee faithful performance of his duties.

The market administrator has the power to administer the terms and provisions of the order and to receive, investigate, and report complaints of violations.

Among his duties the market administrator is required to keep books and records which will clearly reflect the transactions of his office, furnish such information as the Secretary of Agriculture or the Commissioner of Agriculture and Markets may request, and employ such persons as may be necessary to carry on the functions of his office.

The expense of administering the joint Federal-State program would be borne by handlers. Each handler would be required to pay as his pro rata share of the expense of administering the program not more than 2 cents per hundredweight on that total quantity of milk received from producers at his plant which is sold primarily as fluid milk or fluid cream. The exact amount per hundredweight of milk to be paid would be determined by the market administrator on the basis of what was necessary for administering the program.

Milk Classified According to Use

The order provides that all milk received from producers by handlers must be classified according to its use at, or the form in which milk leaves, the plant where first received from producers with the proviso that if milk is moved as milk from the plant where it was originally received from producers to a second plant outside the marketing area, the classification of such milk at the first plant may

be according to its use at the second plant. Any use of milk claimed by a handler would be subject to verification by the market administrator.

Milk received at the plants of handlers would be classified into nine classes so that payments to producers may be made on the basis of the use value of the milk.

Each class of milk is defined in substance as follows:

Class I milk is defined as milk which leaves the plant as whole milk, chocolate milk, or a whole milk drink, or any milk not so accounted for as to be placed in a class lower than class I.

Class II–A milk is all milk the butterfat from which leaves a plant as cream which was not sold as frozen cream, made into ice cream, or shipped to markets in any county where there is no New York approved plant.

Class II–B milk is that milk which furnishes butterfat for plain condensed milk and homogenized mixtures (for ice cream).

Class III–A milk is all milk which supplies butterfat in evaporated milk, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than cream cheese and American Cheddar cheese.

Class III–B milk is milk which supplies butterfat in frozen cream.

Class III–C milk is milk furnishing butterfat for frozen desserts sold outside of New York City.

Class III–D milk is milk furnishing the butterfat for cream sold outside the New York milkshed and the butterfat in cream cheese.

Class IV–A milk is milk which is manufactured into butter.

Class IV–B milk is milk which is manufactured into American cheese.

The nine classifications for milk which are provided for in the order follow rather closely the classes used by the State of New York in regulating milk since 1933 and the classes used by a large portion of the market for 10 or more years before that time.

These use classifications are made necessary by the large territory of the New York milkshed, the wide variations in conditions of production and climate, the great variety of possible manufacturing outlets for milk at times not needed for Class I or Class II–A uses, and the tremendous volume of milk involved in even small proportionate changes in the sales and production of milk in the shed from day to day, week to week, and month to month. These classes, together with the price applicable to each class, are designed to permit all producers' milk to be absorbed in some channel of use at all times in order that it may be available when needed for Class I and Class II–A uses in the market.

Minimum Price for Each Class of Milk

For each of the nine use classifications there is provided in the order a method which will fix the price of milk in each class for each month. The method used is designed to provide flexibility in

the pricing of milk so as to recognize seasonal changes in production, general economic conditions, and the level of dairy prices.

The prices prescribed in the order are minimum prices based on milk, containing 3.5 per cent butterfat received during each month from producers or associations of producers at plants in the 201-210-mile zone from New York City. Differentials are provided for milk received at plants in zones nearer or farther than the 201-210 mile zone is from New York City.

The order contains a schedule which prescribes the class I price which handlers would be required to pay from April through July and from August through March. The schedule sets $2.20 per hundredweight for the 25-34.9-cent butter price range for the months of April through July, and $2.65 per hundredweight for the 30-34.9-cent butter price range for the months of August through March. This seasonal movement of the class I price is modified by changes in the price of butter, moving up or down by 20 cents per hundredweight for each 5-cent rise or fall in the average of New York 92-score butter prices for a period of 60 days before each month. The following table is contained in the order and prescribes the butter price range and the class I price to be paid during the different periods:

Butter price range (cents per pound)	Class I price		Butter price range (cents per pound)	Class I price	
	April through July	August through March		April through July	August through March
	Dollars per cwt.	*Dollars per cwt.*		*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.80	2.05	35 to 39.9	2.40	2.85
20 to 24.9	2.00	2.25	40 to 44.9	2.60	3.05
25 to 29.9	2.20	2.45	45 to 49.9	2.80	3.25
30 to 34.9	2.20	2.65	Over 49.9	3.00	3.45

If an order has become effective August 1, the class I price for August would be $2.45, since the average of butter prices was in the 25–29.9-cent range.

The method for fixing the class II–A price follows along the same lines as that for fixing the class I price, but it is designed to move the class II–A price more nearly in keeping with changes in the prices of butter. This is done by requiring that the butter price range be determined during the 30 days preceding the 25th of the month before the price would be in effect. In making this determination the average of New York 92-score butter prices would be used.

The lowest level of class II–A prices in the same butter price range is set for the months of March through July when production is heaviest, with slight increases for the months of August through October, the highest prices coming during the months of November through February. The following table contained in the order

scribes the butter price range and the class II–A price for the ious periods:

r price range s per pound)	Class II–A price		
	March through July	August through October	November through February
	Dollars per cwt.	*Dollars per cwt.*	*Dollars per cwt.*
29	1.30	1.35	1.50
34.9	1.50	1.55	1.70
39.9	1.70	1.75	1.90
44.9	1.85	1.90	2.05

Butter price range (cents per pound)	Class II–A price		
	March through July	August through October	November through February
	Dollars per cwt.	*Dollars per cwt.*	*Dollars per cwt.*
35 to 39.9	2.00	2.05	2.20
40 to 44.9	2.15	2.20	2.35
45 to 49.9	2.30	2.35	2.50
Over 49.9	2.45	2.50	2.65

f an order had become effective August 1, the class II–A price August would be $1.75 per hundredweight since the average of ter prices was in the 25–29.9-cent range. The class II–A price uld move to $1.90 for the month of October if the butter price el moved into the 30–34.9-cent range, and to $2.05 per hundred-ght for November if the butter price level remained the same. m the 25–29.9-cent butter price level the class II–A price moves p 20 cents, or up 15 cents, for each 5-cent change in the butter e level.

Prices for milk in the lower use classifications are established on a is so as to absorb all the milk not needed for class I and class II–A poses. These prices are set up so as to enable the manufacturer of ducts made from these lower classes of milk to compete without lue advantage or disadvantage with the same products made from k not qualified for the New York market.

The class III–A milk price under the order is to be 10 cents higher n the average of prices paid at 18 evaporated milk plants in the tes of Ohio, Michigan, and Wisconsin. The order contains a pro-on to prevent the class III–A milk price from being less than that e which the market administrator would compute by the following mula: The average price of 92-score butter at wholesale in the icago market for the month, plus 30 per cent of that average price. es 3.5, plus 7 cents. This formula approximates that contained in Federal marketing agreement program in effect for the evaporated k industry.

The class II–B price is to be 10 cents higher than the class III–A ce.

The class IV–A milk price is to be calculated by the market admin-rator each month from the average of the highest daily prices of score butter at wholesale in the New York market, deducting 4 ts as allowance for manufacturing costs, adding 20 per cent of the mainder, and multiplying by 3.5.

The class IV–A milk price is the basis for the class III–B, III–C, d III–D prices, which each month are to be respectively 20 cents, cents, and 7½ cents per hundredweight higher than the class IV–A ice.

The class IV–B price is to be determined by the market administrator on the basis of the average of weekly quotations of cheese per pound at Plymouth, Wis., Gouverneur, N. Y., and Cuba, N. Y., deducting 3 cents as an allowance for manufacturing costs, and multiplying by 9.45, a reasonably expected yield of cheese per hundred pounds of 3.5 per cent butterfat milk.

A butterfat differential of 4 cents per one-tenth of one per cent butterfat content above or below 3.5 per cent is to apply on all class prices except those for class III–A, IV–A, and IV–B. In the case of class III–A, IV–A, and IV–B milk prices, the butterfat differential is to be in direct ratio to the price of milk of 3.5 per cent butterfat content.

Handlers Required to Report

Administration of the order by the market administrator is based largely on periodic reports which handlers are required to make. The market administrator is charged with the duty of promptly verifying all reports, and handlers must, under the order, make available to the market administrator records and facilities to enable him to verify their reports and to obtain correct figures in case of errors or omissions.

The most important report which handlers must file with the market administrator is the final monthly report which, in addition to considerable detailed information, shows the total quantity of milk and the average butterfat content of the milk received from producers and from other sources, and the utilization of the milk at each plant, together with a complete computation of the sum of money which represents the handlers' net cost of milk on the basis of the 201–210-mile zone.

Upon receipt of reports for a month, the market administrator is required under the order to audit each report for mathematical correctness and obvious errors. These reports, subject to verification by the market administrator, must be sent to him on the 10th of the month following the month for which the report is made.

The Uniform Price Computation

On the 14th day of the month the market administrator is required to compute the uniform pool price, or blended price, out of all reports in his hands at that time.

For purposes of convenience, the milk of each class to which the minimum prices apply is known as the "net pooled milk." Class I and Class II–A milk which never enters the marketing area is not included in the net pooled milk. The uniform price is computed by the market administrator upon this net pooled milk in all classes of all handlers.

In computing the uniform pool price from all reports each month, the market administrator is required to deduct payments for services rendered by cooperatives and payments for market services rendered by handlers.

Payments Out of Pool

Payments for services by cooperatives are to be made to those cooperative associations which have been determined by the Secretary of Agriculture as having their entire activities under the control of their members and as being able to render service to producers as a whole by facilitating the delivery of milk to persons at the point where it may be used in the highest possible class, and by making available to handlers in need of milk an adequate supply. These payments would go to producers' cooperatives which exercise control over milk and route milk into the channels of utilization which net the highest returns to all producers.

Under the order any cooperative association of producers may apply to the Secretary of Agriculture for determination as to its qualifications to receive the cooperative service payment. If the determination is made in favor of the cooperative, the service payment is to be received by the cooperative until it has been disqualified by the Secretary for failure to exercise the authority and to perform the functions upon which the determination was made.

These payments are to be made at only one of the following rates on net pooled milk dealt with by a cooperative:

One cent per hundredweight of net pooled milk to a cooperative which caused the milk of its members to be delivered to a handler's plant and on which the handler made reports to the market administrator and paid producers as required under the order;

Two and a half cents per hundredweight of net pooled milk to a cooperative which has collected payments for milk delivered to the plant of a handler by its members and which has met its obligations under the order; and

Five cents per hundredweight of net pooled milk to a cooperative which operates plants, is able to take care of all the milk of all its members, and is willing and able to take care of milk from producers who are not members.

Market service payments to handlers would be made for facilitating the utilization of milk in a way so as to benefit all producers sharing in the pool.

During any month except November or December one market service payment would be made to those handlers who move milk from a plant equipped only for receiving and shipping milk to one equipped for manufacturing when it is impossible to move the milk in fluid form. For moving the milk to the manufacturing plant the handler would receive for that service 23 cents per hundredweight of milk so moved, plus a small additional allowance for hauling. No such payment would be made for any month when the manufacturing plant shipped class I milk to the marketing area if both plants are operated by the same handler.

Another market service payment would be made during November and December to a handler who moved class I milk from a plant which

is primarily a manufacturing plant, and who would be entitled to claim this market service payment. This payment is at the rate of 30 cents per hundredweight of class I milk during these 2 months only, and the manufacturing plant must not have shipped to the marketing area more than 10 per cent of its receipts as class I milk nor more than 50 per cent as cream during the preceding May and June.

Uniform Pool Prices for Producers

The order requires handlers to pay the uniform pool, or blended price, calculated by the market administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as class I milk outside of the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. For the remainder of each producer's milk the handler may pay such prices as he see fit, but is required to furnish the producer with a statement of the percentage of the producer's milk paid for at the uniform price.

Payment of the uniform price is subject to the butterfat differential of 4 cents per hundredweight for each one-tenth of 1 per cent butterfat content above or below 3.5 per cent in the milk delivered by each producer and to the transportation and location differentials.

The transportation differential scale is that prescribed in the order to apply to class I milk and is based on the railway tariff for the movement of milk in tank cars.

The location differential amounts to 25 cents per hundredweight to producers who deliver at plants in counties of New York, New Jersey, Connecticut, and Massachusetts, located close to New York City, and separated to a large extent from the rest of the milkshed by mountainous country in which very little, if any, milk is produced. Of this 25 cents paid to producers, the handler is reimbursed 20 cents per hundredweight from the total pool. This leaves a location differential of 5 cents per hundredweight to be paid by the handler.

In addition to the other differentials, handlers are required to pay to producers delivering milk qualified as grade A by the New York City Department of Health premiums according to butterfat content and bacteria count on that amount of milk actually sold in the marketing area as grade A milk. The premiums range from 78 cents for 4 per cent milk having less than 10,000 bacteria count down to 5 cents for 3.7 per cent milk containing over 25,000 bacteria count.

A producer settlement fund operated by the market administrator is provided for under the order as a clearing arrangement into which each handler pays the amount by which his net pool obligation is greater than his net pooled milk multiplied by the uniform price, or out of which he is paid the amount by which his net pool obligation is less than his net pooled milk multiplied by the uniform price. Provision is also made for receiving or paying out of the producer settle-

t fund amounts of money arising out of any errors. Handlers
t make payments to producers on or before the 25th day of each
th for milk received during the preceding month.
he arrangement which the order prescribes for determining and
ing a uniform pool price to producers for milk sold in the market-
area operates under what is commonly termed a market-wide pool
. Operation of the pool assures all handlers the same cost for
sold in the marketing area, and assures for that milk payments
ll producers at a uniform rate except for the transportation and
er differentials provided.

"I URGE ALL PRODUCERS TO VOTE FOR THIS ORDER"—COMMISSIONER HOLTON V. NOYES

n a statement issued last week New York State Commissioner of
riculture Holton V. Noyes again urged every dairy farmer to make
ecial effort to get to his voting place next week and vote for the
posed federal-state marketing order. Commissioner Noyes said:
Milk producers of the New York City milk shed will determine by
e August 18, 19, and 20 whether milk control under State and Fed-
l cooperation shall be adopted.
Every producer should see that his vote is registered either for or
nst this very important question.
I believe that many years of experience point clearly to the neces-
of milk control. Particularly the experience of the past several
rs indicates that State and Federal control is the only form that
l work.
We have been working on the present order for some time. It is
essarily a complicated document. Every possible utilization of
k must be clearly defined, and every possible movement of milk
m one utilization to another must be foreseen and provided for.
We believe that the present order is so written that its provisions
fair and reasonable and will assure a satisfactory price to all pro-
cers. Under the law it can be amended later if experience should
ow the need of change.
I urge all producers to vote for this order. I am confident that if
s adopted it will stabilize conditions in our milk industry which can
t be assured in any other way.
Neither the State nor Federal government wants to go ahead with
is order unless the producers signify clearly by vote that they
nt it.
This is no proposition for government regulation. It is a plan by
hich the industry may secure government cooperation in the enforce-
ent of rules which the industry itself believes to be necessary to the
derly and equitable marketing of milk.
If the vote is favorable, the order will be put into operation as soon
possible. But the continued cooperation and support of producers
ill still be necessary to insure success."

QUESTIONS AND ANSWERS ON THE FEDERAL-STATE MILK PROGRAM FOR NEW YORK

The News prints herewith questions and answers on the proposed Federal-State milk program for the New York metropolitan marketing area. Producers qualified to ship milk to this market will ballot on this plan on August 18, 19, and 20. The final draft of the marketing order, as the plan is officially called, was printed in the News last week. These questions and answers have been prepared in the Department of Agriculture to clarify the main points in the plan for the benefit of all producers who will ballot on it August 18, 19, and 20.

Q. What is the purpose of the Federal-State program which the dairy industry is requesting for the New York metropolitan marketing area?

To help stabilize conditions in the New York milk market and to improve returns to the milk producers.

Q. How is this program possible?

Through a marketing agreement and order issued by the Secretary of Agriculture of the United States, together with an order issued by the New York State Commissioner of Agriculture and Markets.

Q. What is a marketing agreement?

A marketing agreement is a voluntary contract between the Secretary of Agriculture and the handlers of milk who sign.

Q. What is an order?

An order is a regulation issued for the purpose of making the program applicable to all handlers in the market. The Federal order embodies the provisions of the agreement. The State order contains the same provisions.

Q. What is necessary before the Federal-State program can go into effect?

Most important is the fact that producers must vote their approval of the plan. The Federal marketing agreement and order may go into effect if handlers of more than 50 percent of the milk sold in the marketing area sign the agreement and if at least two-thirds of the producers voting in the referendum approve the issuance of the Federal order. In the event the required number of handlers fail to sign the agreement, the order may go into effect with Presidential approval, together with the required two-thirds producer vote. The State order requires a three-quarters vote before it can go into effect. Both the Federal and State orders must receive the required producer approval before the program as a whole can go into effect.

Q. How was the program developed?

The program was developed by dairy farmers and cooperative organizations working through the Metropolitan Cooperative Milk Producers' Bargaining Agency. Public hearings on the plan were held jointly by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets.

. What part did the dealers play in preparing it?
formation presented by the dealers before, during, and after
ic hearings was taken into consideration.
. How long has it taken to develop the program?
pproximately 8 months.
. Why has it taken so long?
ecause of the complexity of the problem and the attempt to bring
t a program which would as nearly as possible fit the needs of the
ket.
. Why is the order so long?
nce the marketing of milk in an area as large as New York is a
plicated problem, the order must be so worded as to apply to the
y varying conditions. The obligations imposed must be fully and
rately defined in the order so as to prevent evasion and stand the
in the courts.
. Who is a producer as defined in the order?
producer is any person who produces milk which is delivered to a
dler at a plant approved by any health authority for the receiving
ilk to be sold in the marketing area.
. What is the meaning of the word "handler"?
andler means any person who engages in the handling of milk or
m which was received at a plant approved by any health authority
the receiving of milk to be sold in the marketing area.
. Does the term handler include cooperative associations?
es; as applied to any milk received from producers at any plant
rated by a cooperative association, or with respect to any milk
ch it causes to be delivered from producers to any other handler
the account of such association and for which such association
ects payment.
. Are persons engaged in the handling of milk not received from
ducers considered as handlers?
o; neither are persons who handle milk or cream all of which is
outside the marketing area.
. Are producers required to file reports under the order?
o. Reports are required only from handlers.
. Does the order regulate producers in their capacity as pro-
ers in any way?
o. Handlers only are regulated under its provisions.
. Why cannot the State regulate the metropolitan New York milk
rket without the assistance of the Federal Government?
ecause the Supreme Court of the United States has ruled that
le a State can regulate the handling of milk produced within that
te, such regulations cannot apply to milk moving in the current
nterstate commerce.
. Who would be directly responsible for the administration of the
gram?
The market administrator.

Q. By whom would he be elected?

By the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets.

Q. What would be his principal duties?

Receiving reports from handlers, computing prices to be paid producers, assuring proper payments to producers, and checking on the accuracy of reports and payments made by handlers.

Q. Is the authority of the market administrator strictly prescribed in the order?

Yes. His duties are definitely stated and the scope of his work clearly indicated.

Q. How would the expense in connection with the administrator's office be met?

By an assessment on handlers of not more than 2 cents per 3679 hundredweight of milk utilized in classes I, II–A, and II-B under the terms of the order.

Q. Would this assessment be made as a deduction from producers' checks?

No. It would be paid by handlers in addition to the price paid producers as fixed in the order.

Q. What provision has been made for violations?

Specific procedure for enforcement of the program in the courts is provided for under the Federal and State laws.

Q. Would the market administrator be placed under bond?

Yes. For protection against losses through possible irregularity, he is required to furnish bond commensurate with his financial responsibility.

Q. Under what authority do State and Federal agencies act in exercising regulation in the milk industry?

Laws passed by the Legislature of the State of New York and the Congress of the United States.

Q. Just which laws?

The New York State Rogers-Allen Act and the Federal Agricultural Marketing Agreement Act of 1937.

Q. Have there been other attempts by the State of New York to regulate the New York milk market?

Yes. The latest attempt terminated in March 1937 because the State regulations could not apply to milk shipped in from other States.

Q. How would the Federal order overcome the problem which the State encountered in dealing with milk which moves in interstate commerce?

By complementing the State order and thus providing a complete program under which intrastate and interstate milk will be subject to identical regulations.

Q. How may the present provisions of the program be changed?

They are subject to modification by amendment, suspension, or termination in accordance with the provisions of the respective State and Federal Acts.

Q. Can producers secure termination of the order?

Yes; at the request of producers of more than 50 per cent of the milk.

Q. Is the plan established by the order an experiment?

No. The basic features of the plan are those which have developed out of approximately 25 years of cooperative marketing experience.

Q. How does the program tend to increase the purchasing power of producers?

In two ways: First, by establishing minimum producer prices which are in line with market conditions for each class of milk according to its use; and second, by requiring that not less than such minimum prices be paid for all milk received from producers by handlers under the order.

Q. Why does the order provide that milk be classified on the basis of its use?

Because that method is generally recognized as the only fair basis on which milk should be purchased.

Q. What assurance is there that milk sold to handlers under the order will be properly classified?

The market administrator is required to verify all reports received from handlers as one of his duties in administering the program. Handlers must make available to the market administrator all records and facilities so that a complete check may be made on these reports which show receipts and utilization of milk delivered by producers at handlers' plants.

Q. Why does the order provide for so many classes of milk?

To enable producers to receive the highest return from milk according to the use which handlers make of it.

Q. Does the program throw open the metropolitan New York market to milk produced anywhere in the United States?

No. As in the past, the health departments in the area must approve or reject plants supplying milk to the market. The program merely provides for the pricing of milk delivered by producers to plants approved by the health authorities.

Q. Are producers required to control the production of milk under the order?

No. Under the laws provided for issuance of State and Federal orders, there are no provisions for production control.

Q. To what extent will producers receive a uniform price for milk?

Milk of the same quality produced in the same mileage zone and sold to handlers for sale in the marketing area will command the same price.

Q. How will producers shipping the same quality of milk under similar conditions share in the benefits of the fluid milk market?

They will share equally in such benefits through the operation of a market-wide pool which makes it possible for handlers to pay producers on the basis of all fluid milk sales in the market.

Q. How is the burden of surplus in the market shared among producers?

Producers will share equitably in the burden of surplus milk in the market also through the operation of a market-wide pool.

Q. Would dealers be prohibited from paying producers more for milk than the minimum price to producers as computed under the order?

No. The prices established are minimum prices and dealers may pay their producers more than the order requires.

Q. Under the provisions of the order, is the producer permitted to sell his milk where he pleases?

Yes. The responsibility for selling his milk remains entirely with the producer.

Q. Are resale prices established under the order?

No. Neither the State nor Federal order provides for establishment of resale prices. Such prices are left to be fixed by the forces of competition.

Q. To what extent does the order prevent a minority group of handlers from destroying the general marketing program?

The order applies alike to every handler who receives milk from producers at plants approved by any health authority for the receiving of milk to be sold in the marketing area.

Q. How does the program affect cooperatives?

It is intended to supplement and strengthen the position of cooperatives in the market.

Q. Have the interests of the consumer been considered in the development of the program?

Yes. Under the law consideration must be given to the interests of consumers. A stabilized market safeguards the interests of consumers and assures an adequate supply of wholesome milk which can be sold at prices reasonable to consumers.

Q. Can the Federal-State program greatly help the dairy industry without the cooperation of that industry?

No. The policy of Government is to help the industry to help itself.

THIS MARKETING ORDER IS NOT VOTED IN WE WILL BE THROWN BACK 50 YEARS.

"To Dairymen of the New York Milk Shed:

"The chaotic condition of the metropolitan market has for many years been the great discouraging element in the lives of all dairymen in the Empire State especially.

"For a little more than a year there has been an attempt to bring order out of chaos through the opportunity afforded by the so-called Rogers-Allen Law.

"In this situation, through the cooperation of the Cooperative groups in New York and adjoining states with the Department of

griculture the Federal Marketing Order has been prepared. The airymen are to vote on this order in a few days. The effect of this rder if adopted will be to guarantee a reasonable price to the Dairy- en of the New York Milk Shed for their milk.

"From my personal observation and study of conditions it is my m conviction that if this marketing order is not voted in we will thrown back fifty years in our marketing of milk or we may be ed with the proposition of milk being made a public utility. We ir men cannot afford to contemplate either of these results, so let vote for the Federal marketing order and save our business."

—Raymond Cooper, Master New York State Grange.

DO NOT BE LED ASTRAY BY DEALER PROMISES

o PRODUCERS IN THE NEW YORK METROPOLITAN MILK SHED:

"On August 19 and 20, producers will vote and decide whether ey want to use the full powers intended under the Rogers-Allen w to secure for themselves a living price for milk. It must be nembered that the Rogers-Allen Law is a permissive law and pro- cers themselves decide what shall be done under it. Producers , if they will, control their prices or they can let the dealers ntrol, with resulting ruinous prices, as they have in the past.

"My statement of last year still holds and I call your attention to now. I urge all producers to vote for the Federal-State Order, d thus prove to the public that, through real cooperation, they win. By adopting this Order, producers will make use of all the power that their Governments intended they might have if y so wished.

"Knowing producers as I do, I am confident they will not be led ray by dealer promises or propaganda at this time but will vote producer control of prices and a better living for all farm folk."

—George F. Rogers.

3 *Exhibit No. 24F to the stipulation*

IRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., SEPTEMBER 20, 1938

PRODUCERS READY TO DIVERT MILK FROM NONCOMPLYING DEALERS

ague Gets Vote of Thanks From Bargaining Agency for Its Offer of Marketing Facilities

Volunteer enforcement agents—100 strong—were riding the roads t week explaining to farmers how they could convince recalcitrant tropolitan milk handlers of the advantages of complying with the by obeying the rules and regulations of the new federal-state lk marketing program.

This action followed a meeting of delegates of the Metropolitan operative Milk Producers' Bargaining Agency in Syracuse Sep-

tember 10. The delegates voted to have 100 farmers go out as volunteer enforcement agents to "crack down" on dealers who have not signed the marketing agreement. They were to explain to producers delivering to such dealers that they could divert their milk and not lose money. Such diversion it was believed would quickly bring the few New York holdouts into line.

Delegates of the Producers' Agency gave a rising vote of thanks to the Dairymen's League Cooperative Association for its generous offer to make plant and sales department facilities available to handle 5,000 cans of diverted milk daily.

Harmon and Gaynor Address Meeting

Decision to organize the squad of volunteer enforcement agents followed speeches by E. M. Harmon, Market Administrator, and E. M. Gaynor, personal representative of Holton V. Noyes, Commissioner of Agriculture and Markets.

Mr. Harmon told the farmers that the rules and regulations of the new marketing program are laid down in the order voted into effect by farmers, and that he intends to administer them without fear or favor.

Despite harnessing of federal and state government forces to combat farmers' milk price problems, said Mr. Harmon, producers' cooperative organizations shall continue to be the most powerful factor in obtaining favorable prices. He urged farmers to perfect their organizations, and said that if they were properly united there would be no need for a market administrator.

In a spirited speech Mr. Gaynor told the dairymen that they "need not think about dealers for two minutes." He explained the
3694 provisions for diverting milk from dealers who fail to comply with the regulations. The Dairymen's League plants are open—and others too," said Mr. Gaynor. "Call me up, I'll tell you where to put the milk. You won't have to divert very long before these dealers will be ready to sign up."

Dr. A. C. Dahlberg, of the Geneva Experiment Station, told the dairymen of work being carried on to develop new outlets for milk, particularly cheese and industrial products.

C. E. Ladd, Dean of the Cornell Agricultural College, also addressed the meeting and urged that action be taken toward obtaining government assistance to carry on research work to find new industrial uses for milk.

Action was taken by resolution on that subject, and also requesting a $2,000,000 appropriation by the New York state legislature to fight Bangs disease.

E. R. Eastman, editor of the American Agriculturist, addressed the meeting.

Ask Funds for Research

Following is the resolution asking funds with which to intensify search at Geneva:

"WHEREAS the dairy farmers of the New York Metropolitan ilkshed have, through the cooperative associations, developed a sur-us control plan; and

"WHEREAS the producers have overwhelmingly voted to put this an into effect by the adoption of a Federal-State Milk Marketing rder; and

"WHEREAS surplus market milk of high quality is now being held the country and is there being manufactured into dairy products; nd

"WHEREAS the New York State Agricultural Experiment Sta-ons at Ithaca and Geneva have proven that superior products can e made from high quality milk and these stations have already de-eloped new methods of manufacturing and found new uses for dairy products; and

"WHEREAS at Geneva there are studies being carried on that offer romises which, if successful, should be of great financial benefit to e producers of market milk; and

"WHEREAS there is need for more intensive study along this ne:

"BE IT RESOLVED, that we firmly believe that the services of ur scientists should be used to the fullest possible extent, and that as r as practicable, the results of their studies should be used for the nefits of the producers of New York State.

"BE IT FURTHER RESOLVED, that we, the representatives of e cooperatives making up the Metropolitan Cooperative Milk Pro-ucers Bargaining Agency go on record as commending the scientists nd research workers who are working in our behalf and pledge our pport and appreciation; and

"BE IT FURTHER RESOLVED, that we go on record as favor-g an appropriation on the part of the State Government of $10,000 r the Dairy Department of the New York State Agricultural Ex-eriment Station at Geneva for more intensive work on new and nproved uses of dairy products.

"BE IT FURTHER RESOLVED, that the purposes of this resolu-on be explained by the Executive Committee to other dairy and rm organizations and that their support be solicited and that copies f this resolution be sent at the proper time to the authorities directly sponsible for putting the purpose of this resolution into effect."

393 OFFICIAL VOTE ON N. Y. C. ORDER MADE PUBLIC

The final and official results of balloting on the federal and state rders for fixing milk prices in New York City were made public by lbany and Washington last week. On the state order 86.8 per cent oted "yes" and on the federal order 87.6 per cent voted "yes."

Total State Ballots 35,596

In announcing the results on the state order, Commissioner Holton V. Noyes, of the Department of Agriculture and Markets, said:

"Exclusive of rejected votes, a total of 29,883 votes were cast on the state order. Of these, 25,935, or 86.8 per cent, were in favor and 3,948, or 13.2 per cent, were opposed.

"Out of a total vote of 35,596, a total of 5,713 votes were rejected. The principal ground for rejecting ballots was that they were
3694 cast by producers who are members of cooperative associations which voted collectively for all of their members. Many additional ballots were rejected because they were cast by producers whose milk was not being delivered to plants approved by any health authority having jurisdiction in the marketing area, or because the voting producer's name did not appear on the list of producers delivering to an approved plant.

"Other ballots were rejected because they were not completely filled out, and in many of these instances the intent of the voter could not be determined. The intent of the voter could be determined, however, in the case of 5,376 ballots which were disallowed for the reasons mentioned. Of these 5,376 ballots disallowed, 77 per cent of the voters favored the adoption of the order.

Commissioner Noyes expressed the conviction that even though no cooperatives had insisted on voting as units, as the statute permits, and had the members of such cooperatives voted individually, more than the required 75 per cent would have voted in favor of the state order.

On the federal order, total number of votes cast was 45,644, according to an announcement by the Triple A Office at Washington. Out of this number 7,017 were rejected because of practically the same reasons given for rejections of votes on the state order.

The total number of the valid votes on the federal order was 38,627. 33,663 voted "yes" and 4,964 voted "no." The total number of ballots voted by cooperatives was 24,903, with 24,589 voting "yes" and 314 voting "no." The total number of individual votes was 13,724, with 9,083 voting "yes" and 4,641 voting "no."

The ballot on the federal order through the milk shed was tabulated according to the plant to which the delivery was made, rather than by residence. In this way producers in the seven northeastern states were able to vote at any polling place. They could even go from one state to another to vote if necessary.

Exhibit No. 24-G to stipulation

ARYMEN'S LEAGUE NEWS—NEW YORK, N. Y., SEPTEMBER 27, 1938

90 PER CENT OF N. Y. C. MILK SIGNED UP BY DEALERS

York Producers and Dealers Set Up New Record, Says AAA Official

lilk dealers representing approximately 90 per cent of the milk in the New York City area have signed the federal marketing ement. This fact was confirmed by announcements made at the of last week by the Dairy Section of the Agricultural Adjustment inistration and the New York office of Wellington J. Griffith, Jr., ctor of the recent producer referendum.

. C. Treat, secretary of the New York Metropolitan Cooperative k Producers Bargaining Agency, made the prediction in Syracuse all the larger dealers would be signed up by the end of last week. ept for a few small handlers, Mr. Treat predicted the sign-up ld be almost 100 per cent. None of these smaller dealers handle e than 50 or 75 cans a day and practically all of them are in the t buyers" class, he said.

Ir. Treat also reiterated a former statement made by the Bargain- Agency to the effect that the squad of 100 producer volunteers e still on duty in the milk shed and that shipments of milk would iverted from those buyers who declined to pay full prices as called by the order or who might attempt through court action to obstruct inistration of the order.

Washington officials hailed the signing of the agreement by dealers. R. Tolley, administrator of the AAA, said that the handlers' action encing cooperation between producers and distributors enhanced possibilities for effectiveness of the marketing program. He ed that this was the first instance in which a marketing agreement a large metropolitan market where an order also is in effect, had n signed by handlers representing such a large percentage of the ket.

Ir. Tolley said: "The federal program requested and approved by ducers and their representatives supplying milk to the New York ket was developed by the AAA Dairy Section under the direction Mr. Gaumnitz and was made possible largely by the efforts and cooperation of producer cooperative associations."

E. W. Gaumnitz, chief of the AAA Dairy Section, said: "Co- operation by producers and handlers with state and federal governments is essential to end chaos that has existed in the stry and to stabilize marketing conditions for the benefit of pro- ers, handlers, and consumers."

3725 *Exhibit No. 24–H to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., NOVEMBER 15, 193[illegible]

NEW YORK MARKET STABILITY THREATENED BY PRICE CUTS

Some Dealers Bid for Store Trade by Lowering Prices Three Fourths of a Cent Per Quart—Farmers Have Power to Halt Destructive Practice

A threat to stability of the New York City milk market exists in the low prices at which some distributors are selling milk to stores.

To meet prices established under the federal-state milk marketing order milk should sell to stores at 9¾ cents per quart. A good many dealers are selling at 9 cents and soliciting new business. It is the old price cutting trick to build up volume. Various producer groups are beginning to worry as to how they are going to obtain full payment for their milk, while dealers insist on selling at reduced prices. To pay established prices, pay for full butter fat content and all other charges, 9¾ cents is figured as the absolute minimum at which handlers can sell milk to stores and make full payment to producers.

There is apprehension in some quarters as to what this situation may lead to in the future. If history repeats itself, and it usually does, further price cutting may be expected. Some day some dealer who loses business to one of the price cutters will lower his selling price below the quotation of his rival. It takes only a few such instances to launch a wave of price cutting and soon the foundation has been knocked from under the price structure.

Remedy for the present condition is in the hands of the producers supplying handlers who are trying to wreck the market. By insisting that they receive full payment for all of their milk in accord with all of the regulations of the federal-state program, they can make it practically impossible for dealers to destroy their market.

3741 *Exhibit No. 24–I to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., OCTOBER 25, 1936

3743 RETURN FOR SEPTEMBER

The Dairymen's League Cooperative Association, Inc., announces an average net pool return for September of $1.83 for 3.5 milk at the 201–210 mile freight zone.

This includes an average plus differential of 18 cents, which varies both according to locality and differentials earned by individual producers. Grade A premiums, where earned, are in addition. This is the average return on all milk delivered to country plants and direct to city markets by members.

Grade A producers delivering to Essential Grade A plant will re-
ive 56 per cent of the Grade A premium earned.

The figures above include a deduction of 5 cents per 100 pounds
r Certificates of Indebtedness. The following service charges have
en deducted:

ite advertising of milk	.0026
oducers' Bargaining Agency	.0024
tal administrative expenses	.032
stributed to local associations to cover local expense	.002
stributed to sub-district organizations to cover expense	.001
create insurance fund to cover losses from uncollectible accounts and other losses	.005
cover depreciation in value of fixed assets and good will of business purchased, which it is deemed inadvisable to carry as assets	.01
Total of above deductions	.055

57 *Exhibit No. 24–J to stipulation*

DAIRYMEN'S LEAGUE NEWS—NEW YORK, N. Y., DECEMBER 20, 1938

59 LEAGUE RETURN UP TO $2.07

Returns to members of the Dairymen's League Cooperative Asso-
ation, Inc., for milk delivered in November, will average from 20
nts to 40 cents per hundred pounds above October and 80 cents
r 100 pounds higher than for August milk before the present pro-
cer marketing plan was put into effect in the New York City
ea.

Members of the Association will receive an average net pool return
f $2.07 per hundredweight for 3.5 milk at the 201–210 mile zone.
his includes an average city and location plus differential of 6
nts. In addition to this, 82 per cent of League producers eligible
participate will receive the special November production differen-
al of 20 cents per 100 pounds, making their net return at the base
ne $2.21.

With the exception of November a year ago, this is the highest
eague net pool return for the month of November since 1930, which
as a year of high prices. While a year ago the November return
as 51 cents above the eastern condensery price, this November re-
rn is 77 cents per hundred above eastern condenseries. Since last
ne, eastern condensery prices have gone down 7 cents while the
et return to League producers has increased 87 cents per 100 pounds.
his improvement has all come since September 1, when the pro-
cer-federal-state marketing plan, sponsored by the Dairymen's
eague and other cooperatives, was put into effect.

For milk delivered in November, the average producer will receive
bout $45 more than he would have received on the basis of prices
hich prevailed last August.

3773 *Exhibit No. 25–A to stipulation*

THE SHEFFIELD PRODUCER—NOVEMBER 1938

MINUTES OF DIRECTORS' MEETINGS

Minutes of Special Full Board Meeting, Held in New York October 31, 1938

Meeting called to order by President Cronk at 9:45 A. M. Roll Call. All directors present. Mr. Cronk reported on a meeting called by the Research Council, at which the members of the council discussed ways and means of assisting in the enforcement of the Order. He also reported on a meeting of the Executive Committee of the Producers' Association held on October 19, at which the matter of payment for September milk was fully taken up.

It was moved by Mr. Selleck and seconded by Mr. Lamb that the following resolution be adopted:

Whereas by the items of agreement entered into on the 30th day of August 1938, which agreement is supplementary to a contract made prior thereto on the 30th day of August 1938, this association agreed to pay to the Company for certain services to be rendered by the Company, 2c per cwt. for all milk sold to the Company during the month of September 1938, subject, however, and conditioned upon the approval of the Federal and State authorities; and

Whereas the portion of said contract above referred to has been disapproved by the Federal and State authorities having in charge the enforcement of the Milk Marketing Order:

Resolved, that in compliance with the recommendations of the Federal and State authorities, the Association void so much of said contract as is referred to above; and further

Resolved, that the claims of the Company for services rendered under the said contract be rejected. Unanimously carried.

It was agreed by the Board that the publication of The Sheffield Producer be held up until after the announcement of the market pool price by the Administrator.

There was considerable discussion by the Board in regard to making deductions from our members checks for our own cooperative expenses or for our payment of dues to the Bargaining Agency. Neither deduction was made from the September milk payments.

The contract between the Association and Sheffield Farms Company for the sale of October milk was read by Mr. Cook and discussed by the Board, particularly that clause in the propose contract which limited the Company's purchases to their needs, following which the contract was rewritten.

Sheffield Farms Company, represented by Messrs. Wellwood, Crowley, Halsey, Daly, Judge Pyrke, and Dr. Roberts, entered the meeting at 12 noon.

Dr. Roberts gave figures which indicated a drop in Sheffield Farms ceipts of over 2,000 cans per day from October 15 to October 31. he production per dairy per day on October 15 was 218 lbs., against 6 for the same d te in 1937. These figures, however, are not comrable on account of the strike which was in effect a year ago in tober. Dr. Bond, of Cornell, reports a nine to ten pound per day r dairy increase for September 1938 over September 1937. It was so pointed out that over 400 cans of milk per day had been manutured into butter by the company during the month of October.

The meeting was adjourned until 2:30 P. M., at which time the ard reconvened.

Mr. Williams gave a detailed report of the meeting of the committe of directors Williams, Smith, and Lamb with the Federal authoris in Washington, at which time was explained our reasons why we lieve our association should be qualified as a bargaining cooperative der the Order. Mr. Williams also reported that the committee had inted out to the men in Washington what our association had done the past regarding returns to our producers.

Moved by Mr. Lamb, seconded by Williams, that we accept the conct as drawn for the sale of October milk and that we authorize the sident to sign the same in behalf of the association. Unanimously rried.

Meeting adjourned.

Minutes of Regular Meeting of Full Board, November 15, 1938.

Meeting called to order at 9:45 A. M. All directors present. The nutes of the meeting of October 31, 1938, were read and approved. e Secretary reported on a meeting with Messrs. Loomis and Fee in bany as to the classification of our cooperative under the Order. Mr. Rolfe reported on a meeting in Mr. Harmon's office in regard the same matter. He stated that at that meeting he took the poion that there was great danger in withholding cooperative payents from a great number of the co-ops, whose activities were instrutal in the formation of the Bargaining Agency and the favorable e of all producers for the joint Federal and State Order.

Mr. Rolfe told the Board that there was to be a meeting in a few ys, probably Thursday of this week, in New York City, between a mmittee of our association and representatives of the Commissioner d the Secretary, at which time a final determination as to our classiation under the order would be made.

It was suggested by Mr. Rolfe that the committee of directors illiams, Lamb, and Smith be enlarged for this meeting. It was ved, seconded, and unanimously carried that Directors Kinney, lfe, and Ceas be added to the above committee.

Moved by Mr. Kinney, seconded by Mr. Carlson, that we direct the effield Farms Company to deduct ½ cent per cwt. from the pay-

ments to members of our association for October milk for the expenses of the association.

Unanimously carried.

Motion made and carried electing Mr. Rolfe as director of the bargaining agency for our association. Mr. Williams was elected to act as our delegate to the Bargaining Agency for the coming year, with Mr. Kinney as alternate.

Mr. Cronk called for discussion by the Board of the price we should receive for that portion of our October milk not covered by the Order. He also suggested that due to the fact that our association finds itself faced with an increasing number of problems, more time should be devoted by the directors to association affairs than had been in the past.

Sheffield Farms Company entered the meeting at 12:15, represented by Messrs. Wellwood, Reynolds, Crowley, Halsey, Daly, Drs. Corbin and Roberts, and Judge Pyrke. It was pointed out by Mr. Wellwood that the latest available figures for September 1938 revealed a decrease in milk consumption in the New York area of 4.8%, or over 4,000,000 quarts. Also, a decrease in cream consumption of 19.9%. The question of irregularities in the sale of fresh and storage cream during the month of September by some dealers was considered. It was also announced that the purchase of surplus milk by the surplus Commodities Corporation for the month of November was aiding considerably in stabilizing the price.

Sheffield Farms Company stated that some attention should be directed toward amending the Order to provide diversions of milk to butter manufacturing plants for more months of the year. They stated that unless this was done that they would be forced to cut to a considerable extent their purchases of surplus milk.

There was also some discussion as to the activity of the Mayor's committee in regard to its investigation into the cost of distributing milk in N. Y. City; also, its movements toward the elimination of the grading principle of milk. Dr. Roberts report on total receipts showed an increase of more than 2,500 cans per day over a year ago, and production per dairy per day showed an increase of 25 pounds over last year. Again it was pointed out that these figures were not comparable on account of the 1937 strike.

It was stated that wholesale prices to stores had been held very generally to nine to 9¼ cents per quart during the past month.

Dr. Corbin asked Pres. Cronk to designate a committee of directors to work with the Company to consider the Grade A problem.

A market pool price for the New York area of $1.91 per cwt. was announced. Negotiations were then started toward fixing a price for the 12.8% of our October milk which was not priced under the Order. Meeting was adjourned until 3:30 P. M. At which time the Board reconvened.

Moved by Mr. Rolfe, seconded by Shaul, and unanimously carried that a committee of three be appointed to work out plans for the future

development of the association. Directors Kinney, Burditt, and Shaul were appointed by Pres. Cronk.

Moved by Rolfe, seconded by Shaul, and unanimously carried that a Ways and Means committee of two be appointed to act upon suggestions presented by the Plan and Scope committee, and directors Williams and Ceas were appointed to act on this committee.

Moved by Mr. Smith, seconded by Mr. Lamb, and carried that we adopt the following resolutions:

Resolved, That this Board declares as a matter of policy:

1. That it will support the movement of surplus milk and cream from Sheffield country plants to Cooperative Associations which have offered and have been recognized as possessing the facilities for handling surplus.

2. That it will forthwith prepare to strengthen and protect established Grade A milk production and sales.

3. That it will initiate proceedings for the Amendment of the Federal and State Order to increase the period during which milk may be diverted from fluid plants to butter manufacture.

After a long discussion, considering the price to be negotiated for that portion of our milk which is not priced by the Order, it was moved, seconded, and carried that a price of $1.88 per cwt. be agreed upon for October milk, from which price shall be deducted one-half cent to provide for the publicity tax for the month of September and October and one-half cent to be deducted for association expenses, netting the producer $1.87 for October milk.

A contract for the sale of November milk was entered into between the company and the association and was signed by both parties.

Meeting adjourned at 5:30 P. M.

3774. *Exhibit No. 25 to stipulation*

THE SHEFFIELD PRODUCER—OCTOBER 1938

MINUTES OF DIRECTORS MEETINGS

Special Meeting, Full Board, Onondaga Hotel, Sept. 24, 1938

Meeting called to order at 9:45 A. M. All directors present with the exception of Mr. Tiffany, whose district was represented by Chas. Morris, Mt. Upton, N. Y.

Pres. Cronk stated that the purpose of the meeting was to discuss and determine our answers to the question'aire sent out from the Administrator's office.

Mr. Rolfe explained the presence of Mr. Cook, attorney for the Producers' Bargaining Agency.

It was suggested that Mr. Cook proceed with an explanation of the question'aire following the reading by the Secretary of a letter from Mr. Harmon, which accompanied the question'aire.

There was a full discussion of all the questions led by Mr. Cook, who stated that our cooperative could become a dominant factor in the milk shed under the State and Federal Agreement or Order.

Mr. Smith talked at some length in regard to a meeting of the Executive Committee called to discuss the problem of disposing of our surplus milk.

Moved by Mr. Kinney, and seconded by Jones, that this meeting be adjourned to Wednesday, Sept. 28, at 10:00 A. M., in New York City, and that the Committee, consisting of Williams, Lamb, and Smith, together with Mr. Cook, meet with Mr. Harmon prior to this meeting for a discussion of the classification of our cooperative.

Meeting adjourned.

Meeting called to order at 12:40 P. M., Sept. 28, 1938, by Pres. Cronk. Mr. Williams reported that Mr. Harmon stated that the classification of cooperatives was a matter to be decided by the Commissioner and the Secretary after the application and answers to the question'aire had been received.

Moved by Mr. Ceas, seconded by Rolfe, and carried, that the committee of Williams, Lamb, and Smith meet with the Commissioner and the Secretary, if necessary, for further discussion of the classification of our cooperative and the matter of payment to Sheffield Farms for services.

Meeting adjourned.

Meeting of the Full Board, Onondaga Hotel, 10 A. M., Oct. 3, '38.

All directors present with the exception of Messrs. Tiffany, Taylor, and Burditt. Mr. Cronk suggested that Mr. Tiffany, who was absent on account of illness, be remembered with cards and letters from the Directors.

Moved by Mr. Mather, seconded by Williams, and unanimously carried, that the Secretary be instructed to write Mr. Tiffany expressing our regret at his illness and wishes for his speedy recovery.

After a full report by Mr. Williams of the meeting with the Commissioner, the matter of answering the question'aire was taken up and completed, together with an application for payment to our cooperative of one cent per hundred as a bargaining cooperative.

Moved by Mr. Williams, seconded by Sampson, that the acceptance of new members to our association shall be governed by strict adherence to the by-Laws. Unanimously carried. Meeting adjourned.

Regular Meeting, Full Board, October 8, 1938

Meeting called to order by President Cronk at 9:00 A. M. All directors were present; also Mr. Cook, attorney for the Bargaining Agency, acting as Counsel.

Mr. Ernest Saxon, member of the association from Granville Summit, Pa., was present at the meeting.

Minutes of the previous meeting were read by the Secretary and approved. A letter from Mr. Edward F. Brown, of the Milk Research

ncil, thanking the association for the contribution of $1,000.00, was
d by the secretary.
here was considerable discussion by the Board in regard to the
sification of our cooperative under the Order. It was finally
ided to leave the matter until we received the decision from the
mmissioner and the Secretary in regard to our application as a
gaining Cooperative.
loved by Mr. Rolfe, seconded by Mr. Tiffany, that the Committee
Messrs. Williams, Lamb, and Smith, together with Mr. Cook, con-
the Secretary of Agriculture during the coming week for further
ussion as to the classification of our cooperative under the Order.
ried.
Ir. Cronk suggested to the Board that we should be considering
presentation of some recommendations to the Secretary and the
mmissioner for the purpose of correcting some of the weaknesses
he Order as they become apparent.
t was moved, seconded, and carried that the Committee consisting
Messrs. Williams, Lamb, and Smith, together with Mr. Cook, should
pare a form of application for membership in our association for
mission to the Board.
he Sheffield Farms Company entered the meeting at 10:30 A. M.,
resented by Messrs. Wellwood, Halsey, and Duryea and Drs. Rob-
and Corbin.
here was considerable discussion in regard to the change of appli-
on for membership in our association. It was finally decided to
he matter rest for the present. The price for our milk not covered
he Order was discussed at considerable length, and it was finally
ided that we would receive for that portion of our milk the same
e as for the milk covered by the Order. The percentage of
mium for grade A producers worked to be 62½%.
leeting adjourned at 11:45, subject to the call of the Secretary.

5 *Exhibit No. 26 to stipulation*

Information for the Press

ITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL ADJUSTMENT ADMINISTRATION

elease—Immediate.

SEPTEMBER 20, 1938.

ANDLERS IN NEW YORK MILKSHED APPROVE MARKETING AGREEMENT

he Agricultural Adjustment Administration announced today
51 handlers, representing about 85 percent of the milk supplied
y to the New York metropolitan market, have signed a Federal
keting agreement. The agreement parallels the terms of the
eral and New York marketing orders which became effective
September 1.

H. R. Tolley, Administrator of the A. A. A., said today that the handlers' action, evidencing cooperation between producers and distributors, enhanced the possibilities for effectiveness of the marketing program. He said this is the first instance in which a marketing agreement for a large metropolitan market, where an order also is in effect, has been signed by handlers representing such a large percentage of the market.

"Cooperation by producers and handlers with the State and Federal Governments is essential to end chaos that has existed in the industry and to stabilize marketing conditions for the benefit of producers, handlers, and consumers." E. W. Gaumnitz, chief of the A. A. A. Dairy Section, said.

A federal marketing program under the 1937 Agricultural Marketing Agreement Act can be put into operation if approved by at least two-thirds of producers, by number or volume, and with Presidential approval. The Federal order for the New York program received Presidential approval as well as the necessary pro-
3776 ducer approval required by the Federal statute. A Federal marketing program can likewise be put into effect when at least two-thirds of producers supplying the market approve a Federal order, and handlers of 50 percent of the volume of milk delivered to the market sign a Federal agreement approved and signed by the Secretary of Agriculture. The marketing agreement has been approved by Secretary of Agriculture Henry A. Wallace. With the approval of the agreement, both requirements, either one of which is sufficient to make an order effective, have been met.

Mr. Tolley also announced final results of the producers' referendum which had been required to put the order into effect September 1. "The Federal program," Mr. Tolley said, "requested and approved by producers and their representatives supplying milk to the New York market, was developed by the A. A. A. Dairy Section, under the direction of Mr. Gaumnitz, and was made possible largely by the efforts and full cooperation of producer cooperative associations."

The referendum was held August 15, 18, 19, and 20 among dairymen in New York, Pennsylvania, Vermont, Massachusetts, Connecticut, New Jersey, and Maryland who deliver milk to plants qualified by health authorities to ship milk into the New York marketing area. Of the 38,627 valid votes cast, 33,663, or 87.1 percent, were in favor of the Federal order.

Results of the vote on the Federal order in the New York referendum compiled by Wellington Griffith, Jr., who was designated by Secretary Wallace as referendum polling officer, are as follows:

Total vote cast, 45,644 (including votes of the members of the cooperatives approved for casting a ballot for their membership).

Ballots rejected as invalid, 7,017 (unsigned, omitted plant names, failed to indicate "yes" or "no" or written with both "yes" and "no."

ecause the individual voted after having been voted by this erative):

Valid votes, 38,627; "yes" 33,663; "no" 4,964.

Votes of members of cooperatives which cast single ballots for their members who supply milk to the New York market, 3; "yes," 24,580; "no," 323.

tal individual votes, 13,724; "yes," 9,083; "no," 4,641.

e vote on the Federal order used throughout the milkshed was ated according to the plants to which delivery was made, rather by the State residence of producers. Producers in the seven eastern States were able to vote at any polling place.

tes in the referendum were cast in polling booths so that the of the farmer to vote as he decided was fully protected. Polling s were located in places most easily accessible and during hours convenient to the bulk of the farmers, and the voting was super- by local committees.

ballots were signed by dairymen voters so that votes could be ed by checking the names on the ballots with the names of dairy- delivering milk to the country plants in the milkshed supplying ew York market. Mr. Griffith and a New York State polling and officials of the New York Department of Agriculture and e were in charge of counting the ballots in Albany, New York, they verified the votes.

proval by 75 percent of the dairymen in New York who voted referendum is required by the Rogers-Allen Act (New York eting law) to make the State order effective. More than 75 per- f New York dairymen who voted in the referendum approved tate order, as announced by New York officials recently. The order implements the Federal order as far as intrastate milk ents are concerned.

ndlers of milk in the New York metropolitan marketing area hus far signed the Federal marketing agreement under the New program are:

NEW YORK STATE

ensboro Farm Products, Inc., Long Island City, Queens.
wley's Milk Company, Binghamton.
d Medal Farms, Inc., Bronx.
eral Ice Cream Corporation, Schenectady.
ffield Farms Co., Inc., Manhattan.
ller Dairies, Inc., Manhattan.
ffield Condensed Milk Co., New York City.
ystone Dairy Co., Brooklyn.
akstone Brothers, Inc., Manhattan.
ntgomery Eastern Dairy Coop., Inc., Fort Hunter.
rey, Stanter and Co., Inc., New York City.
ndview Dairy, Inc., Ridgewood.

L. Daitch and Co., Inc., Bronx.
Dairymen's League Cooperative Assn., Inc., New York City.
Meridale Dairies, Inc., Manhattan.
Hoffman and Dudo, Lowville.
Seelig Creamery Corportion, New York City.
Adler's Creamery, Inc., Ft. Plain.
Lexington Farms, Inc., Brooklyn.
Vogts Dairies, Inc., New York City.
Fiorlat Dairy Products Corporation, New York City.
Waddington Milk Co., Inc., Manhattan.
Arnstein & Beckmann, Inc., Bronx.
Dellwood Dairy Co., Inc., Mt. Vernon.
Milk Products Division, The Borden Co., New York City.
Borden's Farm Products Division, The Borden Co., New York City.
Dairy Sealed, Inc., Ozone Park.
Reid's Union Dairy, Inc., Brooklyn.
Willow Brook Dairy, Inc., Mt. Vernon.
Orbock Farm, Inc., Pleasantville.
The B. and B. Dairy Co., Inc., Margaretville.
Lowville Producers Dairy Cooperative, Inc., Lowville.
Oriskany Valley Milk Producers Cooperative, Inc., Deansboro.
Glen and Mohawk Milk Assn., Inc., Fultonville.
The Brown Creameries, Inc., New York City.
Sussex Milk and Cream Co., Inc., New York City.
3779 Conesus Milk Producers Cooperative Assn., Inc., West Crossing.
Bovina Centre Cooperative Creamery Co., Inc., Bovina.
Amsterdam Milk Producers Cooperative, Inc., Amsterdam.
M. H. Renken Dairy Co., Brooklyn.
G. A. F. Seelig, Inc., Manhattan.
Saquoit Valley Farms Cooperative Assn., Inc., Westwinfield.
Poland Milk Producers Cooperative Assn., Inc., Poland.
Raisin & Levine, Inc., Manhattan.
Chas. aqua Malted Milk, Inc., Mayville.
Local Milk Products, Inc., Manhattan.
Pioneer Ice Cream Division, The Borden Co., New York City.

NEW JERSEY

The Jersey Milk and Cream Co., Newark.
P. and K. Dairy Company, Inc., Newark.

PENNSYLVANIA

Breyer Ice Cream Co., Philadelphia.

CONNECTICUT

The Rider Dairy Co., Danbury.

Exhibit No. 26A to stipulation

Information for the Press

UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL ADJUSTMENT ADMINISTRATION

Release—Immediate.

JULY 22, 1938.

K MARKETING ORDER PROPOSAL SUBMITTED TO NEW YORK INDUSTRY

notice giving producers, handlers, and other interested parties opportunity to file arguments for or against a proposed marketing ement program to regulate the handling of milk in the Metro- tan New York marketing area was signed today by Acting Secre- of Agriculture M. L. Wilson, the Agricultural Adjustment inistration announced.

he notice requires seven copies of written arguments to be filed the Hearing Clerk, Room 0318, South Building, United States artment of Agriculture Washington, D. C., not later than August postmarked not later than August 1.

the request of the Metropolitan Cooperative Milk Producers' gaining Agency, Inc., an organization of more than 100 coopera- claiming 43,000 producer members, hearings were conducted ly by the Secretary of Agriculture and the New York Commis- r of Agriculture and Markets during the period from May 16 ugh June 7. Provisions of the marketing agreement program, tter with findings, were prepared following these hearings.

her study of the written arguments filed by interested parties, ion will be made as to whether a marketing agreement will be tively approved by the Secretary and an order issued which will. by the provisions of the agreement. Before the program can go effect it must be approved by at least two-thirds of the producers, by number or by volume of milk.

Main points of the provisions of the marketing agreement program on which arguments are to be filed govern:

The establishment of minimum prices which handlers would uired to pay producers for each class of milk; (2) the classifica- f milk received from producers at the handlers' plant into nine s according to the form in which it is on hand or leaves such ; (3) the establishment of a method for making payments to ers and the use of a market-wide pool plan to assure producers share of the fluid milk market; and (4) the selection of a market istrator to administer the program.

imum prices to producers for each class of milk would be set up the marketing program by a flexible method prescribed to give ition to seasonal changes in production and variations in ge-

eral economic conditions. The Class I or fluid milk price, under this method contained in the program, would vary from the season of flush production to the season when milk production is short, depending upon the range of butter prices in the New York market. Using the 201–210 mile zone as a basis for calculation, the price paid producers in other zones for their milk varies with the freight differential from New York City to their respective areas.

For Class I milk in the 201–210 mile zone, the schedule sets $2.5 per hundredweight for milk (if the price of butter is between 30 and 39.9 cents a pound) for the months August through March, and $2.9 per hundredweight (if the price of butter is between 25 and 34.9 cents a pound) for the months of April through July.

From this starting point, the Class I milk price moves up another 20 cents per hundredweight if the price of butter rises about 39.9 cents a pound, and 20 cents additional each time there is an additional increase of more than five cents from the original starting point. In other words, an increase of more than 10 cents above 39.9 cents a
3782 pound would mean an increase of 40 cents per hundredweight; an increase of more than 15 cents would mean an increase of 60 cents per hundredweight, and so on. There would be a corresponding decrease for each decrease below 30 cents per pound. For example, if the provisions of the order were effective August 1 and butter prices were between 25 and 29.9 cents, the Class I milk price for August would be $2.45 per 100 pounds.

Under the program handlers would be required to file with the market administrator periodic reports showing their purchases, utilization of milk received from producers, and payments made. These reports would be subject to verification by the market administrator, who could examine and audit books and accounts of handlers.

A provision of the order would require handlers to bear the cost of administering the program, each handler paying not more than two cents per hundredweight of Class I (fluid milk), Class 2 (fluid cream use), and Class 2b (plain condensed milk or homogenized milk) sold in the marketing area.

The marketing program defines the New York metropolitan marketing area as the City of New York, and the counties of Nassau, Suffolk, and Westchester, all in the State of New York. Between 60,000 and 70,000 dairymen in New York, Pennsylvania, New Jersey, Connecticut, Massachusetts, and Vermont produce milk for the New York metropolitan area. About one out of every three pounds of milk received in the New York market is shipped in from outside the State.

An average of approximately 13,000,000 pounds of milk is delivered daily by producers to plants qualified by New York City health authorities. About half of this volume of milk is shipped to the marketing area in fluid form, the remainder being manufactured into cream and other dairy products for the market.

Twenty years ago dairy farmers producing milk for the New York market organized cooperatives to get better prices and improve mar-

t conditions. Flat price selling to distributors was replaced in a sector of the market in 1921 with pricing according to use.

38 New York passed a state milk control act in 1933, the first of its kind in the United States, to supplement farmers' cooptive efforts. This law was upheld by the United States Supreme urt, but the legislation did not operate to the satisfaction of most oducers, because distributors obtained milk supplies from outside e state. Price of this milk from outside the State was not ntrolled by the State law.

An act, known at the Rogers-Allen Act, authorizing cooperative ociations of producers to bargain collectively with milk distribus, was adopted in 1937 to replace the state control law.

The Metropolitan Cooperative Milk Producers' Bargaining Agency en was organized to utilize the regulatory and bargaining features the Act. The measure permits the New York State Commisner of Agriculture and Markets to issue orders under certain nditions if the bargaining system fails to produce satisfactory ults. A number of New York milk distributors do business with e agency, but many buy at their own prices from producers.

The orders issued under the Rogers-Allen Act may fix prices paid dairymen by distributors in the State of New York, but do not ply to dairymen in the milkshed outside the state. According to oducers, the aid of the Federal Government is necessary to regue the orderly marketing of milk from outside the State.

Consequently, producers have asked the help of the federal govnment in regulating the handling of milk coming into the New rk market from outside the state. Provisions of the Federal milk rketing order would complement a similar order which would issued by the New York State Commissioner of Agriculture and rkets.

Testimony at the hearings in May and June showed that during latter part of May milk prices to producers ranged from $1.30 to 70 per hundredweight. Since then prices paid dairymen have hit low levels, many producers receiving a June price below $1 per ndred pounds of milk.

4 *Exhibit No. 26B to stipulation*

RODUCTORY STATEMENT BY COMMISSIONER HOLTON V. NOYES OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS

This hearing, and others to be held throughout the State this week, cerns a proposed plan for the establishment of State and Federal trol over milk prices to be paid to producers supplying the tropolitan New York market.

The plan has been prepared by representatives of the dairy indus in this State, in consultation with representatives of the Federal d State Departments of Agriculture. Utilizing the provisions the National Agricultural Adjustment Act and our own State

Rogers-Allen law, it is proposed in this plan to coordinate the authority of both governments to establish minimum prices to be paid producers for all milk approved for sale in this market and which originates within or without the State.

Neither the Federal nor State government can assume the control proposed to be set up in this plan unless, and until, it has been favorably voted upon by at least a majority of the producers concerned. The detailed provisions of the Federal law require that at least sixty-six and two-thirds per cent of producers vote favorably, while our State law requires seventy-five per cent.

It is possible under the law for cooperative associations to cast the vote of their entire membership by action of the officers and directors alone on this question. I have, however, repeatedly warned in public statements that it would be, in my opinion, a mistake for cooperative associations to cast their votes in this manner. My reason for this attitude is that no law, rule, or regulation ever has been effective in operation unless it had majority support favorable to it and popularly expressed.

This plan, however meritorious its advocates say it is, or however bad its opponents claim it to be, should not be put into operation without an individual vote by every dairyman concerned. The question directly concerns his business and his future, and he, alone, should decide by his vote what he wants to do about it. The question is too important for any group to presume to express anyone's attitude toward it by collective rather than individual action, although the law may specifically permit this.

This and other hearings provide an opportunity for full discussion of this plan. You are invited to say how, and in what way, the proposal should be changed to make it more satisfactory and effective. If you oppose it in any form, you are to feel free to say so. When these hearings are completed, all testimony will be reviewed. Suggested changes developed at these hearings to make the orders more equitable and more likely of success will be incorporated in the final form, which will be submitted to our dairymen for approval or rejection.

3785 I feel it my duty at this time to point out also that if this form of control is authorized by the dairymen the cost of its administration must be paid by them. No provision in either the State or Federal law exists for defraying its expense out of government funds. The salary of the market administrator, his assistants, and such machinery as may be necessary to make the control effective must be paid by deductions from producers' checks under the State order and by distributors under the Federal order.

The control set up by this plan extends only to producer prices. In this respect it differs from the State control act, which fixed prices to producers and to consumers as well. It is intended to equalize producer prices throughout the New York milk shed, subject, of course, to the usual differentials for freight, butterfat, etc. To do this means that those dairymen who have heretofore enjoyed special

rketing advantages over other producers will have to pool these rantages for the benefit of all producers. This does not mean, rever, that these producers' return will necessarily be lower as a sequence. Proponents of the plan claim and expect its operation, l raise the general level of all producer prices sufficiently high so t no producer will receive a lower price than he now gets.

bring these matters to the attention of our dairymen as we enter on the discussion of this plan so that there may be no future mis-derstanding. After the discussion of all phases of the matter which se hearings provide, I urge each dairyman to consider the question efully, thoughtfully, and with the sole purpose of determining for nself what is best for his own and his industry's interest.

feel it my duty also at this time to repeat what I have said be-e. This plan, or no other, will ever be of lasting or permanent efit to the dairy industry until, and unless, it has the active and cere cooperation of at least a majority of the dairymen who have ividually and willingly voted for it.

6 *Exhibit No. 26–C to stipulation*

Release Tuesday P. M., January 25, 1938

MARKS BY HOLTON V. NOYES, COMMISSIONER OF AGRICULTURE AND MARKETS, AT THE NORTHEASTERN DAIRY CONFERENCE, HARTFORD, CONN., TUESDAY, JANUARY 25, 1938

The dairy industry of New York is learning to walk all over again. That statement, I believe, quite accurately describes the milk situa-n in the Empire State today. After a four-year period of state gulation, the industry convinced the Legislature and Governor that was able again to take over its own affairs. State regulation was led last April and machinery provided for the resumption of self-ntrol.

During the emergency that provoked state control, prices to pro-cers and consumers were fixed by the state and an attempt made to force them. The effect of this supervision quite naturally encour-ed greater reliance upon government and discouraged individual or up effort by the industry to work out its own solution of its prob-s. This tendency was not peculiar to our state, or to this industry. s the usual result of circumstances of this kind.

After four years of such complete dependence upon the state, it was be expected that abandonment of a policy of control and price-ng necessarily would be temporarily disturbing to the industry, to the least. The only question was how great this disturbance uld become. It could easily be most destructive to the whole price ucture. It could, if it became bad enough, bring the whole indus-down in a tremendous crash. In New York such a result would a catastrophe of the first degree, with our dairy industry, our

largest agricultural branch, accounting for approximately one-half of our farm income.

But I am happy to tell you here today that while we feared and expected the worst, we have been pleasantly disappointed. The crash has not come. There was disturbance in prices immediately following the transition. There were times when it seemed that failure was dangerously close. This trend might have continued and resulted in the disaster which we feared if our dairymen had not acted resolutely and with no time to spare, to make the fullest use of the machinery for self-control which the Legislature and Governor had provided.

3787 Organization under this legislation, popularly known as the Rogers-Allen Law, was completed and in full operation about the first of July. From that moment on, the perplexity and uncertainty with which the industry had been groping about to get its bearings began to be displaced by some confidence and hope. Today, several months later, I feel justified in saying that the industry has met and passed this first critical test successfully. It is beginning to walk again, alone and unassisted.

Will this progress continue until the industry again becomes able-bodied and independent, or will it go backward and collapse again upon the doorstep of the capitol at Albany?

The answer to this question can be given only by the industry itself. If it has learned that each of its component groups must play fairly and squarely with each other; if it has realized that internal dissension, distrust, and disagreement lead only to disintegration; if it has sensed that cooperation and good will are vitally necessary to success and they can only be supplied by the industry itself—then I think we may with confidence expect not only happier days for this bedevilled industry but a sounder, more stable and more prosperous condition.

If most of these conditions which I have stated are not met with some degree of completeness, then I fear that instead of this pleasant prospect we shall have a picture as dark as the other outlook is bright.

No one realizes better than I do how difficult it will be to meet all of these conditions. Disorganization, dissension, and distrust have so long been the accepted practice in this industry that they cannot be overcome in a day. Nor can they be changed by individuals acting alone or groups of individuals acting alone. The chore is so big that it needs the help of all individuals and all groups.

But it should be heartening and stimulating to the industry to know that in so far as the government of the State of New York is concerned all of its resources, all of its prestige, and all of its influence can be depended upon to help this industry to help itself.

3788 I appreciate that what we do in New York may greatly influence the destiny of the whole dairy industry of the northeastern states. This responsibility is but another reason why all that we do in dealing with the milk problem should be undertaken in an unselfish and broad-minded spirit that gives equal consideration to producer,

tributor, and consumer. This injunction applies equally to governnt and the industry.

f this is our approach to the problem, then the results must be conctive.

Exhibit no. 26 D to stipulation

Released to morning papers, Wednesday, May 4, 1938

TEMENT BY COMMISSIONER OF AGRICULTURE HOLTON V. NOYES OUTINING HIS POSITION REGARDING THE PROPOSED FEDERAL-STATE ORDER

YRACUSE, May 3d—Commissioner Holton V. Noyes, in addressing eral dairy groups at the Drumlin Country Club, Syracuse, Tuesnight, made the following statement of his position regarding the posed federal-state marketing agreement:

No plan of voluntary or arbitrary control of the dairy industry ever be effective, in my opinion, unless it meets three definite irements:

1. It must have at least the majority support of those members of industry over whom the proposed control is to be exercised.

2. It must not favor any particular group or groups at the expense ny other group or groups. By the same sign, no one group or ps should be allowed a determining influence in establishing con- or in destroying it.

3. It must have the active and sincere cooperation of at least a tantial majority of the industry.

In explanation of the first requirement, it has always been my ention that no law can be made to work which does not have the roval of a substantial majority of our citizens. If any law is d upon the statute books without an opportunity for possible ression regarding it, the difficulties of enforcement and the possiies of failure are thereby greatly increased.

know that under provisions of the Agricultural Adjustment Adistration Act, under which the proposed control system will be set cooperative associations can vote the whole association member- by decision of the officers and directors only. I realize also that provision is considered by some a justifiable protection of coopives.

t me say here and now that no one is more sympathetic to the s and purposes of cooperative associations than I am. They have ived every possible encouragement from me in private and official They will continue to have my support and interest.

"But in the present instance I have taken the position that it would be most unwise, if not most unfortunate, for any cooperative association in this state to cast the votes of its members n this proposition solely by action of officers and directors, even gh it is permissible to do so by law. The whole question is so

fundamental and of so great importance to the welfare of all our dairymen, their families, and their future that I do not believe any association is justified in presuming to express the opinions of its members, at least without an honest referendum among the membership as to their wishes.

"Some leaders of cooperative associations take an opposite view. They contend that allowing individual members to vote upon the proposition itself or to express them by a referendum within the organization would be confession of weakness by the cooperatives and undermine their prestige and influence. I disagree with them. Instead, I insist that a referendum of the membership would have the opposite effect. It would inspire and strengthen the belief of members that their leaders were interested in doing what the majority really wants, rather than doing what officers and directors alone think is best, without regard to individual views.

"The ideal plan, in my opinion, would be for every dairyman in the State of New York to have an opportunity to vote individually upon this question with the same protection of his ballot that he enjoys in selecting the Governor of his State or any other public official. I think his vote upon this matter is no less important.

"But if the leaders of these cooperatives insist that this should not be done, I would feel that any vote registered upon this proposition by officers and directors alone did not represent the true sentiment of the dairymen of this State.

"The least they should do, I feel, is to have an actual poll within the membership on the question. If this is done, then I feel that the actual vote so registered should be the official vote of the membership upon the proposition. I mean by this statement that if an actual poll of the membership shows 70 percent for the proposition and 30 percent against that is the way the vote of the organization should be recorded, only expressed in the actual figures.

"One of the principal weaknesses of some forms of control tried by the industry heretofore has been the suspicion that one
3791 or more particular groups are able, by the size of their membership, to exert a dominant influence upon the action of all dairymen in this State. If the present proposed order offers even the possibility of such suspicion, then I feel it is doubly important that the leadership take such a course that this suspicion can not be justified.

"As no group or groups, or combination of groups, should be allowed dominant influence at the expense of other groups in setting up this control, so I believe that no group or groups should have the power to destroy its control by withdrawal at any time that suits their convenience.

"In other words, in keeping with my idea that this plan should not be enacted in the first place without an individual vote of the membership, so I believe that it should be so interpreted that it cannot also be destroyed without an individual vote of the membership. No group or groups which now favor it as the possible salvation of the

iry industry should be allowed the opportunity to throw it aside if ey discover that things are not going to suit them, or that it is not complishing all that they hoped and expected.

"As for the matter of cooperation in an undertaking of this kind, have repeatedly stated in my discussions of the dairy problem that e industry's troubles could be solved without resort to official interrence of any kind, if the members of the industry would show a eater determination to cooperate for their common benefit. Failre of the industry to cooperate prior to 1933 caused the emergency ich necessitated state control. Failure of the industry to cooperate stroyed state control. Failure of the industry to cooperate has paired the effectiveness of the Rogers-Allen law, successor to state ntrol. Failure to cooperate, no matter how high-minded the prinples and purposes of those interested, will cause any plan to fail.

"So, I warn the industry that, unless and until it is willing to give ive and interested cooperation of at least a majority of the indus-, it will be as futile to expect this plan to bring any more lasting ace to New York's troubled dairy industry than the futile plans heretofore tried, most of which were destroyed or impaired by 2 those they were intended to benefit through their failure to cooperate.

"It should be remembered that the request for government control s not originated with us, but with some producer groups in the te. This fact makes it the more imperative that all dairymen have opportunity to express themselves on it by individual vote to determe if all, or at least a substantial majority, want it. No one should asked to assume the great responsibility of such extensive control the dairy industry as this plan would establish without such urance.

"In the event that this plan is approved, I consider it absolutely ential to its success that the administrator be someone of demonated ability and experience, and who is not, or has not been, in any y connected or identified with any dairy group in the State."

FP-814.
-3-38.
r, f, pi.

3 *Exhibit No. 26-E to stipulation*

MARKS BY H. V. NOYES, COMMISSIONER OF AGRICULTURE AND MARKETS, ON THE WGY FARM FORUM, JULY 8, 1938

Released to morning papers Saturday, July 9, 1938

am again indebted to the generosity of Mr. Markham for the portunity of attending this last meeting of the Farm Forum in the sent studios.

ew York State farmers, who regard WGY as an institution peculy their own, will join me in congratulating the General Electric

Company; Mr. Hager, WGY station manager; and the Forum Director, Mr. Markham, on the well deserved promotion to new and more modern studios.

The agriculture of our State has no better friends than these three. For many years programs of WGY have advised, counselled, and informed our progressive farmers of what is going on in the world that directly and indirectly affects their business. I believe that those farmers, who have been most faithful listeners to these programs and have taken advantage of what they heard, will generally be found among the most successful in our State. They believe in and practice that cooperation of which this program is an outstanding example.

In a short time New York farmers must make one of the most momentous decisions in the history of our State. They must decide if our dairy industry is to continue trying to manage its own affairs or whether this responsibility is to be shared with state and federal governments under a marketing agreement. During the hearing on this question many arguments, both for and against, have been presented. Some exception was taken to details of the proposed order for control. These objections, however, have generally been helpful in enabling representatives of both state and federal governments to rewrite the agreement to make it as completely fair to all interests as is possible. Some of the other discussion has been along such general lines that it has not been entirely clear whether it originated in rather undefined prejudice or clearly thought out reasoning.

Much has been said against the general idea of price fixing and many oratorical references have been made to the impossibility of getting away from the great economic law of supply and
3794 demand. Both of these subjects, "Price Fixing" and "The Law of Supply and Demand," lend themselves to demagogic oratory and specious reasoning. The fact is, if you step behind the natural reluctance, which I think we all feel against price fixing, and subject this particular question to the light of investigation, it must be admitted that prices are always fixed by someone. The only question is, who shall be the proper authority to fix prices.

A good many years ago I lost faith in this law of supply and demand, as applied to any ordinary transaction between the farmer and his market. I had a large barn full of good hay in the days before automobiles. When hay was a very substantial and important cash crop for farmers of Central New York. I wanted to sell the entire crop. I baled two carloads and shipped them to commission merchants, one in New York, one in Boston. Both carloads came from the same barn. There was no possible difference in quality. When returns came back from the commission merchants, I received $12.00 per ton for the New York shipment and $28.00 from Boston. Right then and there I lost faith in the law of supply and demand.

The transaction interested me so much that I went to Boston to find out just what happened. I found the shipment was sold as high quality hay to a large merchant in Boston. I actually went with the

mission man to this buyer to find out just how satisfactory the had turned out to be. He not only expressed complete satisfac-, but said he would take all of my crop. I sold him the entire nful, making shipments weekly until the entire lot was gone.

frequently asked myself whether the law of supply and demand ked that time in Boston, or in New York. I still wonder! My clusion from that operation, and from a lifetime of observation, hat this much revered law probably does work in a very broad over a series of years, but, so far as direct relations between the York State farmer and his market are concerned, it is seldom mitted to operate without interference.

n our milk industry it is my opinion that there is never any real plus of milk if it is put to proper use. It is also my opinion, after years' experience with the law of supply and demand, as it applies, fails to apply, to this particular industry, that we must look the situation squarely in the face and take such measures as will meet it. These must include assurance that so far as the fluid milk market in the Metropolitan district is concerned, we start n cost of production in determining fair prices to farmers and gnize that to maintain a sufficient milk supply for the fluid market e must always be a surplus. A practical way of disposing of this plus necessarily must be found.

tate milk control, which worked satisfactorily for a time, was dicated upon realization of these facts. But when it was found state control could not be extended legally to interstate milk, the k plan began to fail and finally had to be abandoned. Voluntary stry control under the Rogers-Allen Law replaced state control has been tried during the past year. It has also failed, because as as the flush period arrived each group insisted upon competing inst other groups for a larger share of the fluid market, thereby ressing the price to all, instead of cooperating to share the burden easonal surplus.

hen hearings were held throughout the State by the 1937 Legis-e Committee to determine whether State milk control should be ndoned, I made the statement at the Syracuse meeting that the e milk control law should be strengthened, possibly through co-ration with the federal government to control interstate milk; that tate milk control were abandoned we should promptly find the stry unable to operate its affairs successfully; that this experience ld show some kind of government control, probably state and fed-, as the only course holding any promise of stability or security New York dairymen.

his was long before I had any idea I should ever be in my present tion. I refer to this statement because what I predicted has been ified by events. My conclusion at that time, and my conclusion , is that we must have milk control of some kind. My conclusion , and my conclusion now, is that the only kind of milk control will work is state and federal.

I personally feel an instinctive repugnance against any control, state or federal. But it seems to me that we are up against cold, hard facts that make government control necessary in some form. I am quite willing to call upon government, state and federal, to so regulate this important industry that the interests of producers will be safeguarded insofar as it is necessary and proper for government to protect them.

3796 Under the law I, as Commissioner of Agriculture, am faced with the very grave responsibility of determining whether our producers supplying the Metropolitan market want such federal and state control; whether an emergency exists making it necessary or desirable that such measures be adopted.

As I have said, I am entirely convinced that we should adopt such a control system. But I am not at all convinced that producers generally agree with my views. Under the law I am not justified in proceeding with the establishment of state control until I am convinced that at least a majority want such control.

Unfortunately, the law permits cooperative associations to vote as a unit. This means that any legal cooperative may vote its entire membership solely by action of the Board of Directors, although there may be considerable disagreement on the subject within the membership itself.

To illustrate: Suppose a cooperative has a hundred members, of which fifty favor federal and state control, while fifty are opposed. The Board of Directors of this cooperative can legally, under the law, disregard this difference of opinion in the membership and vote the entire hundred either for or against the measure.

With this collective method of voting by action of the directors I do not believe it possible for me, or anyone else, really to determine the correct collective producer opinion on the question. And you may be assured I shall certainly not assist in establishing either state or federal control unless I am convinced in some definite and accurate manner that producers themselves really want it.

Neither the state nor the federal government will make any move toward the adoption of this control plan without definite assurance that the producers themselves want it and ask for it. Neither government initiated the demand for this control. The farmers themselves have made the demand. But no law or regulation has ever worked in a democracy unless it had the backing of a substantial majority of the citizens. We must, therefore, have assurance that producers want this control before it is adopted, and to make certain it will work after adoption.

The proposed control order is being re-written and about to be published. We believe the new document will correct the
3797 imperfections pointed out at the hearings. We believe that provisions of the new document will be fair to all producers and dealers. When it is submitted to producers for a vote, if dairymen could be individually polled, the result would be a clear mandate to

s Department. If the vote is taken collectively through the direc-
s of cooperatives, I shall be in considerable doubt as to just what
means. A vote cast by the latter method would need to be nearly
e hundred per cent for or against to be convincing to me.
We, as the people of New York State, elect representatives to the
gislature. On any ordinary matters we permit these legislators to
ke laws. But on fundamental matters, such as increasing the
nded debt or altering the constitution, the Legislature's action must
approved by direct vote of all the people.
It seems to me that our milk situation is comparable. The question
fundamental. It affects the lives and future of one of our most
portant groups. I believe that the vote should be a direct refer-
dum to the producer, and only an individual vote by each producer
l accurately reveal the true producer opinion. It seems to me, in
w of the very vital importance of the question, that the coopera-
es themselves ought to insist on a direct individual referendum.
FP-836.
-8-38.

6 *Exhibit No. 26F to stipulation*

From Foster Potter, Department of Agriculture and Markets, State
ice Building, Albany. Telephone 3-5511, Ext. 207. Holton V.
yes, Commissioner. Release on receipt. (Written for Weeklies.)

NOYES CALLS FOR DIRECT VOTE ON CONTROL OF MILK

ALBANY, July —.—Although he is convinced that milk control by
w York State and the Federal Government is "the only kind of
k control that will work," Commissioner Holton V. Noyes, of the
partment of Agriculture and Markets, will "not assist in establish-
either state or federal control unless I am convinced in some
inite and accurate manner that producers themselves really want it."
Speaking on the WGY Farm Forum from Schenectady Friday
ht, July 8, Commissioner Noyes said in part:
Much has been said against the general idea of price fixing and
ny oratorical references have been made to the impossibility of
ting away from the great economic law of supply and demand.
th of these subjects, "price fixing" and "the law of supply and de-
nd" lend themselves to demagogic oratory and specious reasoning.
e fact is, if you step behind the natural reluctance which I think we
feel against price fixing and subject this particular question to
light of investigation, it must be admitted that prices are always
d by someone. The only question is, who shall be the proper
hority to fix prices. * * *
When hearings were held throughout the State by the 1937 Legis-
ive Committee to determine whether State milk control should be

abandoned, I made the statement at the Syracuse meeting that the State milk control law should be strengthened, possibly through co-operation with the federal government to control interstate milk; that if State milk control were abandoned we should promptly find the industry unable to operate its affairs successfully; that this experience would show some kind of government control, probably state and federal, as the only course holding any promise of stability or security for New York dairymen.

"This was long before I had any idea I should ever be in my present position. I refer to this statement because what I predicted has
3799 been justified by events. My conclusion at that time, and my conclusion now, is that we must have milk control of some kind. My conclusion then, and my conclusion now, is that the only kind of milk control that will work is state and federal.

"I personally feel an instinctive repugnance against any control, state or federal. But it seems to me that we are up against cold, hard facts that make government control necessary in some form. I am quite willing to call upon government, state and federal, to so regulate this important industry that the interests of producers will be safeguarded insofar as it is necessary and proper for government to protect them. * * *

"While I am entirely convinced that we should adopt such a control system, I am not at all convinced that producers generally agree with my views. Under the law, I am not justified in proceeding with the establishment of state control until I am convinced that at least a majority want such control.

"Unfortunately, the law permits cooperative associations to vote as a unit. * * * With this collective method of voting by action of the directors, I do not believe it possible for me, or anyone else, really to determine the correct collective producer opinion on the question. And you may be assured I shall certainly not assist in establishing either state or federal control unless I am convinced in some definite and accurate manner that producers themselves really want it.

"Neither the state nor the federal government will make any move toward the adoption of this control plan without definite assurance that the producers themselves want it and ask for it. Neither government initiated the demand for this control. The farmers themselves have made the demand. But no law or regulation has ever worked in a democracy unless it had the backing of a substantial majority of the citizens.

"The proposed control order is being rewritten and about to be published. We believe the new document will correct the imperfections pointed out at the hearings. We believe that provisions of the new document will be fair to all, producers and dealers. When it is submitted to producers for a vote, if dairymen could be individually polled, the result would be a clear mandate to this Department. If the vote is taken collectively through the directors of cooperatives, I shall be in considerable doubt as to just what it means. A vote cast

by the latter method would need to be nearly one hundred per cent for or against, to be convincing to me.

"We, as the people of New York State, elect representatives to the Legislature. On any ordinary matters we permit these legislators to make laws. But on fundamental matters, such as increasing the bonded debt or altering the constitution, the Legislature's action must be approved by direct vote of all the people.

"It seems to me that our milk situation is comparable. The question is fundamental. It affects the lives and future of one of our most important groups. I believe that the vote should be a direct referendum to the producer, and only an individual vote by each producer will accurately reveal the true producer opinion. It seems to me, in view of the very vital importance of the question, that the co-operatives themselves ought to insist on a direct individual referendum."

Fp-837.
7-8-38.
w, f. pi.

3800 *Exhibit No. 26-G to stipulation*

From Foster Potter, Department of Agriculture and Markets, State Office Building, Albany. Telephone 3-5511, Ext. 207. Holton V. Noyes, Commissioner. Released to Morning Papers, Friday, July 22.

Albany, July 21.—"Copies of the revised Federal-State Milk Marketing Agreement will be mailed in a few days to all persons, groups, or organizations which appeared officially at hearings on the proposed order," Commissioner Holton V. Noyes of the New York State Department of Agriculture and Markets said in a statement issued tonight.

"A period of about ten days will then be allowed to submit briefs supporting recommended changes or criticism of the revised document. The federal and state departments of agriculture will study these briefs and make any changes in the order which seem necessary and justified.

"We will, of course, do this as quickly as possible, and it is the hope and expectation of both departments that the final document will be ready to submit to a vote of the dairymen not later than August 15.

"In preparing the final document our one purpose is to make it fair and equitable to every group interested in and concerned with the dairy industry.

"Those who have been critical of the delay in preparing this agreement should consider the complexities of the metropolitan New York market. Every conceivable condition that might arise must be provided for and every possible use of milk must be definitely specified in the order because the market administrator, if the order is adopted, will have no discretionary power. He must administer and enforce the provisions of the agreement as he finds them.

"I repeat what I have said many times, that demand for this proposed Federal and State control came from the dairymen themselves. It did not originate with either government. Neither government, I am sure, wants to undertake such a great responsibility without definite and overwhelming assurance that the dairymen want to transfer price control of milk from the industry itself to the government.

"My opinion, often expressed, is that experience has shown that some form of milk control is necessary and the only control that will work is combined State and Federal. But even that form of control will not succeed without the overwhelming support and cooperation of the dairymen."

FP–846.
7–21–38–c.

3801 *Exhibit No. 26–H to the stipulation*

From Foster Potter, Department of Agriculture and Markets, State Office Building, Albany. Telephone 3–5511, Ext. 207. Holton V. Noyes, Comissioner.

NOTE TO EDITORS:

This is copy for the column, "I see it this way," by Commissioner Noyes. You have a mat of the 2-col. head. Release Monday, Aug. 8, 1938, and thereafter.

JUSTICE FOR MILK PRODUCERS

So much is said, from time to time, about the so-called Law of Supply and Demand, and there is so great an inclination on the part of the public to think that this is some great law of nature which determines the price of most of the necessities of life, that I feel once in a while we should inquire into the general question of just how this law works in actual practice.

Without doubt there is a general relationship between available supply and immediate demand, which, to a certain extent, regulates the price of any commodity. However, in most industries there is no supply if there is no demand. The successful manufacturer produces only what he can sell at a satisfactory price. If he finds this impossible, he shuts down the factory.

The power and light companies, which have the potentiality of an endless supply of electric current available, set the price to their consumers and then produce only as much power as their consumers demand. The same general principle applies to the transportation industry. Transportation for the public or the movement of merchandise is provided at a price set by the operators of these common carriers, subject to approval by quasi-judicial commissions of the state or federal governments. If there is a demand for more transportation, another train is placed in operation. If the demand declines, one or more trains is removed from the schedule.

In many spectacular instances in history, the law of supply and demand has been manipulated in such way that the supply of the necessities of life got into private hands, to the very great detriment of the general public. These were the famous "corners" in wheat and corn, which resulted in enormous fortunes to the certain
3802 individuals or groups of individuals, all at the expense of either the producers of these commodities or the consumers of them.

In general, I think, it is becoming more and more recognized that the law of supply and demand under modern conditions is so susceptible of manipulation that it cannot be left to itself; that there must be regulation, particularly in certain branches of industry, to protect the public interest by offsetting this artificial interference of selfish and interested individuals or companies with the free working of supply and demand.

This, I believe, is true of the dairy industry in particular in this State. Milk is a necessity of life. The milk industry should be so regulated that people living in the cities should always have available an ample supply in the best sanitary condition at a fair and reasonable price.

At the same time, this regulation or control should be such that those who produce milk efficiently are reasonably assured of a decent living from their investment and labor. It should also permit those who distribute milk efficiently to be reasonably assured of a fair return upon capital invested and reimbursement for fair wages paid to those they employ.

Recently the uncontrolled law of supply and demand has been working at its savage worst in this industry. I have on my desk several photographs of store windows in New York City with large advertisements printed on them offering milk of a certain reputable brand at three cents per quart.

We learn from investigations that have been made from time to time that the actual cost of processing and delivering milk is not far from five cents per quart. It is perfectly evident that when it is sold at three cents per quart that is less than cost and is done for some unfair, sinister purpose; perhaps to put some competitor out of business. This would not be a matter of so great concern if it were simply a fight between two dealers. But price cutting inevitably reacts to the disadvantage of the producer who is the least able to suffer this loss and in no way responsible for it.

The attempt on the part of a few dealers to buy cheap milk to carry on a savage fight such as this in the retail market results in a generally much lower price for all milk. During the past several months much more milk in fluid form has been offered for sale in New
3803 York City than the market, under recent economic conditions could absorb. The result has been that the producers who are unorganized and unregulated, are suffering from the lowest prices experienced in many years.

The law of supply and demand has brought the milk producers of New York State very close to ruin. While we have been nearly fifty years trying to find some way to make the law of supply and demand operate to produce its greatest benefits, it is difficult to see where any great progress has been made. One of the purposes of government is to regulate relationships between factors of industries having to do with the necessities of life.

If there were no differences of opinion between people and groups in this world, there would be very little need for government of any sort. The purpose of government is to so govern that the interests of each group are fairly considered and to so regulate the affairs of individuals and groups that the best interests of all groups are served.

When the price of milk gets too low, the farmer cannot simply shut off the supply. When the supply of milk is too little, the farmer cannot, through any immediate action, very greatly increase the supply. Therefore, the source of supply must be so regulated that in periods of shortage there is still enough to supply the needs of the public. In order to insure a proper supply for the public during the shortage period there will always inevitably be a surplus during the flush period.

Milk is a commodity which can be used for purposes other than sale as fluid milk, and the sensible thing, of course, is to remove from the fluid milk market any surplus above needs. This can only be done by a general movement on the part of the farmers, and such united effort is entirely dependent upon organization and cooperation, which are not possible except under government regulation.

It seems to me entirely natural and proper that in such a case as milk the government should take responsibility for enforcing such rules as the industry itself may suggest to cure the evils of uncontrolled operation of the law of supply and demand, providing such rules are fair to all factors of the industry.

I feel very definitely that this is a natural and proper function of government. To me it does not appear like government regulation so much as government cooperation to secure justice throughout the industry.

FP–852.
8–5–38.
d, w, f, pi.

3804 *Exhibit No. 26–I to stipulation*

From Foster Potter, Department of Agriculture and Markets, State Office Building, Albany. Telephone 3–5511, Ext. 207. Holton V. Noyes, Commissioner. Released to morning papers, August 10, 1938.

ALBANY, Aug. 9.—Commissioner of Agriculture Holton V. Noyes today made the following statement in urging dairymen to support the proposed Federal milk marketing agreement:

"Milk producers of the New York City milk shed will determine by vote August 18, 19, and 20 whether milk control under State and Federal cooperation shall be adopted.

"Every producer should see that his vote is registered either for or against this very important question.

"I believe that many years of experience point clearly to the necessity of milk control. Particularly the experience of the past several years indicates that State and Federal control is the only form that will work.

"We have been working on the present order for some time. It is necessarily a complicated document. Every possible utilization of milk must be clearly defined and every possible movement of milk from one utilization to another must be foreseen and provided for.

"We believe that the present order is so written that its provisions are fair and reasonable and will assure a satisfactory price to all producers. Under the law, it can be amended later if experience should show the need of change.

"I urge all producers to vote for this order. I am confident that if it is adopted it will stabilize conditions in our milk industry which can not be assured in any other way.

"Neither the State nor Federal government wants to go ahead with this order unless the producers signify clearly by vote that they want it.

"This is no proposition for government regulation. It is a plan by which the industry may secure government cooperation in the enforcement of rules which the industry itself believes to be necessary to the orderly and equitable marketing of milk.

"If the vote is favorable, the order will be put into operation as soon as possible. But the continued cooperation and support of producers will still be necessary to insure success."

FP–856,
8–9–38.
c.

3805 *Exhibit No. 26–J to stipulation*

From Foster Potter, Department of Agriculture and Markets, State Office Building, Albany. Telephone 3–5511. Ext. 207. Holton V. Noyes, Commissioner. Release at noon, Tuesday, Aug. 16, 1938.

I FAVOR THE MARKETING AGREEMENT

(A radio talk over WGY by Holton V. Noyes, Commissioner of Agriculture and Markets)

Many dairymen throughout the state have recently written or called upon me personally asking that I say a final word about the proposed federal-state milk marketing agreement before a vote is taken this week.

I have had but one answer to each of these inquiries. It is my sincere belief that this plan is the only one that holds any possibility of bringing stability, peace, and prosperity to our great dairy industry. For that reason, I earnestly urge and recommend that it be adopted.

This is not a new position with me. For many years I have been personally interested in the production of milk. I have watched intimately the development and expansion of this industry from the restricted business of cheese and butter manufacture to the present extensive fluid operation which embraces seven states.

Prosperity has alternated with distress during this transition. Problems incident to this growth have become matters of great concern, not alone to the industry but to the economic welfare of the state itself.

To deal with them the industry has attempted self-regulation, which failed. State control followed, with equally unsatisfactory results. Its breakdown has been followed by another attempt at self-control that has been no more successful than the previous effort.

Experience has thus shown that none of these forms of regulation is adequate to solve the problems of this industry in its present expanded development. None can hold forth any promise of mastery of the industry's complex problems. None can, in the light of
3806 trial and experience, suggest with any reason the likelihood of sufficient success to insure fair return for labor and capital invested. That, after all, is what every dairyman is entitled to. That is what any plan offered as a remedy for the ills of this industry must provide.

It was from this personal knowledge and experience that I told a joint legislative committee a year and a half ago that some form of control is necessary for this industry; that the only form that could succeed must be combined state and federal regulation.

That declaration was made long before I had any idea of holding my present position. What has happened in the meantime, however has only strengthened the conviction that what I said at that time applies with equal, if not greater, force to our present milk situation.

For several months we have seen this industry struggle along by itself without any semblance of control or regulation. The bargaining provisions for dealer-producer negotiation of price have not been utilized successfully. Every farmer who produces and sells milk knows what this has meant to him better than I or anyone else can tell him. His milk check tells the whole story. He knows that if he must continue to produce and sell milk at present ruinously low prices there can be only one outcome. He must go bankrupt, or go out of business.

He knows now, if he did not know it before, that without control of some kind price-cutting of the most vicious kind is possible by dealers. That the milk his hard labor and money has produced, without control, will be sold at any price to drive a competing dealer

of business. That the one who ultimately pays for this price cutting is the farmer himself who is finally paid only what his milk finally sells for after the price cutting is over.

The farmer should also know that this price-cutting with his milk which so greatly harms him does not benefit the consumer. Milk consumption has declined during this price-cutting period of the last three months when milk retailed in some stores at three
807 cents a quart and farmers have received about two cents a quart. Consumers, I am sure, want our farmers to receive a fair price for their milk. That price must be not less than five cents a quart which most studies agree is the average cost of production.

The first essential to milk consumption is purchasing power. Given that, consumers will gladly pay a fair price that will adequately reward the producer and distributor. The greatest gains in consumption in the past three years have been at the period of highest retail price but also at the time of rising purchasing power, according to statistical records.

To each individual dairyman, his own situation under present conditions is disheartening and disastrous. Many farmers will be unable to pay their taxes this fall. Collectively the misfortune and distress of our dairymen present a major economic danger to our whole state because at least half of our farm income is derived from milk and tax revenue in many upstate communities comes principally from farmers' milk checks.

No one has a right to claim and no one should expect that the proposed marketing agreement will cure every evil that now afflicts this industry. But I feel that it can justifiably be maintained that with at least 35% of all milk supplying the metropolitan market coming from other states, any control plan must include federal authority. Only such authority can lawfully be applied to out of state milk. For the 65% produced and delivered within our own state, authority granted to our department under the Rogers-Allen law is adequate. By combining federal and state authority—a procedure now possible under the revised national Agricultural Adjustment Act—the two governmental authorities can be coordinated to bring all milk entering this metropolitan market under equal jurisdiction and control. That is just what the proposed order does.

But despite the apparent advantages of the proposed agreement there are dairymen who honestly and sincerely oppose this plan and who believe its adoption will be unwise. Others may have been in-
808 fluenced to such an attitude by misinformation deliberately circulated by elements in the industry who are selfishly interested in seeing the plan defeated and the present chaotic conditions continued. These dairymen, however they have reached their decision, have every right to take such a position and they are entitled to respect for their belief.

They see in the plan further expansion of governmental authority which they believe may lead to dictatorship. I do not share this fear. Government to me is nothing more or less than organized cooperative enterprise itself. Its tremendous power and influence can and should be, in my opinion, utilized to the fullest extent to make our greatest cooperative enterprise, our dairy industry, a success.

As for the possibility of dictatorship, I believe that such a fear is based more upon prejudice and emotion than upon fact. We should remember that under provisions of the Rogers-Allen law only 35 per cent of producers is necessary to terminate the marketing agreement insofar as it applies to intrastate milk. This milk, I have said, constitutes 65 per cent of the whole metropolitan supply. If control is ended over this amount, then control by the federal government over the remaining 35 per cent would be ineffective and would have to be ended.

This means that veto power over the whole plan rests solely in the hands of the dairymen themselves, who can end it at any time they believe it is failing to accomplish its purpose.

Another frequent criticism is that the plan means regimentation of our dairymen. Again I must disagree. The agreement, despite all the authority, influence, and prestige of both federal and state governments, cannot succeed unless at least a majority of the dairymen support it and will give to it their active and wholehearted cooperation. They must themselves approve it. They only can make it succeed by cooperating.

This cooperation is wholly a voluntary matter. It cannot be compelled by any official edict or law. As the heading "marketing agreement" indicates, the whole plan is based upon willingness to
3809 unite. Therefore, if there is to be any so-called regimentation, it must be entirely voluntary on the part of the dairymen themselves. But such action is at once contradictory of regimentation and therefore no regimentation at all. The petition for governmental assistance under the law had first to originate with the dairymen themselves. It can be ended only by their action.

I feel that we must remember in considering this question that personal prejudice, political feeling, or bias should have no part in influencing our judgment. We should weigh this question solely upon its merits and in terms of what the decision means to each farmer individually, to farmers and their principal industry collectively, and, lastly, to the state itself.

If that is done, I am sure that when our dairymen cast their votes this week on this question, either individually or collectively, that the result will be overwhelmingly favorable.

But such a vote will be only the first step. From that point on it becomes the moral responsibility of every dairyman who votes for the plan to back up his vote with his own interested and active cooperation. As for those who may sincerely and honestly oppose the plan in the exercise of their best judgment, I ask that once the polls are

closed and the result known, if it be contrary to their opinion, that they, nevertheless, in true American tradition, abide by the result and unite with their neighbors to give the plan a fair trial.

If experience justifies the fear and judgment of those who oppose this order, it will not long endure. If, however, a fair trial justifies the hope and expectation of those who favor it, the benefits will flow equally to those who favor and to those who oppose and contribute unreasonably to the betterment of economic conditions of the state at large.

FP-864.
8-15-38.
c, spc.

3810 *Exhibit No. 26K to stipulation*

From W. J. Griffith, Jr., Agent to Conduct the Referendum for the Secretary of Agriculture of the United States, Hearing Room No. 3, State Office Building, Albany, N. Y. Release on receipt.

ALBANY, Aug. 16.—Twenty-one cooperative associations of milk producers supplying milk to the New York metropolitan marketing area have been determined by the Secretary of Agriculture to be qualified to vote in behalf of their members in the referendum now under way on the proposed milk marketing order.

The 21 cooperatives qualified to vote their members as units rather than by individual ballots cast by the members were announced today by Wellington J. Griffith, Jr., agent to conduct the referendum for the Secretary of Agriculture of the United States.

The same cooperatives also have been determined by Commissioner Holton V. Noyes, of the New York State Department of Agriculture and Markets, to be qualified under state law to vote in that manner. Voting in New York State on the proposed order fixing minimum prices to producers will take place Aug. 18, 19, and 20.

Mr. Griffith explained that the secretary of each qualified cooperative will cast one ballot for the entire membership. The number of producers in each of the cooperatives has been, or will be, verified by audit.

The cooperatives are as follows:

Amsterdam Milk Producers Cooperative, Inc., Amsterdam; Antwerp Milk Producers Cooperative, Inc., Philadelphia (N. Y.); Bennington County Cooperative Creamery, Inc., Manchester Depot, Vermont; Canajoharie Cooperative Milk Producers, Inc., Canajoharie; Central Mohawk Producers Cooperative, Inc., Fultonville; Circleville Milk Producers Cooperative, Inc., Middletown; Conesus Milk Producers Cooperative Association, Inc., Webster's Crossing; Crowley's Milk Producers Cooperative Association, Inc., Binghamton; Dairymen's League Cooperative Association, Inc., New York City; Lakeville Milk Producers Cooperative Association, Inc., Holcombe; Lehigh Valley Cooperative Farmers, Allentown, Pa.; Leon Milk Producers Cooperative, Inc., Cattaraugus.

Also, Liberty Valley Cooperative Milk Producers Association, Liberty, Pa.; Malone Milk Producers Cooperative, Inc., Malone,
3811 Milton Cooperative Dairy Corporation, Milton, Vermont; Mount Joy Farmers Cooperative Association, Mount Joy, Pa.; North Blenheim Milk Producers Cooperative Association, Inc., Middleburg; Osceola Milk Producers Cooperative Association, Osceola, Pa.; Poland Milk Producers Cooperative Association, Inc., Poland; Portville Milk Producers Association, Cuba; and Richmond Cooperative Association, Inc., Richmond, Vermont.

FP–865.

8–16–38.

e.

3812 *Exhibit No. 26 L to stipulation*

From W. J. Griffith, Jr., Agent to Conduct the Referendum for the Secretary of Agriculture of the United States, Hearing Room No. 3, State Office Building, Albany, N. Y. For immediate release.

ALBANY, Aug. 17.—Extension of voting hours at five polling places for the referendum of dairymen on the proposed New York metropolitan milk marketing order was announced today by Wellington J. Griffith, Jr., agent to conduct the referendum for the Secretary of Agriculture.

The polling place at Poughkeepsie will be open from 7 A. M. until 5 P. M., daylight saving time.

At two other polling places in Dutchess County, Wiccopee and Fishkill Plains, the polls also will be open from 7 o'clock in the morning until 5 in the afternoon, daylight time.

The extended time for voting at Franklin, Delaware County, will find the polls open from 7 A. M. until noon and from 1 to 5 P. M. eastern standard time.

An entire day has been added for voting at Sheffield, Berkshire County, Mass. The original schedule called for voting there only on Aug. 20, but the extended time will result in the polls being open on both Aug. 19 and 20 from 7:30 A. M. to noon, and 1:30 to 4 P. M. daylight saving time.

FP–866.

8–17–38.

c.

3813 *Exhibit No. 26 M to stipulation*

From W. J. Griffith, Jr., Agent to Conduct the Referendum for the Secretary of Agriculture of the United States, Hearing Room No. 3, State Office Building, Albany, N. Y. Release on receipt.

ALBANY, Aug. —.—One more polling place has been designated for New York State dairymen supplying milk to the New York metropolitan market to cast their votes on the proposed State-Federal milk marketing agreement.

e 309th polling place in the metropolitan milkshed, which takes
arts of seven states, is at Little Valley, Cattaraugus County.
ymen in the vicinity of Little Valley will express their approval
isapproval of the agreement by secret ballot at the Fair Grounds,
20. Little Valley's polling place will be open from 2 P. M. to
M., standard time, on that date.
J. Griffith, Jr., agent to conduct the referendum for the Sec-
y of Agriculture, and representatives of Commissioner Noyes,
plans for the voting in seven states are progressing satisfactorily.
York dairymen will vote at their designated places during Aug.
9, and 20.
P-863.
12-38.
d, w, pi.

Exhibit No. 26-N to stipulation

rom W. J. Griffith, Jr., Agent to Conduct the Referendum for
Secretary of Agriculture of the United States. Hearing Room No.
tate Office Building, Albany, N. Y. For immediate release.
LBANY, Aug. 18.—Two additional polling places where dairymen
plying the New York metropolitan milk marketing area may cast
r votes for or against the proposed Federal-State Marketing Agree-
nt this week were announced today by Wellington J. Griffith, Jr.,
nt to conduct the referendum for the Secretary of Agriculture.
The two additional polling places which bring the total up to 311 in
seven states of the New York milk shed are: Room 406, Federal
ilding, Lewisburg, Pa., in charge of Harold R. Erdley, of the
icultural conservation office. The Lewisburg polling place will
pen on Saturday, August 20, from 8 A. M. to noon, eastern stand-
l time.
Farmers in the vicinity of St. Albans, Vermont, will cast their votes
the proposed marketing order at Curley and Wilder's office, Enos-
g Falls, Vermont. That polling place will be in charge of County
ent C. R. McWilliams, of St. Albans, and the voting will take place
urday, August 20, between 8 A. M. and 8 P. M., eastern standard
e.
Dairymen in New York State who supply milk to the New York
ropolitan market began casting their votes on the order today.
ballots cast today, tomorrow, and Saturday will be checked and
nted under Mr. Griffith's direction and the supervision of repre-
tatives of Commissioner Holton V. Noyes, of the New York State
partment of Agriculture and Markets, in hearing room 3 at the
te Office Building, with State Police on guard.
P-868.
-18-38.

3815 *Exhibit No. 26-O to stipulation*

From Foster Potter, Department of Agriculture and Markets, State Office Building, Albany. Telephone 3-5511, Ext. 207. Holton V. Noyes, Commissioner. For immediate release.

ALBANY, Aug. 18.—State and Federal officials today assured milk producers in six states that "each producer who votes in the referendum on orders regulating the handling of milk in the New York market will do so by secret ballot."

This assurance was given to more than 65,000 dairy farmers eligible to vote by L. L. Clough, referendum agent for Holton V. Noyes, New York State Commissioner of Agriculture and Markets, and by W. J. Griffith, Jr., referendum agent for the Secretary of Agriculture of the United States.

Commissioner Noyes will speak on the proposed orders at a meeting of North Country dairymen at Malone tonight.

"The secret ballot is being used in the referendum to enable producers to vote their own views on whether they want the help which the State and Federal governments are able to extend jointly to overcome the chaotic conditions existing in the New York milk market," Mr. Griffith said.

"Milk producers who vote on whether they approve the issuance of the orders regulating milk handlers," Mr. Griffith said, "may be assured that no one in the dairy industry will know how any individual voted."

Both Mr. Griffith and Mr. Clough said the ballots are to be counted by State and Federal employes "bound by strict regulations which govern the handling of confidential information."

More than 300 polling places will be open to milk producers in New York, Pennsylvania, Maryland, New Jersey, Massachusetts, and Vermont. Voting in New York State started today in Ulster county. Dairy farmers in all other New York State counties will vote Friday and Saturday, with most of the polling places open on Friday. Producers in Massachusetts will vote Friday and Saturday. Dairymen in Maryland will vote Friday. In Pennsylvania and New Jersey dairy farmers will vote Saturday.

The plan under the Federal and State orders would establish minimum prices which handlers would be required to pay
3816 farmers for milk delivered to plants qualified by health authorities to receive milk for the New York market. Producers would be assured of a uniform rate of return through the operation of a market-wide pool arrangement for making payments. The pool is designed to enable producers to share equitably in the benefits from fluid milk sales in the market as well as in the burden of the market's surplus milk. The two orders would be administered jointly by a market administrator named by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets. The cost

of operating the program would be borne by handlers, each paying not more than 2 cents per hundredweight of milk sold primarily as fluid milk or fluid cream.

New York State dairy farmers who vote will mark two ballots, one for the Federal order and one for the State order. Producers in all other states will mark only the Federal ballot. The two orders are designed to complement each other and provide for joint Federal-State regulation of the handling of milk in the New York market. The area included under the program consists of the City of New York and the counties of Nassau, Westchester, and Suffolk, all in New York State. This territory has a population estimated at more than 10,000,000 people and is said to be the largest milk marketing area in the world.

Federal and State officials said they expected "a fairly large number of farmers to vote." They based this on the widespread interest which the program has aroused and the heavy attendance at the public hearings and meetings held to consider the proposal.

Briefs filed by milk handlers with the State and Federal agencies indicate general dealer opposition to the regulatory program. Milk producers have indicated strong support for the plan which is sponsored by organized dairy farmers operating through the Metropolitan Cooperative Milk Producers Bargaining Agency.

Officials of the Federal department of agriculture point out that if the program had been in operation producers in the 201–210 mile zone from New York would receive for the month of August $2.45 per hundredweight for Class I, or fluid milk, and $1.75 per hundred for milk used for cream. These prices, it is pointed out, represent "a material improvement from those which prevail without a program. Farmers experienced the most chaotic conditions in the New York market during June when many producers received returns of less than $1 per hundredweight for their milk. The situation has improved only slightly since."

Before the Federal order can go into effect the Secretary of Agriculture must determine that its issuance is favored by at least two-thirds of the producers who vote in the referendum. The issuance of the State order must be approved by 75 percent of the New York State producers who vote. Producer approval of both orders is necessary before the joint program can go into effect.

Under the plan, minimum prices to producers only would be established. Prices at which consumers would buy their milk are left to the forces of open competition, officials explained. The orders would apply to handlers only. They cannot regulate production, nor regulate dairy farmers as producers.

FP–869.

8–18–38.

3818 *Exhibit No. 26-P to stipulation*

From Foster Potter, Department of Agriculture and Markets, State Office Building, Albany. Telephone 3-5511, Ext. 207. Holton V. Noyes, Commissioner. Released to afternoon papers, Monday, Sept. 12, 1938.

ALBANY, Sept. 12.—The final results of balloting on the State order fixing prices to be paid to producers for milk sold in the New York metropolitan area were announced today by Commissioner Holton V. Noyes, of the Department of Agriculture and Markets, upon his return from the State Fair.

Exclusive of the rejected ballots, a total of 29,883 votes were cast on the State order. Of these, 25,935, or 86.8 percent, were in favor and 3,948, or 13.2 per cent, were opposed to its adoption.

Out of a total vote of 35,596 on the State order, a total of 5,713 votes was rejected. The principal ground for rejecting ballots was that they were cast by producers who were members of cooperative associations which voted collectively for all of their members. Many additional ballots were rejected because they were cast by producers whose milk was not being delivered to plants approved by any health authority having jurisdiction in the marketing area, or because the voting producer's name did not appear on the list of producers delivering to an approved plant.

Other ballots were rejected because they were not completely filled out, and in many of these instances the intent of the voter could not be determined. The intent of the voter could be determined, however, in the case of 5,376 ballots which were disallowed for the reasons mentioned. Of these 5,376 ballots disallowed, 77 per cent of the votes favored the adoption of the order.

The 14 cooperatives which voted as units cast a total of 19,499 votes, 98.3 per cent of which were cast in favor of the order. Out of a total of 16,097 individual votes cast, 10,440 were found to have been cast by persons who were duly qualified. Of these, 65.3 per cent were favorable to the adoption of the order. Had the votes cast by persons who for one reason or another were not qualified but whose intention was shown, been considered, the percentage of those who voted as individuals who were in favor of the order would

3819 have been increased to 69.3 per cent.

Commissioner Noyes expressed the conviction that even though no cooperatives had insisted on voting as units, as the statute permits, and had the members of such cooperatives voted individually, more than the required 75 per cent would have voted in favor of the State order. He pointed out that it is a well-known fact that the percentage of individual members of cooperative associations who favored the order was greater than the percentage of non-members.

FP-875.

9-12-38.

20 *Exhibit No. 26–Q to stipulation*

From Foster Potter, Department of Agriculture and Markets, State fice Building, Albany. Telephone 3–5511, Ext. 207. Holton V. oyes, Commissioner. Release on receipt.

OFFICIAL BUFFALO MILK COUNT SHOWS 94% VOTED "YES"

estern New York Dairymen Overwhelmingly Approved New Milk Marketing Order, According to Final Tabulation

ALBANY, Sept. — Milk Producers in the Niagara Frontier milk rketing area—the so-called Buffalo area—voted 94 percent in favor the order which goes into effect Oct. 1 fixing minimum prices to be id to farmers, according to the official tabulation of votes announced Commissioner Holton V. Noyes, of the Department of Agriculture d Markets.

Not counting the rejected ballots, 3,264 votes were cast. A total of 69, or 94 per cent, favored the State order, and 195, or six per cent, re opposed to it.

Total vote of the dairymen was 3,575, but 311 votes were rejected. st of the rejected ballots were discounted because they were cast by oducers affiliated with cooperative associations which had voted llectively.

The intent of the voter could be determined on all but three of the ected ballots, and 87.3 per cent of those disallowed favored adoption the order.

Three cooperative associations voted as units, representing 2,663 es, of which 99 percent favored the order. Of the 904 individual es cast, 601 were cast by properly-qualified dairymen and 72 per- t of them favored adoption.

Laurance L. Clough, referendum agent, explained that if the votes t by farmers who were not qualified for any one of several reasons, whose intent was shown, had been counted, the percentage of those o voted as individuals would have stood at 77 percent in favor.

Commissioner Noyes said he is "entirely satisfied," that more than the required 75 percent of Buffalo area dairymen favor the order, which is expected to stabilize the milk market in that tion of the State.

FP–883.
9-23-38.
, w. pi.

2 *Exhibit No. 26–R to stipulation*

From Foster Potter, Department of Agriculture and Markets, State ice Building, Albany. Telephone 3–5511, Ext. 207. Released to rning papers, Tuesday, Oct. 25, 1938.

Commissioner Holton V. Noyes, of the New York State Depart... of Agriculture and Markets, speaking from Station WGY, Schen... tady, Monday night, Oct. 24, said:

"It is a real pleasure to speak on this program of the She... Company.

"It is my belief that I can best serve the entire dairy industry b... helping each particular group solve its problems, insofar as I can b... helpful. I do not conceive of the dairy problem as a matter in whi... the interests of the dairymen alone must be considered. Nor do I think that only the interests of the dealer should receive attention. Nor are the interests of the third interested group, the consumers, to be considered alone.

"Each of these three groups—producer, distributor, and consumer—have their own interests and their own special problems. But each should have an appreciation of the other's point of view. Each should try to help the other understand what that point of view is. Each should recognize that only by all three working cooperatively together can there be any lasting and profitable solution of the dairy problem in this State.

"This being my conception of the relationship of these three groups, I have, at every opportunity, tried to find the practical application of these relationships. I have given much of my time to conferences with each of these groups. I have contributed such counsel as my experience enables me to provide, both as a farmer and business man. I have refused to believe that farmer organizations are necessarily all good; that dealer organizations are necessarily all bad; that consumer representatives are all unreasonable.

"I have preferred rather to recognize and respect the rights and the interests of each group and to recognize the fact that in many ways their real interests are quite identical.

"It was in accordance with this theory that about a year ago I conferred with officials of the Sheffield Company in New York
3823 at their request. Some time previously I had not hesitated publicly to criticize the policy of this company in its handling of the milk situation in northern New York. In the correspondence that followed I had opportunity to suggest that both the company and the industry would be benefitted by a more broad-minded and progressive public relations policy, which would have its basis in the recognition of the necessity and importance of the three groups interested in the dairy industry.

"At this conference I suggested a closer contact with both producers and consumers and a real attempt to discuss the problems of these groups in a sympathetic and appreciative way. Such frank discussion, I felt, would be an important and helpful contribution to removal of much of the misunderstanding which has stood in the way of any constructive approach to the problems of the industry.

"Perhaps this radio program may be one of the results of that conference. I hope that at frequent intervals the company will take its problems to the public in this fashion.

"Sheffield, I am informed, is now celebrating its 98th year of business. Any organization which has been able to endure and grow during the past 98 years certainly merits admiration. I say this with the distinct understanding that my statement is not in any way to be interpreted as a blanket approval of all the policies and acts of this company. For I have not hesitated, nor shall I in the future, to criticise such policy, if it pursues what I honestly and sincerely believe to be a course inimical to the best interests of the whole dairy industry, of which this company is such an important part. That is a duty and responsibility which my public office imposes upon me and which I shall not hesitate to discharge fully to the best of my ability.

"We have embarked upon another experiment in regulation for the dairy industry. We who have urged its adoption sincerely believe that it holds the greatest promise of success of any plan heretofore proposed. But as I have repeatedly pointed out this plan or no other has any chance of success unless and until it receives the complete cooperation of every group in the industry. Thus far it is a pleasure to report very general cooperation of dealers.

24 "I do not pretend, and I know of no one else in authority who does, that the present plan is perfect and complete. Experience will reveal its defects. I shall be the first to insist that these be corrected and any injustices that may develop be righted at once. I shall be equally eager, if it should be fully demonstrated that the plan will not work, to urge its abandonment.

"It is too early to make any prediction. I am encouraged by the first month's operation but I do not base any prediction for the future upon that showing.

"I prefer instead to close this talk with an appeal to every group in the industry for its whole-hearted and active cooperation to afford this plan an honest and fair trial. If that is done, I am sure that within a reasonable time we shall be able to reach a permanent solution of New York's great agricultural problem."

FP-890.
10-24-38.
c, spc.

25 *Exhibit No. 26-S to stipulation*

From W. J. Griffith, Jr., Agent to Conduct the Referendum for the Secretary of Agriculture of the United States, Hearing Room No. 3, State Office Building, Albany, N. Y. Release on receipt.

POLLING PLACES ANNOUNCED FOR VOTE ON NEW YORK MILK MARKETING PROGRAM

Over 300 polling places will be available to dairy farmers in seven states who will vote in a referendum on whether they approve the order issued by the Secretary of Agriculture to regulate the handling of milk in the New York metropolitan marketing area.

A detailed list of polling places together with the time and plac of voting at each was released today by Wellington J. Griffith, Jr., agent of the Secretary of Agriculture to conduct the referendum. Over 230 of the polling places are located in New York State where voting will take place during August 18, 19, and 20.

Dairy farmers in Vermont, Massachusetts, New Jersey, Pennsylvania, and Maryland will vote on the federal order August 20. The polling places scheduled for these states are located in sections from which milk supplies are drawn for the New York market.

Connecticut dairy farmers whose milk is produced for the New York marketing area will be the first to vote in the referendum. A polling place for these producers will be open August 15 from 1 to 5 P. M., daylight saving time, at the Community Service Food Store at Canaan in Litchfield County, Conn.

In addition to voting on the federal order, dairy farmers in New York State will, at the same polling places, vote on the order which the New York State Commissioner of Agriculture and Markets has issued. The two orders are designed to complement each other and provide for joint federal-state regulation of the handling of milk in the New York metropolitan marketing area.

Before the federal order can go into effect, the Secretary of Agriculture must determine that its issuance is favored by at least two-thirds of the producers participating in the referendum. The state order requires approval, of three-fourths of the New York State producers voting.

The program under the federal and state orders is designed to establish minimum prices which handlers would be required
3826 to pay for milk bought from dairy farmers. Provision is made for a method of paying producers through the operation of a market-wide pool to assure a uniform rate of return to dairy farmers. The operation of the market-wide pool is designed to provide for equitable sharing of the benefits of the fluid milk sales in the market, as well as for equitable sharing of the burden of surplus milk.

Detailed information relating to the referendum to be held in the seven states may be obtained from the referendum headquarters in charge of Mr. Griffith, located in Hearing Room No. 3, State Office Building, Albany, N. Y.

Attached is a list of polling places in the various states together with the time and place of voting at each polling place.

FR–857.

8–9–38.

c, d, spc.

827 *Exhibit No. 28 to stipulation*

FEDERAL MARKETING ORDER

Why Should It Be Rejected?—What Will It Accomplish, if Adopted?—What Are the Reasons, and Who Is Responsible for the Dairy Farmers' Distress?—What Program Will Give You Relief?—How Can You Escape This Marketing Order Trap?

828 FEDERAL MILK CONTROL

Why the Proposed Federal Milk Order Should Be Rejected

Every dairy farmer should oppose the proposed Federal order or the following reasons:

1. The producer himself has no actual voice in fixing the price for is milk.

All prices proposed are founded on base prices of butter and cheese. The prices for butter and cheese are controlled and manipulated by he Milk Trust.

The report of Attorney General John J. Bennett, Jr., states among ther things, that National Dairy, Bordens, and other dealers make ver 100% profit on milk which is manufactured. Under the Order, hey will make newer and greater profits at the dairy farmer's xpense.

2. The Order will make the producer the absolute slave of the ooperatives; put every producer under contract (see Article VI, ection 11); and penalize him if he changes his market by paying him butter price for from two to three months (see Article VII, ection 3.)

3. The program now presented should be rejected if for no other eason than it was written and is now sponsored by the Dairymen's eague, Sheffield Producers, and agents of the Big Three. The terms re so intricate that a staff of lawyers and accountants would have ifficulty in understanding it, and the clear intention of the sponsors eems to be to tie the dairy farmer up in such a vast legal tangle hat he can never free himself again.

4. The measures used to put it across discredited it at the start. The Federal legislation under which it is proposed, was unquestionbly enacted at the instance of the Dairymen's League.

5. The apparently unlimited sums of money for radio broadcasts, eetings, speeches, propaganda in the public press and elsewhere, ave largely come from the Bargaining Agency. Of the eighty ooperatives in that Agency, only the Dairymen's League and Sheffeld Producers are known to have furnished the money. If these unds have been supplemented, there can be no other source than the ig Three, Bordens, National Dairy, and the Dairymen's League.

6. Milk control was actually promulgated at the instance of the Dairymen's League. Its widespread political activities and huge expenditures in this direction, put it across. Public sentiment was built up by depressing the price of milk to a pitifully low level.

The Rogers-Allen Bill was promulgated and put across by the Dairymen's League. The same measures were employed. Milk was sold in New York City at two quarts for 7 cents in 1937. At least one dealer, who sold milk at that price, got 40,000 quarts of milk daily from the Dairymen's League. The 7 cents for which the milk sold was only sufficient to pay the cost of receiving, shipping, pasteurizing, bottling, and delivering the milk. There was nothing left for the farmer.

The same method is again being employed. Actually, the Milk Trust is responsible for the present low price of milk in order to create a demand for Federal Control. The paid propagandists and mouth pieces of the League in their own state wide meetings, in the newspapers, over the radio, and in a whispering campaign, all accuse others of responsibility. The dairy farmers themselves have neither the money nor the organization to distribute the actual facts, and to give the farmers and the public the real truth. The lies and
3829 propaganda, half truths, deliberate falsehoods, and clever misrepresentation, must go unanswered. The demagogues have all been hired by those interested in the adoption of this Order, who seem to have unlimited funds to put it across.

What Will Actually Be Accomplished If The Order Is Adopted!

Large market service differentials will be paid, principally to the Dairymen's League. If this would actually pay League farmers a better price, it might be justified. However, after the blended price is arrived at, the cooperative may (an' unquestionably will) take from its producers deductions the same as in the past (Article VII, Section 3), and the price returned to such producers will still be far below that returned by bona fide dealers who actually pay the control price. The most important result will be to give the large cooperatives a strangle-hold on those who are so unfortunate as to have to earn their living in producing milk. Under the proposed Order, that strangle-hold cannot be shaken off. The League will be free to give rebates, indulge in unfair trade practices, to aid the Trust in returning large profits, and to whip out of business the class of individual dealers, now almost extinct, who in the past were willing to live and let live, and who in most cases paid a substantial price for milk.

What Is The Reason And Who Is Responsible For The Present Distressed Condition Of The Farmer?

That purchasing power of the public and the law of supply and demand is a factor in milk prices, cannot, and should not, be denied. These contribute to some extent to the present low prices.

However, for many years past, an insurmountable disturbing factor n the New York City market is the presence of the Dairymen's League n that market as a dealer. This dealer, posing as a cooperative, was xempted from compliance with Milk Control, the Rogers-Allen law, nd is now to be exempt, under the Federal Order. Many informed ersons in the industry believe that if the Dairymen's League is taken ut of the New York market as a dealer, and acts only as the pro- ucers' agent, the industry can get on its feet without government egulation.

Any well informed persons in the industry also knows that if the eague and other cooperatives are subject to a bona fide and critical xamination by the Commissioner of Agriculture so that it cannot xtend rebates and special privileges and cannot indulge in unfair ade practices, as brought out by the Attorney General's report, that aos in the market will end.

Recommendations

If new legislation is needed, it should incorporate the following:

1. A producer organization should be restricted from engaging in usiness as a milk dealer and restricted from competing with its stomers.
2. Cooperatives should be forbidden by law to give rebates, special ivileges, or to give loans to customers of any nature.
3. Cooperatives should be forbidden by law to expend moneys for bbying, political activities, propaganda, and particularly from pay- g, either directly or indirectly, any sums of money to or on behalf candidates to any legislative body, whether state or federal.
4. The financial affairs of cooperatives and their marketing activi- s should be subject to examination and control in the same manner at banking institutions, committees of incompetents, trustees, and duciaries of every nature are regulated.

30

How You Can Escape This Trap

You can deliver yourself from this unholy scheme by insisting that ting be by individuals, and then individually in making it your siness to cast your vote aga'nst the proposed Order or in favor of e recommendations above stated.

New York State Commissioner of Agriculture Holton V. Noyes, on ay 4, 1938, gave out a public statement, which we quote in part:

"No plan of voluntary or arbitrary control of the dairy industry will er be effective * * * unless it meets three definite requirements:

"1. It must have * * * majority support of those members of e industry over whom * * * control is to be exercised.

"2. It must not favor any particular group or groups at the expense any other group or groups. By the same sign, no one group or oups should be allowed a determining influence in establishing ntrol or in destroying it.

"3. It must have the active and sincere cooperation of at least a substantial majority of the industry.

"I have taken the position that it would be most unwise, if not most unfortunate, for any cooperative association in this state to cast the votes of its members upon this proposition solely by action of officers and directors, even though it is permissable to do so by law. The whole question is so fundamental and of so great importance to the welfare of all our dairymen, their families and their future, that I do not believe any association is justified in presuming to express the opinions of its members—at least without an honest referendum among the membership as to their wishes.

"Some leaders of cooperative associations take an opposite view. They contend that allowing individual members to vote upon the proposition itself or to express them by a referendum within the organization would be confession of weakness by the cooperatives and undermine their prestige and influence. I disagree with them * * *.

"But if the leaders of these cooperatives insist that this should not be done I would feel that any vote registered upon this proposition by officers and directors alone did not represent the true sentiment of the dairymen of this State."

Conclusion

We regret Commissioner Noyes' entire statement cannot be printed here. It is the sincere expression of a man of high character, who has brought credit to the administration of which he is a cabinet member.

If you would save your self from greater misery than you now have, defeat the proposed marketing Order and make it your business to help break the strangle-hold of the Milk Trust and the Big Cooperatives in accordance with the recommendations above outlined.—Dairy Farmers' Union.

3831 THE FEDERAL MARKETING ORDER

Who is sponsoring it?—How is it to be voted by producers?—How does it set prices?—Why?—What are the market service differentials?—Are producers to be under contract?

3832 Sponsors

This order is sponsored by the Dairymen's League, the Sheffield Producers' Association, and the Metropolitan Bargaining Agency.

The Sheffield Producers' Association has been branded by the Federal Trade Commission as controlled by Sheffield Farms, a subsidiary of National Dairy. No evidence has ever been presented to prove dealer control of the League. However, the Attorney General, in a report on the milk industry dated March 8th, 1938, states that the League, from the nature of its setup and operations, would naturally

incline to a "distributor" point of view, and its relations with Bordens were such so as to have great weight in determination of policy, and that it would have, naturally, sympathy with distributors' problems.

The attitude of the Metropolitan Producers Bargaining Agency upon any problem is necessarily the combined attitude of the Sheffield Association and the League. The League is at present in open cooperation with the Sheffield Producers Association.

Close Inquiry Justified

These circumstances justify a close inquiry into the supposed merits of any plan, procedure, or method advanced by any of these agencies for the ostensible benefit of milk producers. Also justified is inquiry as to the manner in which the agreement is to be presented to producers for their action. Regardless of the importance of this agreement, it is doubtful if 25% of the producers will vote individually. Therefore, a solid League vote cast by the League Directorate would insure the ⅔ majority.

This agreement comes from sources of extremely doubtful loyalty to producer interests. Are these interests to prepare the plan and rig the vote also?

The publicity put out in favor of the Order is entirely misleading and notable for its silence on certain provisions of the Order. It is in some instances untruthful.

It is misleading to say that dealers are to pay for the administration of the order when no limit is placed on dealer profits.

It is misleading and untruthful to say that prices will be fixed at public hearings by producers or that producers will have anything to do with fixing the prices of milk under this Order. This is done to focus attention of the hearings upon price rather than upon the merits of the Order.

No mention is made of the provision for producer contracts. Such contracts are distinctly unpopular in this milkshed.

The nature of the misrepresentation and omissions in the propaganda favoring the Order confirm the "sympathies" of the League and the control of the Sheffield Producers.

Phony Price Fixing

The Order is against producer interests.

Price fixing in the two upper classes and class 3B and C is based upon New York outside quotations for 92 score butter. Butter prices for the U. S. are set on the Chicago Market. The operation of the Chicago exchange has been a matter of complaint to the Federal Trade Commission, which has found the comparable Cheese Exchange at Plymouth, Wisconsin, to be under domination of National Dairy, Bordens, and a couple of meat packers.

In Class 3A the price is set with a differential on prices paid a certain midwest condensaries. These condensary prices are
3833 on a formula which takes into consideration the Plymouth Cheese and Chicago Butter Quotations.

Class 3D (cheese) is set on the average of the Plymouth, Cuba and Gouverneur Exchanges. Gouverneur meets the same day as Plymouth and sets no price until receipt of a telegram from Plymouth. Cuba meets the day following and its prices follow Plymouth. Thus it will be seen that the prices to be paid in all instances for milk under the present Order are within certain control of Bordens and National Dairy.

Borden and National Dairy Benefit

These two companies will purchase about 70 per cent of the milk handled under this Order. In some instances a difference of one quarter of a cent on the quoted price for butter in a market affected by their operations and in which they have been charged with exerting an undue influence will mean a difference in return to producers under this order of 23 to 24 cents per cwt. in class one and 20 cents per cwt. in class two: a matter of hundreds of thousands of dollars.

Certain minimum returns are supposedly to be made to producers. It has been shown that the basis of these returns is within the control of the larger companies. The order, however, sets no resale or consumer price. Consequently the rates of profit of the distributors is uncontrolled. This rate of profit now takes upwards of 25 per cent of the farmers milk. That rate of profit is the real cause of all present farm ills. No people can long stand to have one quarter of their product taken away from them in the form of profit alone. It is as much of a handicap to both consumer and producer purchasing power. The present Order makes no effort to correct this condition, and it is, indeed, doubtful if any governmental interference could correct it successfully.

There is no indication in the order that producers will receive the blend of minimum prices. Certain market service differentials are provided, ostensibly for the care of surplus and the supplying of a short market. It is obvious that the larger companies are in a preferred position to take advantage of the possibilities offered for profit in interplant or even intercompany exchange of surplus milk. Any movement of surplus would necessarily be within the judgment of the company. While the freight rate is set, return hauls are possible to the considerable profit of the dealer. In fact, great quantities of milk could be shunted around to the profit of the dealers by extra freight charge and plant handling charges. There is also the matter of extra handling charges for surplus plants in the short season. All of these extra charges are to come out of the blended return to pro-

ers to the profit of the dealers. Is there anything in the history
ie milk business to indicate that these dealers will neglect any
sibility of profit! Furthermore, the companies best in a position
ake advantage of these marketing differentials are Bordens, Na-
al Dairy.

Producer Contracts

rticle 6, Section 11, subdivision a, paragraph I, requires coopera-
s to put producers under contract for not less than thirty-day
ods.

he idea of producer contracts is repulsive to the producers to be
ted by this Order. These contracts have been used to keep the
producer in line and delivering his milk under unsatisfactory
conditions. These contracts have been used effectively and
continuously to prevent protest.

here is no necessity of any producer being put under contract.
milk is being produced. It must find an outlet. Any decent
ditions of sale and decent treatment of producers, collectively and
ividually, will bring in plenty of milk.

New Producers!

Article VIII, Section 3, a "new producer" is defined as one
who has not regularly delivered milk to a handler for a period
irty days prior to the effective date of this Order." This lan-
e is not clear. In the Fall River and Greater Boston Orders the
ition is one "who did not regularly sell milk for a period of
y days prior to the effective date hereof to a handler or to persons
in the area." The interpretation of this clause is a matter of con-
iable moment. New producers are penalized by a Class 3C
ter) return for a period of two calendar months at least.

e new producers to be defined as new producers to the market or
producers to a plant? Are producers to take their weights,
erfat tests, and treatment by any plant and like it, or be penalized
wo full months out of the blend, or worse? Handlers do not
to lose producers; they also want to treat them as they think
nity demands. This clause is suspicious.

hy cannot this Order be written in plain English!

will be seen from the foregoing that organizations suspiciously
to Bordens and National Dairy are sponsoring this Order. That
proposed method of voting insures its acceptance; that the price
g system set forth places price control with National Dairy and
ens; that there is no restraint upon distributor profits; that
tial provisions of the Order place these companies and their
diaries in the way of making great profits; that producers are
bound into this system by contracts, and perhaps penalized if
do not stay put.

The Five Principles

The five principles upon which this Order is supposed to be predicated are in no wise borne out by the Order as submitted.

1. An equal purchase price to be paid by all dealers for milk for the same use.

The market service differentials defeat this principle.

2. An equal share to each producer of the benefit of the fluid market.

The price control and profits of the monopoly, together with the failure to protect the blend, make this an equalization in misery rather than in benefits.

3. An equal share by each producer in the burden of surplus and the expense of controlling it: and

4. Reasonable contributions to those sharing surplus facilities for the use of them seasonably for market protection.

These principles have undeniable merit, but in the present Order are only a blind to promote the interests and preferential position of monopoly.

5. Effectuation of the foregoing principles in such a manner as will perpetuate and encourage farmers' cooperative organization.

Why?

Why promote and protect and encourage farmers' cooperatives in sympathy with or under control of the distributors?

This Order is not in the interests of farmers.

It is an Order in the interests of private monopoly.—DAIRY FARMERS UNION.

3835 *Exhibit No. 41 to stipulation*

This Agreement, made this _____ day of _____ 193_ between the Central New York Co-Operative Association, Inc., of Cortland, New York, hereinafter called party of the first part, and _____ of the _____ of _____ New York, hereinafter called party of the second part.

Witnesseth: Whereas the first part is a co-operative corporation formed for the purpose, among other things, of producing, marketing and distributing dairy products of its members; and

Whereas the second party is a member of said co-operative corporation and is desirous of having said corporation market and distribute all of the milk produced by the said second party while the said second party is a member of said co-operative corporation,

Now, therefore, It is mutually agreed as follows:

1. The first party agrees to accept, and the second party agrees to deliver to the first party, all of the milk produced by the second party commencing with the signing of this agreement and continuing until cancelled pursuant to the cancellation clause hereinafter contained,

in consideration of the second party turning over all of his milk to the first party.

2. The first party agrees to pay to the second party for the milk turned over to the first party by the second party a price which shall be based upon the amount received for said milk less the expenses of handling, hauling, marketing, distributing, and less all other incidental expenses incurred in conducting the cooperative corporation of the first party, including all expenses of every name and nature, the price to be received by the second party in payment therefor to be based upon all of the above factors as well as being based on the distance from market and the grade and quality of the milk delivered to the first party by the second party from time to time.

3. The first party agrees to pay the second party for all of such milk pursuant to the above terms twice a month.

4. It is agreed that the first party, through its proper officers, servants, agents, and employees, shall accept the milk of the second party, market and distribute the same, and then compute and make all proper deductions and remit to the second party upon the above basis twice a month.

3836 5. This agreement is to remain in full force and effect until cancelled by either party serving a written five-day notice of cancellation on the other party.

6. The party of the second part agrees in producing said milk to comply with all rules and regulations of the Health Department of the State of New York and all laws of the State of New York.

7. The party of the second part, by signing this contract, makes application for membership in and subscribes to the By-Laws of the Central New York Co-Operative Association, Inc.

In witness whereof the parties hereto have hereunto subscribed their hands and affixed their seals the day and year first above written.

CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC.,

By ——— ———.

——— ——— [L. S.].

3837 *Exhibit No. 43 to stipulation*

District Court of the United States, Northern District of New York

Civil Action No. —

UNITED STATES OF AMERICA, PLAINTIFF

v.

JETTER DAIRY COMPANY, INC., DEFENDANT

UNITED STATES OF AMERICA,

Southern District of New York, County of New York, ss:

Paul Grossman, being duly sworn, deposes and says that he is a certified public accountant residing at 147 East Washington Avenue, New

York City, and having an office at said address. Deponent has had 5 years' experience as an auditor covering accounts in the milk business in New York City, and has audited the books of many milk dealers or distributors. Deponent has had and now has charge of the books of the Freeman Dairy, Inc., of Maspeth, L. I., which is engaged chiefly in the sale of fluid milk to storekeepers and other retailers. Said Freeman Dairy, Inc., purchases a part of its milk supply from the Jetter Dairy Company, Inc., the defendant above named, and Arthur Jetter, President of the Jetter Dairy Company, Inc., is also a stockholder in Freeman's Dairy, Inc.

Deponent further says that he has made a computation of the cost of a quart of milk purchased at prices stated in the Federal and State Marketing Orders, so-called, to wit: at $2.45 per cwt., plus butterfat F. O. B. in the 201-210 mile zone, so-called, plus receiving station or handling charges at 23¢ per cwt., freight at 32¢ per cwt., processing charge at 30¢ per 40-quart can, the average cost of such processing, plus the cost of delivery, including actual overhead, general administrative office expense, cost of maintenance and operation of trucks, truck drivers' pay, taxes, compensation insurance, liability and public liability insurance, and the expenses ordinarily incident to the economical operation of a milk business in the Metropolitan Area, and deponent has determined that after considering all of said
3838 figures, that the minimum economical delivered cost of a quart of milk at the stores or places of business of customers, both of Freeman's Dairy, Inc., and of all economical operators engaged in said wholesale, or "dealer-to-dealer" business, is slightly more than 9¾¢ per quart. Deponent believes it to be utterly impossible for any dealer, by any means of saving, to deliver such milk for less than 9¾¢ and the cost to many dealers is more than 9¾¢ per quart. These figures apply to milk delivered in glass bottles. The cost of a quart of milk delivered in paper containers is at least 1⅓¢ per quart more. In the above figures, due consideration is had and made for breakage and loss of bottles in deliveries made in glass, and for wastage and defective containers in paper, the wholesale cost of which, before filling, is $13.89 per thousand (American Can Company).

PAUL GROSSMAN.

Subscribed and sworn to before me the 25th day of November 1938.
VICTORIA J. KOWALSKI,
Notary Public, Oneida County, N. Y.,
Acting in New York Co., N. Y.

Plaintiffs' Exhibit B

Rec. in evidence 1/13/39

ict Court of the United States, Northern District of New York

Civil Case No. 32

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROYAL CO-OPERATIVE, INC., CENTRAL NEW YORK CO-OPERATIVE SOCIATION, INC., SCHUYLER JUNCTION NEW YORK MILKSHED CO-RATIVE, INC., ET AL., DEFENDANTS

ED STATES OF AMERICA,
State of New York, County of Bronx, ss:

ron H. Rubenfeld, of lawful age, deposes and says:

m President of Dellwood Dairy Co., Inc., engaged in the whole- and retail distribution of milk in the New York City Marketing , operating particularly in the Bronx and Westchester Counties. company has been in business since July 1, 1931. We have a urising, bottling plant and distribution depot in Yonkers, at 170 Mill River Road. We also operate country plants where we buy nilk from producers—at Fort Edward, Washington County, State ew York, and Kyserike, Ulster County, New York. Our company ates a number of retail routes and several wholesale routes. We ne of the larger independent dealers in this market, doing a busi- amounting to about two million dollars in volume annually.

am thoroughly acquainted with the history of competition in the York City Marketing Area and with the various efforts that have made to stabilize this market for the benefit of producers, dealers, consumers. I can unqualifiedly assert that it is a market in which eenest competition exists between dealers.

uring the period of six months preceding the inauguration of the ral Milk Marketing Order No. 27 for this area, conditions in the market were very chaotic. About March 1938 representatives of a large number of producers petitioned the Secretary of Agri- culture for an order. The distributors were notified by the tary of Agriculture that hearings were to be held on the proposed ; and I recall that I received a notice some time in April.

e actual hearings commenced in Albany, moved throughout the of New York, and then finally came to New York City, at which I attended hearings which began about May the 20th and lasted ver a week. At these hearings there were present many producer sentatives, distributor representatives, and representatives of ming interests. The hearings were presided over by federal

officials and were also attended by state officials. The distributor representatives opposed certain parts of the proposed order and fully stated their views at the hearings.

After the hearings all sides were given time to prepare and file briefs. A revised proposed order was then sent to all handlers in the market. Everybody was given an opportunity to present their views. Time was allowed to present additional briefs. I also attended a conference in Washington, D. C.

During the hearings a great many independent dealers testified, but I do not recall that any representatives of any of the present defendants in the above action appeared at the hearings to testify either for or against the order. I am thoroughly acquainted with the fact, however, that a large volume of testimony was taken, which, when transcribed in final form, amounts to a rather staggering record.

It is my recollection that heading the consumer representatives who testified was the late Dr. Caroline Whitney, who at that time, I believe, represented the Consumers' Co-operative and a Consumers' Research Foundation.

The larger distributors of the marketing area frequently carry substantial surplus milk, sometimes as much as 50%, in order not to deprive their producers of a regular and continuous market. Many of the smaller competing units made it a practice to buy their fluid milk requirements from day to day and are able in many instances to buy their requirements on the basis of the blend price, that is the average between the price for Class I and the prices for the lower classifications composed of the surplus paid for by the larger distributors. Consequently the smaller operators buying on the basis of such a blend price are able to undersell in the wholesale and retail market.

3841 This very rapidly reduces and depresses the prices which can be paid to the farmer. Many of these smaller units market substantially all of their milk in fluid form and therefore carry no burden and make no allowance for surplus.

On September 1, 1938, the order was put into effect. All handlers were required under the order to pay the Class I price for all the fluid milk and the prices for all other classes of milk according to their uses. This, of course, tended to stabilize the market. This salutary condition continued for approximately three or four weeks after the promulgation of the order. However, beginning about October 1st, there was an indication that milk was being sold in this market substantially below cost. In the last few weeks a downward spiral occurred in this market which was caused principally by milk going into channels where it is sold substantially below cost. This condition is necessarily resulting in loss to all handlers.

Milk is now being sold to stores at prices as low as eight cents per quart. The results have developed a method of distribution known as the "peddler type." In this type of distribution an individual or

up of individuals sometimes operating as a family proposition, ply hire a truck or trucks from day to day and solicit business any price they can get. They do not have nor do they carry any the burdens or obligations of the established milk distributor. is "peddler type" of distribution does not meet the high standards ablished by the labor union and generally does not pay any Social curity taxes or compensation insurance. In the case of my com- ny, all of these obligations must be met and under our contract th the labor union we are required to pay fixed minimum wages d to comply with high standards of working hours and conditions. The Dairymen's League and its subsidiaries distribute milk in the tropolitan Marketing Area. I do not think that the Dairymen's ague and its subsidiaries are responsible for the cause of the break- wn in this market. In this highly competitive market their com- ition is no different from the competition of other distributors. ey are naturally attempting, as every other distributor is, to pro- t their own business.

Normally at this season of the year the market should be in 2 its most stable condition, but due to reckless operations and apparently the feeling on the part of certain distributors that ey may not be required to pay the minimum prices fixed in the der, a depressed condition has developed.

It is my opinion, based on my experience in this industry and in s market, that if any handler is permitted to evade the order the tire market will break down completely in a very short time and notic conditions will rapidly develop. It takes only one or two stances of this character to result in disorder in the entire market. st of the handlers in this market are attempting to hold their own de and to pay to producers the beneficial price fixed by the order. failure to comply on the part of a few units, however, must result the breakdown of the market structure and if permitted to con- ue, will very rapidly make it impossible for my company and all her handlers who are complying, to continue to comply with the der. If those who are now opposing the order are permitted to ade it, there is no question but that the whole structure will umble very rapidly.

Aaron H. Rubenfeld.
AARON H. RUBENFELD.

Subscribed and sworn to before me this 30th day of November, 38.

HENRY METH,
Notary Public, Bronx County.
Bronx Co. Clk's No. 153, Reg. No. 171m39.
Commission expires March 30, 1939.

3843 *Plaintiff exhibit C*

STATE OF NEW YORK,
DEPARTMENT OF AGRICULTURE AND MARKETS,
Albany, June 28, 1938.

Holton V. Noyes(Commissioner. Division of Milk Control, Kenneth F. Fee, Director.

Mr. N. P. POWELL, *Secretary-Treasurer,*
Clinton Co. Dairymen's Coop. Assn., Inc.
R. F. D. 3, Plattsburg, N. Y.

DEAR MR. POWELL: Your letter of June 25, in which you state that you have contracted with Eisenberg Farm Products, Inc., for the sale of your milk and that you expect to start operations on or about July 1, has been received.

We regret to advise you that Eisenberg Farm Products, Inc., has not obtained a license from this department and has filed no bond for the protection of producers or cooperative associations of producers. Under the circumstances, it would be illegal for you to sell milk to that corporation. This corporation cannot permit the sale of milk by you to any unlicensed dealer, and it will be necessary for us to require that any licensed dealer to whom you may desire to sell milk first file with this department a bond to insure payment for such milk.

Very truly yours,

KENNETH F. FEE *Director.*

KFF:WG.
Copy—Mr. Stafford.
Mr. Dodds.

3844 *Plaintiff's exhibit D*

STATE OF NEW YORK.
DEPARTMENT OF AGRICULTURE AND MARKETS.
Albany, July 14, 1938.

Holton V. Noyes, Commissioner. Division of Milk Control, Kenneth F. Fee, Director.

CHATEAUGAY CO-OPERATIVE MARKETING ASS'N., INC.,
Chateaugay, N. Y.

GENTLEMEN: My attention has been called to your monthly report for the month of May in which you indicate the sale of cream to Eisenberg Farms and to I. P. Douglass, both of Brooklyn, New York. Neither Eisenberg Farms, Inc., or Eisenberg Farms Products Company have obtained a milk dealer's license for the license year beginning April 1, 1938. The statute provides that it shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed; milk being defined in the statute as liquid milk and or cream, fresh, sour, or storage. Will you kindly furnish us with an immediate explanation with respect to your sale of milk to this dealer in apparent violation of the statute.

With respect to sales to L. P. Douglass, Mr. Douglass holds a license limited to transactions as a broker. Will you kindly furnish us with the names of the dealers to whom this cream is sold.

Very truly yours,

DIVISION OF MILK CONTROL,
By J. A. CONBOY,
Supervisor of Licensing.

CHF/SRC.

[Copy]

3845

Plaintiff exhibit G

1/13/39 Rec. in evidence 1/13/39

Stops Lost to Gold Medal

634 Fox St., 6 cases, 12/2.
1869 Third Ave., 3 cases, May.
127 E. 102 St., 10 cases, 11/1.
3805 B'Way, 7 cases, Sept.
572 E. 138 St., 4 cases.
744 Fox St., 10 cases, August.
Direct 1616 Madison, 6 cases, Oct. 20.
Direct 1642 Lexington, 7 cases, Canvassed 10/20.
Direct 2 E. 111 St., 5 cases, Nov.
Direct 1353 Fifth Ave., 6 cases, Nov.

Manchester Farms

800 Home St., 2 cases, Nov.
413 St. Anns Ave., 6 cases, Sept.
2268 Amsterdam Ave., 5 cases, Sept.
2244 Amsterdam Ave., 6 cases, Sept.
3519 B'Way, 2 cases, Sept.
681 Elton Ave., 4 cases, Sept.
311 Brook Ave., 4 cases, Nov.

Breakstone

504 E. 138 St., 5 cases, May.
572 E. 138 St., 4 cases, May.
785 E. 151 St., 2 cases, Nov.
542 Southern Boul., 2 cases, Sept.
167 St. Anns Ave., 3 cases, Sept.
715 Second Ave., 5 cases, Sept.
246 Columbos Ave., 2 cases, Nov.
1311 Brook Ave., 2 cases, Nov.
504 E. 174 St., 2 cases, Dec. 1.
879 Longwood Ave., 5 cases, Sept.
1425 Wilkins Ave., 3 cases, Nov.

Adler

Philco 756 Fox St., 6 cases, July.
Philco 1579 Bathgate Ave., 8 cases, Sept. 20.
1633 Madison, 12 cases, 2 years.
Village Bain.
64 E. 110 St., 6 cases.
55 E. 109, 11 cases, 1934.
494 Manhattan Ave., 3 cases, 1933.
1598 Madison Ave., 10 cases, 1934.
949 Longwood Ave., 8 cases.
Philco 3511 Broadway, 7 cases.
Philco 452 E. 145, 4 cases.
899 Longwood Ave., 5 cases.
338 Beekman Ave., 4 cases.
504 E. 138 St., 3 cases, Sept.
1952 2nd Ave., 7 cases, Nov.
129 E. 102, 4 cases, Dec.
600 Concord Ave., 4 cases, Nov.
2285 Seventh Ave., 2 cases, Nov.

3846 Queensboro Farms

781 Prospect Ave., 2 cases, June.
643 Wales, 6 cases.
3822 Broadway, 8 cases, 1937.
21 First Ave., 5 cases, Oct.
605 W. 158, 3 cases, Oct.
155 W. 135.

Lost to Bagdan

544 E. 171 St., 4 cases, Nov. 17.

Lost to Rivera & Sunshine

322 E. 100 St., 6 cases, Ret., Sept.
327 E. 100 St., 3 cases, Ret., Sept.
3805 Broadway, 8 cases, Oct.
306 E. 100 St., 6 cases, Ret., Sept.

Eisenberg

340 E. 77, 7 cases, Jan.
2881 Broadway, Sept.
634 Fox St., 6 cases, Oct.
850 E. 150, 2 cases, Sept.

Gained from Adler

2218 Second Ave., 4 cases, Oct. 17.
1353 Fifth Ave., 2 cases, Oct. 18.

From Others Gained

2 E. 111 St., Gold Medal, Oct. 20.
243 E. 198, Gold Medal, Oct. 18.
2168 Second Ave., Queensboro, Oct. 21.
2102 Second Ave., Muller, Nov. 4.
824 Hunt's Point, Meadowbrook, Oct. 23.
1425 Wilkins Ave., Meadowbrook, Oct. 14.
328 E. 66, Manchester, Oct. 18.
186 E. 116 St., Rivieria, Nov. 30.

Cost to Tri Boro

1938

1869 Third Ave., 30 cases, Dec.
800 Home St., $30.24.
1311 Brook, 25 cases, Nov. 28.
504 E. 138, 572 E. 138, 20 cases, 2 qt. HY, Oct. 22.
1642 Lexington, 30 cases, Nov. 14.
3805 Burg.
413 St. Anns, $100.
311 St. Anns, 34 cases, Oct. 22.
1265 Brook Ave.
1364 Washington Ave., 50 cases, Nov. 28.
328 E. 66 St., 20 cases, Nov. 14.
232 E. 108 St., 50 cases, Nov. 14.
613 E. 141, All 27.23.
222 E. 104, All in price.
167 St. Anns, 50 cases.

3847 *Defendants' exhibit no. 5*

ORISKANY FALLS,
New York, August 4, 1938

JETTER DAIRY CO.,
43 Perry St., N. Y. City.

DEAR SIR: The Metropolitan Producers Bargening Agency and the Distributors Bargening Agency are to meet soon to negotiate a price for our August milk. We believe that this conference will be successful if all the distributors in the market will take part.

We of the Oriskany Falls Milk Producers Co-Op. Inc., recom'end that you join the Distributors Agency and help secure for us an adequate price for our August milk.

Sincerely yours,

(S) H. B. RICHMOND, *Sec.*

3848 *Defendants' exhibit no. 6*

Form D-176-180 pads 100S-10-38 W. P. Co.

RECEIPT

Route No. 18. Date, 12/5 1938. Received from Sheffield F Co., Inc., $1.48 Dollars For 198 qts. @ ¾.

Signature.....

Address, 694 Dawson.

Paid by H. S.

$148. Period From 11/1 1938 To 11/30 1938.

3849 *Defendants' Exhibit No. 11*

FINAL OPERATIONS FOR THE MONTH OF AUGUST 193

The combined disposition of all pooled milk handled in the A ciation and sold to Dealers was as follows:

Class		Total	Pe
1	Fluid milk	111,801,935	
2A	Fluid cream (sweet)	44,718,096	
2B	Plain condensed milk, cream cheese, ice cream	11,932,664	
2C	Milk and storage cream for sour cream	2,078,639	
3	All milk made into evaporated milk, whole condensed milk, milk chocolate, whole milk powder, malted milk and certain types of cheese.	6,570,213	
4A	Milk into butter	6,246,578	
	Grand total	183,348,065	

POOL RETURN AND FINAL CLASSIFICATION FOR SEPTEMBER 193

The Dairymen's League Cooperative Association, Inc., annou an average net paid pool return for September of $1.83 for 3 milk at the 201-210-mile freight zone. Grade A premiums, wi earned, are in addition. This is 56¢ per cwt. above the average paid pool return for August, and is subject to the various different

The combined disposition of all pooled milk handled in the A ciation and sold to Dealers was as follows:

Class		Total	Pe
1	Fluid milk in marketing area	61,453,908	
1A	Fluid milk outside marketing area	35,586,583	
2A	Fluid cream in marketing area	21,556,562	
2A	Fluid cream outside marketing area	13,599,183	
2B	Plain condensed, frozen desserts and homogenized mixtures in marketing area	2,956,086	
3A	For all milk made into evaporated milk, whole condensed milk, milk chocolate, whole milk powder, malted milk and certain types of cheese.	13,446,903	
3B	Cold storage cream	9,823,806	
3C	Frozen desserts, homogenized mixtures outside marketing area	2,795,900	
3D	Cream to a purchaser, not a handler, outside of the State of New York and cream cheese.	3,624,724	
4A	Butter	9,848,267	
4B	American cheese		
	Grand total	174,591,452	

NOTE.—Of the total pounds for September, 67.94% was sold in the New York Metropolitan Milk M ing Area and was subject to the minimum prices for each class as announced by the Market Admini Prices applying to other markets were established by negotiations with dealers or by the variou Milk Control Boards. The Board of Directors at their September meeting revised our differential as of October 1st. These differentials will become effective on your October milk.

3850 *Defendants' Exhibit No. 12*

POOL RETURN FOR OCTOBER 1938

The Dairymen's League Co-operative Association announces an AVERAGE net paid pool return for October of $1.87 for 3.5 milk at the 201–210 mile freight zone. This includes an AVERAGE plus differential of .06 cents. Grade A premiums where earned are in addition. This is the average return on all milk delivered to country plants and direct to city markets by members.

Gross pool return in base zone. (201–210 miles) for 3.5% milk (not including differentials)	1.865
Less service costs	.055
Net pool return in base zone (201–210 miles) (not including differentials)	1.81

CLASSIFICATION FOR OCTOBER 1938

The combined disposition of all pooled milk handled in the Association and sold to Dealers was as follows:

Class		Total	Percent
1	Fluid milk in marketing area	71,137,678	40.48
1	Fluid milk outside marketing area	36,619,930	20.84
2A	Fluid cream in marketing area	21,002,855	11.95
2A	Fluid cream outside marketing area	11,609,892	6.61
2B	Plain condensed, frozen desserts and homogenized mixtures in marketing area	2,603,546	1.48
3A	For all milk made into evaporated milk, whole condensed milk, milk chocolate, whole milk powder, malted milk, and certain types of cheese	9,964,598	5.67
3B	Cold storage cream	291,060	.17
3C	Frozen desserts, homogenized mixtures outside marketing area	3,216,132	1.83
3D	Cream to a purchaser, not a handler, outside of the State of New York and cream cheese	10,182,719	5.80
4A	Butter	9,075,163	5.17
4B	American cheese		
	Grand total	175,703,573	100.00

NOTE.—Of the total pounds for October, 69.25% was sold in the New York Metropolitan Milk Marketing Area and was subject to the minimum prices for each class as announced by the Market Administrator. Prices applying to other markets were established by negotiations with dealers or by the various State Milk Control Boards. The Board of Directors at their September meeting revised our differential system as of October 1st. These differentials will become effective on your October milk.

3851 *Defendants' Exhibit No. 13*

CLASSIFICATION OF MILK REPORTED AS RECEIVED FROM PRODUCERS BY DAIRYMEN'S LEAGUE

	September	October	November
Class I			
Priced	63,112,397	71,137,678	70,033,283
Unpriced	11,594,755	8,528,088	8,277,054
Class II-A			
Priced	20,681,381	20,658,804	23,811,268
Unpriced	4,806,923	3,932,196	1,791,861
Class II-B	1,227,557	1,733,305	1,663,428
Class III-A	12,956,257	9,868,531	6,706,246
Class III-B	8,148,004	291,060	46,075
Class III-C	1,663,981	2,259,591	2,011,634
Class III-D	6,268,483	10,175,210	9,193,227
Class IV-A	7,952,850	7,344,101	2,499,825
Class IV-B			25,527
	138,412,588	135,928,558	125,969,428

3852 *Defendants' Exhibit No. 15*

SEPTEMBER 15TH, 193

TO OUR PATRONS:

The following is a statement of the utilization of milk received by the Dellwood Dairy Co., Inc., Fort Edward, New York, during the month of August 1938. This statement is in terms of milk containing 3.5% B. F.

	Total pounds	Percentage	3.5% price	Amount
Class 1 sales metropolitan area	502,610	18.9089	[illegible]	[illegible]
Fluid milk sales to dealers	427,498	16.1223	[illegible]	[illegible]
Class 2 sales metropolitan area	184,452	6.9377	[illegible]	[illegible]
Fluid cream sales to dealers	135,913	5.1356	[illegible]	[illegible]
Milk sales—Upstate N. Y. and out of state	228,808	8.6089	[illegible]	[illegible]
Cream sales—Upstate N. Y. and out of state	1,064,167	40.0279	[illegible]	[illegible]
Cream for manufacture of butter and buttermilk	108,912	4.0327	[illegible]	[illegible]
	2,651,160	100.0000		

STATEMENT

Due to very bad conditions in the New York Market and low cream prices out of state, our blended price for August 1938 amounted to $1.39259 per cwt.; however, out of consideration for our producers we are paying $1.43 per cwt. for 3.5% milk.

Beginning with September 1st, 1938, milk will be paid for on the basis of prices contained in the new Federal AAA Order.

DELLWOOD DAIRY CO., INC.

3853 *Defendants' Exhibit No. 16*

OCTOBER 24TH, 193

TO OUR FORT EDWARD, N. Y., PATRONS:

During the month of September 1938 we received from patrons our plants a total of 3,177,468 pounds of milk, of which [illegible] pounds were included in the New York Market Administrator's Po

	Per cwt.
Our average net pool obligation for milk received from producers and included in the New York market administrator's pool amounted to	$1.4
The New York market administrator's uniform price in the 201-210 mile zone amounted to	1.3
The difference, amounting to	.0
on total net pooled milk was paid by us to the New York market administrator's producers settlement fund.	
Average price paid to our producers for 3.5% milk at Fort Edward, N. Y.	1.3

DELLWOOD DAIRY CO., INC.

Defendants' Exhibit No. 17

NOVEMBER 25TH, 1938.

OUR FORT EDWARD, NEW YORK PATRONS:

he following is a statement showing the classification of milk ived by us from producers at our plants during the month of ber, 1938:

		Pounds	Percentage	Price	Amount
eceived from producers included in New York et administrator's pool and paid for at the et administrator's uniform price		3,013,907	98.568	$1.91	$57,565.62
eceived from producers not included in New k market administrator's pool		43,777	1.432	1.011	442.59
Total milk received from producers		3,057,684	100.000		58,008.21
York State publicity on class I and class II es in New York State ng the months of Sep ber and October 1938					
ptember	2,389,547 pounds				
tober	2,276,387 pounds				
Total	4,665,934 pounds @ .00375				174.97
					57,833.24
ge price for cwt					1.89[illegible]
ge price paid to our producers for 3.5% milk at Edward, N. Y.					1.895

DELLWOOD DAIRY CO., INC.

Defendants' Exhibit No. 18

DECEMBER 23RD, 1938.

OUR FORT EDWARD, N. Y. PATRONS:

he following is a statement showing the classification of milk ived by us from producers at our plants during the month of ember, 1938:

	Pounds	Percentage	Price	Amount
eceived from producers included in New York et administrator's pool and paid for at the mar- administrator's uniform price	2,643,[illegible]	[illegible]	[illegible]	[illegible]
eceived from producers not included in New market administrator's pool	[illegible]	1.07[illegible]	[illegible]	[illegible]
Total milk received from producers	2,672,[illegible]	100.000		[illegible]
York State publicity on class I and class II-A n New York state 1,916,549 pounds @ .00375				[illegible]
				[illegible]
e per cwt				[illegible]
e price paid to our producers for 3.5% milk at Ft ard, N. Y.				[illegible]

e take this opportunity of extending to our patrons our best es for a Merry Christmas and a Prosperous New Year.

DELLWOOD DAIRY CO., INC.

3856 *Defendants' Exhibit No. 22.*

MARKET ADMINISTRATOR FOR THE NEW YORK METROPOLITAN MILK MARKETING AREA—REPORT FOR MONTH OF SEPTEMBER 1938

Temp. Form 2. United States Secretary of Agriculture. Order No. 27 Commissioner of Agriculture and Markets for the State of New York. Order No. 126.

Name and address of handler—Slate Hill Milk & Cream Co., Inc. 1060 Broad Street, Newark, New Jersey. Leave blank for administrator's use.

Summary of All Plants

NOTE.—If lines are insufficient to list all plants, attach continuation sheets, bringing forward total to this sheet.

1	2	3	4	5	6	7
Location of plant	Milk received from producers	Class I unpriced	Class I total	Combined class II-A and class II-B	Total net pooled milk	Net pool obligation
	Pounds	*Pounds*	*Pounds*	*Pounds*	*Pounds*	*Dollars*
Brought forward	1,203,862	1,144,803	1,152,049	27,140	8,455	78
Total	1,203,862	1,144,803	1,152,049	27,140	8,455	78

1. 100 minus the percent total column 3 is of total column 2, 4 percent.

2. Administration assessment (add totals columns 4 and 5 and multiply by announced rate). $235.84.

3. Memo: Total pounds class I milk sold in the marketing area as grade "A" (article VII, section 4), None pounds.

This report consisting of this page, — continuation sheets and schedules on form 1 for — plants, is correct to the best of my knowledge and belief.

SLATE HILL MILK & CREAM CO., INC.,
Handler.

CONTROLLER.

Signed this 10th day of October 1938.

3857 *Defendants' Exhibit 22-A*

MARKET ADMINISTRATOR FOR THE NEW YORK METROPOLITAN MILK MARKETING AREA—MONTH SEPTEMBER 1938

United States Secretary of Agriculture. Order No. 27. Commissioner of Agriculture and Markets for the State of New York. Order No. 126.

SCHEDULES OF RECEIPTS AND UTILIZATION OF MILK AT SLATE HILL, ORANGE, NEW YORK

Slate Hill Milk & Cream Co., Inc., 1060 Broad Street, Newark, N. J. Zone, 81–90. Railroad, M. & U. Grade A or B, B.

Schedule A—Summary of Receipts at This Plant

Receipts of Products From Approved Plants—Receipts of Milk

	Product pounds	Pounds butterfat		Pounds	Test	*Pounds butterfat
Cream			From producers	1,203,562	3.707	
Plain condensed milk			From other plants	1,167,773		
Homogenized mixtures			From own farm			
Skim milk			Total milk	2,371,635		
Total			Total butterfat in products			
			Total of receipts from approved sources			

Schedule B—Net Pool Obligation for This Plant

1	2	3	4	5	6	7	8	9
Class	Utilization of milk from producers	Percent	Net pooled milk (col. 2× col. 3)	Class prices	B. F. diff. + or −	Trans. diff. + or −	Total class prices	Total value (col. 8× col. 4)
	Pounds		*Pounds*					
Priced	7,246	100	7,246	$2.45	+$0.0828	+$.08	$2.6128	$189.33
I-A								
I-B								
I-C	24,673	049[1]	1,209	935	+.05527		.99027	11.97
I-D								
II-A								
II-B								
Total	31,919		8,455	Total value net pooled milk				201.32

	Rate per cwt. + or −	Amount[2] − or +	
Butterfat adjustment. Rate is 4× points of butterfat test above or below 3.5	+$0.0828	−7.00	
Weight adjustment: Rate for zone of plant (art. IV, sec. 3, col. B	+.08	−6.76	
Location differential: Rate 20 cents for plants located in counties listed in art. VI, sec. 1, par. 8	+.20	−16.91	
Net adjustments		.30.67	
Net pool obligation		170.65	

[1] From column 9 schedule G.
[2] From Line No. 1, summary report on Form 2.
Rate×total cwt. 4 If rate is + amount is −; if rate is − amount is +.

3858 Schedule C—Receipts From Handler's Other Plants or Plants of Other Handlers

Location and owner of plant	Milk or product (name)	Quantity of milk or product	Butterfat in milk or product	For administrator's use only
		Pounds	*Pounds*	
Dairyland Milk Company, Fraser, N. Y.	Raw milk	480,165		
Grover Farms, Grover, Pa.	do	687,608		
Total		1,167,773		

Schedule D—Pounds of Grade A Milk Qualified for Premiums

Butterfat content	Bacteria count per cubic centimeter			Total
	10,000 or less	10,000 to 25,000	25,000 or over	
				Pounds
3.7				
3.8	None			
3.9				
4.0 and above				
Total				

3859 Schedule E—Milk or Products Shipped to Other Plants or Other Handlers' Plants

Location and owner of plant	Milk or product shipped		Claimed disposition		For administrator's use only—class
	Milk or product (name)	Butterfat in milk or product	Milk or product (name)	Butterfat in milk or product	
		Pounds		*Pounds*	
Milk used in chocolate and buttermilk sold in N. Y. C.		6,317	Buttermilk and chocolate	6,317	I Priced.
New Jersey dealers	Milk	998,634			I Unpriced.
Do	Cream (qts.)	1,100	Cream (qts.)	1,100	II-A Priced
Fairmount Creamery, Buffalo, N. Y.	Cream (qts.)	1,000	Butter		II-A Unpriced. IV-A.

Schedule F—Unpriced Class I and II-A Milk, and Class III-D Milk

Destination (if class III-D milk give, in addition, name and address of purchaser)	Unpriced milk (Art. IV, Sec. 1) milk used		Butterfat class III-D
	Class I	Butterfat in class II-A	
	Pounds	*Pounds*	*Pounds*
New Jersey dealers	1,144,803	27,140	
Totals	1,144,803	27,140	

Schedule G—Utilization of Milk

2	3	4	5	6	7	8	9
Item	Quantity of products	Milk butterfat in product	Less from other plants per sched. C	Less B. F. pro rata own farm	B. F. in plant loss [1]	Utilization of butterfat from producers	Utilization of milk from producers
	Pounds	*Pounds*	*Pounds*	*Pounds*	*Pounds*	*Pounds*	*Pounds*
Priced	6,317	6,317			929		7,246
Unpriced (sched. F)	2,165,807	2,165,807	1,167,773		146,769		1,144,803
Priced							
Unpriced (sched. F) cream.....quarts	1,100	26,698			532		27,140
Plain condensed							
Frozen desserts							
Homogenized mixtures							
Name product							
Cold storage cream							
Frozen desserts							
Homogenized mixtures							
Cream (sched. F)							
Cream cheese							
Cream for butter.....quarts	1,000	24,100			483		24,673
American cheese							
Total		2,222,922	1,167,773		148,713		1,203,862

[1] Plant loss or waste not exceeding 2 percent of milk received from producers may be prorated class: Excess over 2 percent is class 1.

ule H—Milk Received From Members and Non-Members

	Total	Percent	Prorated net pooled milk	Number of producers
	Pounds		*Pounds*	
d from producers not members of a co-association	1,203,862	100		107
d from producers members of a cooperative				
	1,203,862	100		107

Defendants' Exhibit 27–A

ADMINISTRATOR FOR THE NEW YORK METROPOLITAN MILK MARKETING AREA—MONTH, NOVEMBER 1938

No. 27. Secretary of Agriculture of the United States.
o. 126. Commissioner of Agriculture and Markets for the New York.

s of Receipts and Utilization of Milk at Slate Hill, Orange, New York

town Milk & Cream Co., Inc., 1060 Broad Street, Newark, one, 81–99. Railroad, M. & U. Grade A or B, A.

Schedule A—Summary of Receipts at This Plant

ts of Milk—Receipts of Products From Approved Plants

	Pounds	Test	Pounds butterfat		Product pounds	Test	Pounds butterfat
rs	1,377,721	3.8302		Cream			
m				Plain condensed milk			
ants	837,010			Homogenized mixtures			
				Skim milk			
	2,214,731			Total			
				Total butterfat receipts			

Schedule B.—Utilization of Milk and Net Pool Obligation for This Plant

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
		Milk or products moved or on hand																
Class	Item	Quantity pounds	Butter fat test	Less quantity made from milk or products from other plants (schedule D)	Milk or milk equiv. from producers and own farm.	Less from own farm prorata	Net utilization milk from producers	Plus plant loss (see note 1)	Net classification milk from producers (see note 2)	Class	Class totals for pool	Per cent	Net pooled milk (col. 12 × col. 13)	Class prices	B. F. diff. + or −	Trans. diff. + or −	Total class prices	Total value (col. 18 × col. 14 ÷ 100)
		Pounds		*Pounds*	*Pounds*	*Pounds*	*Pounds*	*Pounds*	*Pounds*		*Pounds*		*Pounds*					
I	Priced	911, 205		348, 133	563, 072			11, 855	574, 927	I-Priced	574, 927	100	574, 927	2. 45	+. 13208	+. 08	2. 66208	15, 305. 02
	Unpriced (sched. G)	2, 708, 974		2, 296, 041	412, 933			8, 694	421, 627	II-A priced	53, 044		53, 044	1. 90	+. 13208	+. 05	2. 08208	1, 104. 42
II-A	Priced	51, 983			51, 983			1, 061	53, 044	II-B								
	Unpriced (sched. G)	83, 239			83, 239			1, 700	84, 939	III-A								
II-B	Plain condensed									III-B								
	Frozen desserts									III-C		69397						
	Homogenized mixtures									III-D	243, 184	See note 3	168, 762	1. 052	+. 13208		1. 18408	1, 998. 28
III-A	Name product									IV-A								
										IV-B								
III-B	Cold storage cream (see note 5)									Total	871, 155		796, 733	Total value net pooled milk				18, 407. 72

III-C	Homogenized mixtures (Cream (Sched. G)	398,134		169,320	228,814							
III-D	Cream cheese	9,503			9,503			4,867	243,184			
IV-A	Butter											
IV-B	American cheese											
	Total[1]	4,163,038		2,813,494	1,349,544			28,177	1,377,721			

	Rate per cwt. + or −	Amount − or + (see note 4)	
Butterfat adjustment: Rate is 4 × points of butterfat test above or below 3.5	+.13208	−1052.32	
Freight adjustment: Rate for one of plant (art. IV, sec. 3, col. B)	+.08	−637.39	
Location differential: Rate 20 cents for plants located in counties listed in art. VI, sec. 1, par. 8	+.20	−1593.47	
Net adjustments			−3,283.18
Net pool obligation			15,124.54

NOTE 1.—Plant loss not in excess of 2 per cent of milk received from producers (sched. A) may be prorated in column 9 to the total of the items in each class in column 8.
NOTE 2.—Total column 10 must equal milk received from producers (sched. A). Any difference must be added to class 1 priced.
NOTE 3.—From line 1 summary report form 2.
NOTE 4.—Rate × total col. 14÷100. If rate is + amount is−. If rate is − amount is +.
NOTE 5.—If this item in column 3 represents cream sent to licensed warehouse from this plant append a list showing for each lot of cream: The name of warehouse, pounds and test of cream, and date sent to storage.

Schedule C—Milk Received From Members and Nonmembers

	Total	Per cent	Prorated net pooled milk
Milk received from producers not members of a cooperative association	Pounds		Pounds
Milk received from producers members of a cooperative association			
Total		100	

Name of cooperative association

3862 Schedule D—Receipts From Handlers' Other Plants or Plants of Other Handlers

Location and owner of other plant	Milk or product received (name)	Class of utilization at this plant	Quantity of milk or product	Butterfat test	Leave blank
			Pounds		
Slate Hill Milk & Cream Co. Inc., Slate Hill, N. Y.	Raw Milk		1,976,484	3.71517	
N. Y. State Guernsey Breeders Cooperative, Inc., West Coxsackie, N. Y.	Raw Milk		837,010	4.67147	
			2,813,494		

Schedule E—Pounds of Grade A Milk Qualified for Premiums

Butterfat content	Bacteria count per cubic centimeter			Total
	10,000 or less	10,000 to 25,000	25,000 or over	
3.7	153,728	61,821	18,063	
3.8	150,005	36,922	64,993	
3.9	129,253	25,489		
4.0 and above	1,050,330	141,429	50,298	
Total	1,483,316	265,661	133,354	

Schedule F—Milk or Products Shipped to Other Plants or Other Handlers' Plants

Location and owner of other plant	Milk or product shipped (name)	Class of utilization at other plant	Quantity of milk or product	Butterfat test	Leave blank
			Pounds		
New York City	Milk	I	563,072		
New Jersey and Upstate	do	I Unpr	412,933		
New York City	Cream	II-A	3,280 Qts		
Upstate	do	II-A Unpr	3,968 Qts		
New Jersey	do	III-D	18,979 Qts		
Slate Hill, N. Y	Cream	III-D	453 Qts		

Schedule G—Unpriced Class I and II–A Milk, and Class III–D Milk

Purchaser (name and address)	Destination	Class I	Class II–A cream	Class III–D cream
		Pounds	*Pounds*	*Pounds*
New Jersey-Upstate New York		412,933	83,239	228,814
Slate Hill, N. Y.				9,503
Total				

3865 *Defendants' exhibit No. 31*

OCTOBER 24TH, 1938.

TO OUR PATRONS:

The following is a statement of the classification of milk received from producers at our plant at Slate Hill, New York, during the month of September 1938:

Milk included in New York market administrator's pool and paid for at New York market administrator's uniform price	percent	.70233
Milk out of New York market administrator's pool	percent	99.29767
Total	percent	100.00000
Average price paid for 3.5% milk at Slate Hill, New York	per cwt	$2.15

SLATE HILL MILK & CREAM CO., INC.

3866 *Defendants' exhibit No. 32*

NOVEMBER 25TH, 1938.

TO OUR PATRONS:

The following is a statement of the classification of milk received from producers at our plant at Slate Hill, New York, during the month of October 1938:

Milk included in New York market administrator's pool and paid for at New York market administrator's uniform price	percent	.4518
Milk out of New York market administrator's pool	percent	99.5482
Total	percent	100.0000
Average price paid for 3.5% milk at Slate Hill, New York	per cwt	$2.19

SLATE HILL MILK & CREAM CO., INC.

3867 *Defendants' Exhibit No. 33*

DECEMBER 23RD, 1938.

TO OUR PATRONS:

The following is a statement of the classification of milk received from producers at our plant at Slate Hill, New York, during the month of November 1938:

Milk included in New York market administrator's pool and paid for at New York market administrator's uniform price	percent	.3105
Milk out of New York market administrator's pool	percent	99.6895
Total	percent	100.0000
Average price paid for 3.5% milk at Slate Hill, New York	per cwt	$2.38

We take this opportunity of extending to our patrons our best wishes for a Merry Christmas and a Prosperous New Year.

SLATE HILL MILK & CREAM CO., INC.

Defendants' Exhibit No. 34

OCTOBER 24TH, 1938.

TO OUR PATRONS:

The following is a statement of the classification of milk received from producers at our plant at Slate Hill, New York, during the month of September 1938:

Milk included in New York market administrator's pool and paid for at New York market administrator's uniform price	percent	61.2134
Milk out of New York administrator's pool	percent	38.7866
Total	percent	100.0000
Average price paid for 3.5% milk at Slate Hill, New York	per cwt	$2.15

MIDDLETOWN MILK & CREAM CO., INC.

Defendants' Exhibit No. 35

NOVEMBER 25TH, 1938.

TO OUR PATRONS:

The following is a statement of the classification of milk received from producers at our plant at Slate Hill, New York, during the month of October 1938:

Milk included in New York market administrator's pool and paid for at New York market administrator's uniform price	percent	58.909
Milk out of New York administrator's pool	percent	41.091
Total	percent	100.000
Average price paid for 3.5% milk at Slate Hill, New York	per cwt	$2.17

MIDDLETOWN MILK & CREAM CO., INC.

3868 *Defendant's Exhibit No. 36*

DECEMBER 23RD, 1938.

TO OUR PATRONS:

The following is a statement of the classification of milk received from producers at our plant at Slate Hill, New York, during the month of November 1938:

Milk included in New York market administrator's pool and paid for at New York market administrator's uniform price	percent	57.8238
Milk out of New York market administrator's pool	percent	42.1762
Total	percent	100.000
Average price paid for 3.5% milk at Slate Hill, N. Y.	per cwt	$2.18

We take this opportunity of extending to our patrons our best wishes for a Merry Christmas and a Prosperous New Year.

MIDDLETOWN MILK & CREAM CO., INC.

3969 *Defendants' Exhibit No. 37*

MARKET ADMINISTRATOR, NEW YORK METROPOLITAN MILK MARKETING AREA

Federal Order No. 27. Issued by the Secretary of Agriculture and New York Official Order No. 126. Issued by the Commissioner of Agriculture and Markets. Telephone: Murray Hill 3-2940. 95 Madison Avenue, New York, N. Y.

COMPUTATION OF THE UNIFORM PRICE, NEW YORK METROPOLITAN MILK MARKETING AREA

Following are the details of the computation of the uniform price for the New York Metropolitan Milk Marketing Area for November 1938, as outlined in Article VI of Federal Order No. 27, issued by the Secretary of Agriculture, and Order No. 126, issued by the Commissioner of Agriculture and Markets, State of New York.

	Pooled			Not pooled	
	Milk	Percent	Values	Pounds	Percent
	Pounds		*Dollars*		
Class I	204,742,307	65.94	5,340,349.25	31,799,658	79.56
Class II-A	63,830,997	20.56	1,317,799.56	5,699,060	14.26
Class II-B	8,283,825	2.67	127,240.30		
Class III-A	7,015,963	2.26	100,355.48	509,350	1.27
Class III-B	979,422	.32	13,768.42	17,094	.04
Class III-C	6,347,370	2.04	76,267.79	557,539	1.39
Class III-D	13,159,578	4.24	158,724.53	936,498	2.34
Class IV-A	4,854,096	1.56	52,807.07	450,388	1.13
Class IV-B	1,282,515	.41	12,287.54	1,755	.01
Total	310,496,093	100.00		39,971,342	100.00
Total value net pooled milk			7,199,599.94		
Less adjustments:					
Butterfat differentials	$497,368.30				
Location differentials	80,538.41				
	577,906.71				
Less freight differential	26,347.50		551,559.21		
Handlers net pool obligation			6,648,040.73		
Deductions:					
Cooperative association pay	$71,805.51				
Market service payments	40,673.39		112,478.90		
			6,535,561.83		
Add cash in producer settlement fund			116,391.29		
			6,651,953.12		
Less reserve			131,535.17		
Net pool milk	310,496,093 lbs.				
Uniform price at	2.16 cwt.		6,520,417.95		

E. M. HARMON

3870 *Defendants' Exhibit No. 38*

MARKET ADMINISTRATOR NEW YORK METROPOLITAN MILK MARKETING AREA

Federal Order No. 27. Issued by the Secretary of Agriculture and New York Official Order No. 126. Issued by the Commissioner of Agriculture and Markets. Telephone: Murray Hill 3-2940. 95 Madison Avenue, New York, N. Y.

DECEMBER 27, 1938.

ANALYSIS OF MILK UTILIZATION NEW YORK MARKET SEPTEMBER AND OCTOBER 1938

For September and October a few reports were late. A few others were confused and our staff was overworked with current pressing duties. We have, however, been able to complete a summary of the classification of milk from all reports of all handlers (including late and corrected reports) who reported milk received from producers during those months, which we give you below. In analyzing this data you can determine approximately the amount of errors and late reports by handlers by deducting the unpriced Class I and Class II-A from the column entitled "Total Milk Reported Pounds" each month and comparing the result with the column entitled "Milk Included In Price Computation Pounds."

	September 1938		October 1938	
	Milk included in price computation	Total milk reported	Milk included in price computation	Total milk reported
Class I	*Pounds*	*Pounds*	*Pounds*	*Pounds*
Priced	203, 478, 066	208, 021, 772	211, 946, 396	217, 781, 275
Unpriced		33, 900, 632		32, 611, 622
Class II-A:				
Priced	59, 235, 329	66, 022, 357	67, 848, 034	67, 962, 811
Unpriced		9, 142, 413		7, 673, 65
Class:				
II-B	8, 646, 787	8, 886, 217	9, 099, 463	9, 094, 46
III-A	23, 029, 889	24, 209, 366	11, 987, 310	12, 838, 99
III-B	21, 878, 101	21, 710, 080	2, 585, 102	2, 613, 77
III-C	11, 746, 383	12, 730, 271	10, 663, 196	12, 045, 53
III-D	8, 101, 396	11, 490, 688	13, 748, 107	14, 761, 30
Class:				
IV-A	16, 065, 528	17, 468, 528	18, 250, 190	18, 250, 19
IV-B	670, 721	7, 025, 046	4, 178, 682	5, 253, 37
Total	356, 852, 20	420, 607, 370	350, 326, 500	401, 285, 57

(Signed) E. M. Harmon,
E. M. HARMON,
Market Administrator.

371 *Defendant's Exhibit No. 39*

ARKET ADMINISTRATOR, NEW YORK METROPOLITAN MILK MARKETING AREA, 95 MADISON AVENUE, NEW YORK, N. Y.

Release—Immediate.

OCTOBER 14, 1938.

IFORM PRODUCER PRICE OF $1.87 FOR SEPTEMBER MILK IS ANNOUNCED

NEW YORK, Oct. —. E. M. Harmon, market administrator of the deral and State orders regulating the handling of milk in the New rk metropolitan marketing area, today announced $1.87 as the uni- m price per hundredweight of 3.5 percent butterfat content milk eived from producers during the month of September at handlers' nts in the 201–210 mile zone from New York City.

The uniform producer price of $1.87 per hundredweight for Sep- ber milk is based on a Class 1, or fluid milk, price of $2.45 per dredweight, $1.75 per hundredweight for Class 2–A, or milk d for cream purposes, and the following prices for each of the re- ining seven class of milk, which represent the value of milk used various manufactured products: Class 2–B milk, $1.338 per hun- dweight; Class 3–A milk, $1.238 per hundredweight; Class 3–B k, $1.135 per hundredweight; Class 3–C milk, $1.035 per hundred- ght; Class 3–D milk, $1.01 per hundredweight; Class 4–A milk, per hundredweight; and Class 4–B milk, .832 per hundredweight.

Producers who delivered milk in September to plants located in es nearer or farther than the 201–210 mile zone is from New York y are to receive from handlers the uniform price plus or minus erentials for location and for butterfat content.

he price announced is the first since the federal-state program went effect with the approval of over 85 percent of the producers in n states who voted in a referendum last August. The orders were ed following a series of public hearings held during a period in ch many producers were receiving around $1 per 100 pounds for r milk. The regulatory program, which applies only to handlers he metropolitan market, is designed to improve marketing condi- s and returns to approximately 65,000 dairy farmers located in York, Pennsylvania, New Jersey, Maryland, Connecticut, Massa- etts, and Vermont.

he price announced is based on report of handlers, which show their receipts of milk from producers and represents the use A value of all milk as reported by handlers for the marketing area, Mr. Harmon explained. The September price, he said, substantial increase over prices received by producers before Sep- ber 1, when the federal-state milk marketing program went into t in the metropolitan area."

Mr. Harmon reported that the total amount of milk accounted for in the uniform price computation amounted to 356,852,200 pounds. This milk, based on the value of each of the nine use classes established by the orders, had a total value of $7,107,527.15. Out of this total there had to be deducted a total of $270,605.13 for market-service claims by handlers and for payments to cooperatives. Claims filed by handlers for market-service payments amounted to $204,230.33. The market-service payments are provided for in the orders on surplus milk moved to manufacturing plants when not needed in the market. Actual payments are to be made to handlers only after audit of their claims. The remainder of $66,374.80 is to be paid to cooperatives which were determined by the Secretary of Agriculture of the United States and the New York State Commissioner of Agriculture and Markets as meeting certain requirements provided for in the orders. These requirements relate to the ability and willingness of *of* the cooperatives to function in a manner which will serve the market as a whole.

Under the terms of the federal-state orders, the market administrator is required to announce the uniform producer price on the 14th day of each month. Producers must be paid by handlers by the 23th of each month.

3872 *Defendants' Exhibit No. 40*

MARKET ADMINISTRATOR, NEW YORK METROPOLITAN MILK MARKETING AREA, 95 MADISON AVENUE, NEW YORK, N. Y.

Release—Immediate.

NOVEMBER 14, 1938.

UNIFORM PRODUCER PRICE OF $1.91 FOR OCTOBER MILK IS ANNOUNCED

NEW YORK, Nov. —. A uniform price of $1.91 per hundredweight of 3.5 percent butterfat content milk received from producers during the month of October at handlers' plants in the 201–210 mile zone from New York City was announced today by E. M. Harmon, administrator of the Federal-State orders regulating the handling of milk in the New York metropolitan marketing area.

The producer price for October milk, Mr. Harmon said, represents an increase of four cents per hundredweight over that announced by the market administrator for milk received at handlers' plants during September. The October price of $1.91 is based on a Class I, or fluid milk, price of $2.45 per hundredweight, $1.75 per hundredweight for Class II–A, or milk used for cream purposes, and the following prices for each of the remaining seven classes of milk which represent the value of milk used for various manufactured products: Class II-B milk, $1.35 per hundredweight; Class III–A milk, $1.25 per hundred-

weight; Class III–B milk, $1.136 per hundredweight; Class III–C milk, $1.086 per hundredweight; Class III–D milk, $1.011 per hundredweight; Class IV–A milk, 93.6 cents per hundredweight; and Class IV–B milk, 92.2 cents per hundredweight.

Establishment of the uniform producer price is provided for by the Federal-State orders which went into effect September 1 with the approval of over 85 percent of the producers in seven states who voted in a referendum. The price announced each month is based on reports which handlers are required to file with the market administrator. These monthly reports show, among other things, the receipts of milk from producers at handlers' plants and the use made of this milk.

Producers delivering milk to plants located in zones nearer or farther than the 201–210 mile zone is from New York City receive from handlers the uniform price plus or minus differentials for location. Differentials for butterfat content are also provided.

Mr. Harmon reported that the total amount of milk accounted for in the uniform price computation amounted to 350,326,500 pounds. This milk, based on the value of each of the nine use classes estab-
3873 lished by the orders, had a total value of $7,075,507.38. Out of this total there had to be deducted a total of $252,653.71 for market service claims by handlers and for payments to cooperatives. Claims filed by handlers for market service payments amounted to $182,591.42. The market service payments are provided for in the orders on surplus milk moved to manufacturing plants when not needed in the market. Actual payments are to be made to handlers only after audit of their claims. The remainder of $70,062.29 is to be paid to cooperatives which were determined by the Secretary of Agriculture of the United States and the New York State Commissioner of Agriculture and Markets as meeting certain requirements provided for in the orders. These requirements relate to the ability and willingness of the cooperatives to function in a manner which will serve the market as a whole.

The program under the Federal-State orders is designed to improve marketing conditions for approximately 65,000 dairy farmers who sell to handlers operating in the New York metropolitan area. These producers are located in New York, Pennsylvania, New Jersey, Connecticut, Massachusetts, and Vermont. Minimum prices to producers only are established under the orders. Prices at which consumers buy their milk are left to the forces of open competition. The market administrator is required to announce the uniform producer price on the 14th day of each month. Producers must be paid by handlers by the 25th of each month.

3874 *Defendants' Exhibit No. 41*

MARKET ADMINISTRATOR, NEW YORK METROPOLITAN MILK MARKETING AREA, 95 MADISON AVENUE, NEW YORK, N. Y.

Release—Immediate.

DECEMBER 14, 1938.

NOVEMBER MILK PRICE UNDER NEW YORK ORDER

NEW YORK, Dec. 14.—A uniform price of $2.10 per hundredweight for milk testing 3.5 percent butterfat received from producers during the month of November at handlers' plants in the 201–210 mile zone from New York City was announced today by E. M. Harmon, Administrator of the Federal-State orders regulating the handling of milk in the New York metropolitan area. Producers who delivered milk in November to plants located in zones nearer or farther than the 201–210 mile zone from New York City are to receive from handlers the uniform price; plus or minus differentials for location.

The producer price for November milk represents an increase of 19 cents per hundredweight over that announced by the Market Administrator for milk received at handlers' plants during October. The November price of $2.10 per hundredweight is based on a Class I, or fluid milk, price of $2.45 per hundredweight; $1.90 per hundredweight for Class II–A, or milk for cream purposes, and the following prices for each of the remaining seven classes of milk, which represent the values of milk used for the various manufactured products: Class II–B milk, $1.402 per hundredweight; Class III–A milk, $1.30[illegible] per hundredweight; Class III–B milk, $1.177 per hundredweight; Class III–C milk, $1.077 per hundredweight; Class III–D milk, $1.052 per hundredweight; Class IV–A milk, $.977 per hundredweight; and Class IV–B milk, $.875 per hundredweight.

The Market Administrator's office reported that the total amount of milk accounted for in the uniform price computation amounted to 310,496,093 pounds. This milk, based on the value of each of the nine classes established by the orders, had a total value of $6,648,040.73. Out of this total, $71,805.51 was deducted to be paid to cooperatives which have been determined by the Secretary of Agriculture of the United States and the New York State Commissioner of Agriculture and Markets as meeting certain requirements provided for in the order. These requirements relate to the ability and the willingness of cooperatives to function in a manner which will serve the market as a whole. An additional deduction of $40,673.39 was necessary in order to provide for Market Service Claims which have been filed by handlers. A further deduction of $131,535.16 was made to provide operating reserve, pursuant to Section 2 of Article VI of the order, to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. The sum of $116,391.16 was restored from the operating reserve of the previous month.

1875 *Defendants' Exhibit No. 42*

CLASSIFICATION OF MILK REPORTED AS RECEIVED FROM PRODUCERS BY SUSSEX MILK & CREAM COMPANY, INC.

Class	September	October	November
I-A Priced	4,662,227	4,651,671	4,343,084
I-A Unpriced	3,908,691	3,840,665	3,508,194
I-B Priced	967,001	800,602	549,451
I-B Unpriced			
II-A			
II-B			
II-C			
II-D			
V-A	54,538		
V-B			
Total	9,592,457	9,292,938	8,400,729

1876 *Defendants' Exhibit No. 43*

CLASSIFICATION OF MILK REPORTED AS RECEIVED FROM PRODUCERS BY SHEFFIELD FARMS COMPANY, INC.

Class	September	October	November
I-A Priced	40,083,075	43,662,117	48,363,597
I-A Unpriced	7,111,444	7,254,320	7,251,546
I-B Priced	6,766,652	8,710,632	5,787,890
I-B Unpriced	301,791	307,311	320,927
II-A	7,488,151	1,000,920	
II-B	1,719,935		
II-C	110,112	88,287	
II-D	1,231,752	1,049,460	1,615,067
V-A	2,155,601	4,158,761	1,927,986
V-B	788,739	1,074,762	
Total	67,757,252	67,306,590	60,267,013

1877 *Defendants' Exhibit No. 44*

BREAKSTONE BROS., INC.

Total Milk Reported as Sold in All Classes

Class	September	October	November
I-A	9,669,983	8,383,303	8,473,793
I-B	239,914	183,215	218,985
II-A			
II-B	1,042,662	797,346	838,569
II-C			
II-D	5,712	5,060	8,063
V-A			9,858
V-B			
Total	10,958,271	9,368,924	9,549,268

MULLER DAIRIES, INC.

Total Milk Reported as Sold in All Classes

Class	September	October	November
I	5,596,892	5,826,461	[illegible]
II-A	152,897	166,611	[illegible]
II-B	4,140	4,508	[illegible]
III-A			
III-B			
III-C			
III-D			
IV-A			
IV-B			
Total	5,753,929	5,997,580	[illegible]

3878 *Defendants' Exhibit No. 45*

CLASSIFICATION OF MILK REPORTED AS RECEIVED FROM PRODUCERS BY BORDEN CO., INC.

Class	September	October	November
I Priced			
I Unpriced	42	21	
II-A Priced	898,358	625,869	[illegible]
II-A Unpriced	80	51	[illegible]
III-A	449,458	384,696	[illegible]
III-B			
III-C			
III-D	977,683	839,268	[illegible]
IV-A		113	
IV-B	87,101	186,485	
	2,412,722	2,036,503	[illegible]

Plants at Antwerp, N. Y., Evans Mills, N. Y.

3879 *Defendants' Exhibit No. 46*

PRODUCER SETTLEMENT FUND—MARKET ADMINISTRATOR, NEW YORK METROPOLITAN MILK MARKETING AREA

Statement of Payments to Dairymen's League Under Sections 5 and 6 of Article VII, for Milk Received During September, October, and November, 1938

	Article VII			
	Section 5		Section 6	
	Lbs., milk	Amount	Lbs., milk	Amount
September	118,911,179	$59,455.59	28,374,541	[illegible]
October	121,588,142	60,794.07	22,920,087	[illegible]
November	114,560,639	57,280.32		
	355,059,960	177,529.98	51,294,628	[illegible]

880 *Defendants' Exhibit No. 47*

PROXIMATE DISPOSITION OF UNPRICED CLASS I AND CLASS II–A MILK REPORTED AS RECEIVED FROM PRODUCERS BY KEYSTONE DAIRY

	Total amount	Approximate amount to New Jersey	Approximate percent to New Jersey
tember 1938:	*Pounds*	*Pounds*	
Class I unpriced	97,891		
Class II–A unpriced	385,058		
tober 1938:			
Class I unpriced	148,712		
Class II–A unpriced	157,663		

881 *Defendants' Exhibit No. 48*

PROXIMATE DISPOSITION OF UNPRICED CLASS I AND CLASS II–A MILK REPORTED AS RECEIVED FROM PRODUCERS BY SUSSEX MILK & CREAM CO.

	Total amount	Approximate amount to New Jersey	Approximate percent to New Jersey
tember 1938:	*Pounds*	*Pounds*	
Class I unpriced	3,908,691	3,882,702	99.34
Class II–A unpriced			
tober 1938:			
Class I unpriced	3,840,665	3,834,936	99.85
Class II–A unpriced			

882 *Defendants' Exhibit No. 49*

PROXIMATE DISPOSITION OF UNPRICED CLASS I AND CLASS II–A MILK REPORTED AS RECEIVED FROM PRODUCERS BY DAIRYMEN'S LEAGUE COOP. ASSN.

	Total amount	Approximate amount to New Jersey	Approximate percent to New Jersey
tember 1938:	*Pounds*	*Pounds*	
Class I unpriced	11,594,755	6,970,038	60.11
Class II–A unpriced	4,806,923	2,616,208	54.43
ober 1938:			
Class I unpriced	8,528,088	4,791,510	56.19
Class II–A unpriced	3,932,190	1,070,506	27.22

883 *Defendants' Exhibit No. 50*

PROXIMATE DISPOSITION OF UNPRICED CLASS I AND CLASS II–A MILK REPORTED AS RECEIVED FROM PRODUCERS BY DELLWOOD DAIRY

	Total amount	Approximate amount to New Jersey	Approximate percent to New Jersey
tember 1938:	*Pounds*	*Pounds*	
Class I unpriced	935		
Class II–A unpriced	20,713		
ober 1938:			
Class I unpriced	30,940		
Class II–A unpriced	5,215		

3884 *Defendants' Exhibit No. 51*

APPROXIMATE DISPOSITION OF UNPRICED CLASS I AND CLASS II-A MILK REPORTED AS RECEIVED FROM PRODUCERS BY SHEFFIELD FARMS CO., INC.

	Total amount	Approximate amount to New Jersey	Approximate percent to New Jersey
	Pounds	*Pounds*	
September 1938:			
Class I unpriced	7,111,444	6,426,443	9.7
Class II-A unpriced	301,791	282,372	9.7
October 1938:			
Class I unpriced	7,254,320	6,737,848	9.8
Class II-A unpriced	307,311	307,311	10.0

3885 *Defendants' Exhibit No. 52*

APPROXIMATE DISPOSITION OF UNPRICED CLASS I AND CLASS II-A MILK REPORTED AS RECEIVED FROM PRODUCERS BY BORDEN CO., MFG. PRODUCTS DIVISION

	Total amount	Approximate amount to New Jersey	Approximate percent to New Jersey
	Pounds	*Pounds*	
September 1938:			
Class I unpriced	42		
Class II-A unpriced	80		
October 1938:			
Class I unpriced	21		
Class II-A unpriced	51		

3886 *Defendants' Exhibit No. 53*

COUNTRY MILK PLANTS REPORTED BY AUTHORIZED HEALTH AUTHORITIES IN THE NEW YORK METROPOLITAN MILK MARKETING AREA AS HAVING BEEN EXCLUDED FROM APPROVED LISTS BY MONTHS SINCE SEPTEMBER 1, 1938

Month	Location of plant	Operated by—
Dept. of Health, City of New York:		
Excluded September 1938	Rising Sun, Md	Sheffield Farms Co., Inc.
Do	Washingtonville, N. Y	Borden's Farm Prod. Div.
Do	Johnsons, N. Y	Do.
Do	Macedon, N. Y	Meadow Sweet Farms, Inc.
Excluded September 1938 (Re-Approved 10/5/38)	Philadelphia, N. Y	Philadelphia Milk Producers, Inc.
Excluded September 1938	Newark, N. J	Dairymen's League Co-op. Ass'n, Inc.
Excluded September 1938 (Re-Approved 9/28/38)	Rutland, Vt.[1]	Do.
Excluded September 1938 (Re-Approved 9/27/38)	Florence, Vt.[1]	Sheffield Farms Co., Inc.
Excluded September 1938 (Re-Approved 9/28/38)	Wassaic, N. Y.[1]	Borden's Farm Prod. Div.
Excluded October 1938	Rising Springs, Pa	Dairymen's League Co-op. Ass'n, Inc.
Do	Sherman, N. Y	Do.
Do	Earlville, N. Y	Dr. Hall.
Do	Sheffield, Mass	Willow Brook Dairy.
Do	Athens, Pa	Dairymen's League Co-op. Ass'n, Inc.
Do	Beaver Springs, Pa	Do.
Do	Clymer, N. Y	Do.
Do	Mifflinburg, Pa	Do.
Do	Mill Hall, Pa	Do.
Do	Milton, Pa	Do.

[1] These plants were excluded only temporarily due to the water supply being flooded during storm.

COUNTRY MILK PLANTS REPORTED BY AUTHORIZED HEALTH AUTHORITIES IN THE NEW YORK METROPOLITAN MILK MARKETING AREA AS HAVING BEEN EXCLUDED FROM APPROVED LISTS BY MONTHS SINCE SEPTEMBER 1, 1939—continued

Month	Location of plant	Operated by—
Dept. of Health, City of New York—Continued.		
Excluded November 1938	Nyack, N. Y.	Manorkill, N. Y., McDermott Bros. Milk Corp.
Do	Lincolndale, N. Y.	Lincolndale Agr. School.
Excluded December 1938	Halcott Center, N. Y.	Halcott Diary Co., Inc.
Westchester County Dept. of Health:		
Excluded October 1938	Ozone Park, N. Y.	Dairy Sealed, Inc.
Do	Mt. Kisco, N. Y.	Westchester Shallow Brook Farm Dairy.
Do	Grover, Pa.	Grover Farms, Inc.
Do	Sherburne, N. Y.[1]	Sheffield Farms Co., Inc. (F. Maynard).
Excluded November 1938	Mt. Kisco, N. Y.	Braswold Farm.
Dept. of Health, City of Mt. Vernon:		
Excluded September 1938	do	Westchester Shallow Brook Farms.

[1] Still approved by Department of Health, City of New York.

3887 *Defendants' Exhibit No. 54*

POOL RETURN FOR NOVEMBER 1938

The Dairymen's League average return to producers is based upon $2.125 per cwt. for 3.5% milk at the 201-210 mile zone. This is the amount per cwt. collected from all sources for all milk delivered by producers after expenses of country plants, city branches, surplus selling, and necessary reserves have been allowed for. It still includes Association service costs of .055 and differentials of .06, as explained below:

Gross pool return at base zone (201-210 miles) for 3.5% milk (including service costs and differentials)		2.125
Less service costs:		
State advertising of milk	.0026	
Producers bargaining agency	.0024	
Administrative expense	.032	
Distributed to local associations to cover local expense	.002	
Distributed to subdistrict organizations to cover expense	.001	
To create insurance fund to cover losses from uncollectible accounts and other losses	.005	
To cover part of cost of fixed assets and good will of business purchased, which it is deemed inadvisable to carry as assets	.01	
Total service costs as itemized above	.055	.055
Pool return in base zone (201-210 miles) including differentials (this is the Dairymen's League announced return)		2.07
Less differentials (up-state city services and production)		.06
Net pool return at base zone (201-210 miles) (this is base return from which your check is figured)		2.01

To figure your Pool Return, add or deduct your freight rate and your butterfat above or below 3.5%. Grade A premiums where earned are in addition to the above.

CLASSIFICATION FOR NOVEMBER 1938

The combined disposition of all pooled milk handled in the Association and sold to Dealers was as follows:

Class		Total	Perce
1	Fluid milk in marketing area	70,083,283	42.9
1	Fluid milk outside marketing area	35,874,961	21.9
2A	Fluid cream in marketing area	23,811,191	14.5
2A	Fluid cream outside marketing area	9,332,466	5.7
2B	Plain condensed, frozen desserts, and homogenized mixtures in marketing area.	3,097,614	1.9
3A	For all milk made into evaporated milk, whole condensed milk, milk chocolate, whole-milk powder, malted milk, and certain types of cheese.	6,781,089	4.1
3B	Cold-storage cream	46,673	.0
3C	Frozen desserts, homogenized mixtures outside marketing area.	2,[illegible]	1.2
3D	Cream to a purchaser, not a handler, outside of the State of New York and cream cheese.	9,193,227	5.6
4A	Butter	3,588,432	2.2
4B	American cheese	75,527	.0
	Grand total	163,784,211	100.0

NOTE.—Of the total pounds for November, 89.95% was sold in the New York Metropolitan milk marketing area and was subject to the minimum prices for each class as announced by the market administrator. Prices applying to other markets were established by negotiations with dealers or by the various State milk control Boards. The Board of Directors at their September meeting revised our differential system as of October 1st. These differentials will become effective on your October milk.

3888 *Defendants' Exhibit No. 58*

It is desirable that producers be well informed as to the activities of the Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., and the problems that face dairymen.

For that reason the enclosed booklet is sent. You will find it worthy of study and will want to keep it on file as a record of the developments in co-operative marketing in the New York Metropolitan Milk Shed during the year 1938.

If you attended the Annual Meeting on December 6, 1938, and already have a copy of this report, will you not see that this one is given to another?

METROPOLITAN CO-OPERATIVE PRODUCERS
BARGAINING AGENCY, INC.,
Syracuse, N. Y.

3889 *Defendants' Exhibit No. 59*

PRESIDENT'S ADDRESS AND REPORT OF OFFICERS

SECOND ANNUAL MEETING OF THE METROPOLITAN CO-OPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC., SYRACUSE, N. Y., DECEMBER 6, 1938

3890 Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.

Officers: H. S. Rolfe, president; L. A. Chapin, vice-president; J. C. Treat, secretary; E. C. Bardin, treasurer. Executive committee: H. S. Rolfe, L. A. Chapin, J. C. Treat, E. C. Bardin, S. A. Hufcut. Board

of directors: E. C. Bardin, West Winfield, N. Y.; L. A. Chapin, North Bangor, N. Y.; F. H. Child, Amsterdam, N. Y.; J. A. Coulter, Watertown, N. Y.; Joe Davis, Little Marsh, Pa.; Dr. R. E. Davis, Clinton, N. Y.; Warren Davy, Greene, N. Y.; G. Lester Dumont, Malone, N. Y.; Sherrill A. Hufcut, Middletown, N. Y.; J. R. Humphrey, Holland Patent, N. Y.; Earl Laidlaw, Gouverneur, N. Y.; Wm. A. Mather, Adams, N. Y.; L. E. Maynard, Philadelphia, N. Y.; Ralph C. Norton, Boonville, N. Y. (resigned Nov. 4, 1938); Homer S. Rolfe, Ogdensburg, N. Y.; Fred H. Sexauer, Auburn, N. Y.; Dr. Kenneth Shaul, Cobleskill, N. Y.; H. Stannard, Fair Haven, Vt.; E. C. Strobeck, Macedon, N. Y.; J. C. Treat, Honeoy Falls, N. Y.; A. J. Williams, Franklinville, N. Y. C. H. Baldwin, executive secretary, Room 118, Onondaga Hotel, Syracuse, N. Y.; Phone 2-3014.

3891 President's Address—Homer S. Rolfe

Last year at the first annual meeting of the Metropolitan Cooperative Milk Producers Bargaining Agency I said that the occasion marked a new forward step in cooperative effort. I was referring to the fact that producers had been given the right to work together cooperatively by the enactment of the Rogers-Allen Law and now had an opportunity to solve their marketing problems. I pointed out that many organized groups of producers, bound together and working for common good of all, were assembled for the first annual meeting of their Bargaining Agency. I emphasized the fact that "orderly marketing includes the supplying of the market with the maximum amount of goods that can be sold at the established prices, at the same time keeping from the market any surplus that would tend to break prices. To apply this principle to the marketing of milk is our big problem. We must face this problem squarely," I said, "if we are to be truly successful in our efforts. The solution of this problem is fundamental to our permanent success." All this had been recognized in previous years as true. It was true at the time of our first annual meeting. It is true today.

As we convene to hold the second annual meeting we should review the events of the past year. Readily we see that the many years of education and hard work has culminated during 1938 in the greatest forward step dairymen of the New York Milk Shed have ever before taken in cooperative marketing. We have a sound surplus control plan in operation and producers are making the plan work. The Bargaining Agency is generally credited as being the force by which and the medium through which this plan was prepared and accepted by producers and, with their support, made effective. History will record that the long-sought permanent marketing program to control surplus was established in 1938 on a solid foundation, backed by Federal-State assistance, and put into operation with a united producer support. It will also be recorded that it was a result of years of education and costly experience in marketing.

In reporting to the membership at this time it is well to review the developments that placed the responsibilities squarely on the Producers Bargaining Agency for making an effective surplus control plan. In early winter of 1937 it became evident that it would be quite impossible for 75% of the producers in the Metropolitan Milk Shed and who made up the Producers Bargaining Agency at that time to control, through voluntary effort, surplus milk as production increased. Forces were working to keep producers divided as always and increased membership in the Agency in time to check flow of surplus to fluid dealers at low prices seemed doubtful.

As early as December 22, 1937, at a meeting of representatives of the Producers and the Distributors Bargaining Agencies, we were notified by the dealers' representatives that they "were interested in surplus control plan but only insofar as the mechanics of it were 3892 concerned; its set up being wholly a producer problem." In other words, producers were plainly told that surplus control was entirely a producer problem. All knew that there could be no better prices until there was an effective means for controlling surplus. To find a means was purely a producer's problem. In the meantime producer prices must fall. That was realized by all.

Nevertheless, on January 1, and again on January 16, price agreements were entered into between the Board of Directors of our Agency and the Bargaining Committee of the New York Metropolitan Milk Distributors Bargaining Agency, which brought about beneficial results to some producers. It also had a stabilizing effect on the whole price structure. It served as a brake in the downward fall of prices; it slowed down the price decline; it added thousands of dollars to producers' checks. Both of these price agreements included a second alternative, which was a flat price where entire output of country plants were taken by a distributor. It soon became evident to all that the second alternative was not sound and could not be continued when production increased. It was more and more evident as season advanced that stability of prices depended on ability to control surplus and other fundamental principles that must be agreed upon and incorporated in the plan. On March 28th the second alternative was discontinued and a classified price for all milk was adopted. Again the action of the Bargaining Agency slowed down the decline and added money to producer's check.

The Delegate Body, on January 16th, foreseeing the problem, voted that the Board of Directors as a committee be instructed to enter into negotiations with Federal officials and with State officials to the extent necessary in looking towards the drafting in final form of a marketing order for submission to the Delegate Body.

On January 28 Dr. Gaumnitz came before the Delegate Body and discussed the policy of the Federal authorities. Following his address requests were made to the Secretary of Agriculture and to the Department of Agriculture and Markets for assistance in maintaining prices and care of surplus. On February 2 letters setting forth principles

that had been agreed upon, were sent to both Federal and State authorities. These principles were:

1. An equal purchase price to be paid by all dealers for milk for same use.

2. An equal share to each producer of the benefits of the fluid outlets.

3. An equal share by each producer in the burden of the surplus and the expense of controlling it.

4. Reasonable contributions to those having surplus facilities for the use of them seasonally for market protection.

5. The effectuation of the foregoing principles in such a manner as will perpetuate and encourage cooperatives.

On February 7 several representatives of the Federal and State Departments of Agriculture met with the Board of Directors. Work was started on drafting a marketing agreement to incorporate 3893 the principles that had been agreed upon. Frequent conferences involving trips to Albany and Washington, and several meetings of Delegate Body were necessary before the final draft was decided upon and hearing dates announced.

The first hearing was held at Albany on May 16th and the final one was held on June 4th. At hearings members of Bargaining Agency appeared as proponents of order. The Executive Committee attended all hearings. The Agency was determined to see that the producers' best interests were protected and that the principles agreed upon were well supported by evidence. Following hearings, the Order was put in form for submission to producers and to vote. It was not until August 18, 19, and 20 that voting took place. This gave the Bargaining Agency sufficient time to comply with requests for information, and with the assistance of State and Federal officials, extension departments, and many volunteers it was possible to acquaint producers generally with the provisions of the Order.

In doing this many meetings were held, the mail brought every producer copy of Order and official explanation, the American Agriculturist, dairy papers, and newspapers brought out the facts and objectives, advertisements by newspapers and by radio—all combining brought forth a well informed and united producer sentiment for adoption of a surplus control plan as provided for in the Federal-State Marketing Order.

On August 25th the result of the vote was announced and producers were delighted to find that the Order had been approved by approximately 87% of the qualified producers voting. A joint Federal-State Market Administrator was appointed and the Order went into effect on September 1st. Considering the magnitude of the undertaking, the pains that were taken in seeing that all dairymen were given an opportunity to say what the Order should contain, the thoroughness with which Government officials worked to make sure the document was fair to all, and the explanation of Order so well spread that all producers knew its provisions; it is remarkable, and speaks well for

the producers and their organizations, that the task was accomplished at so early a date.

The magnitude of the vote and the speed and determination with which it was put into effect were impressive. Due to the willingness of some dealers to give the Order a fair trial, and due to the insistance of producers in the cooperative associations that made up the Bargaining Agency, most of the buyers of milk promptly signed agreements to abide by terms of the Order.

The Order specified dates on which very definite obligations are placed on dealers, such as the filing of reports and making payments that may be due the Administrator. The sentiment of producers, effectively expressed to dilatory dealers, has resulted in quite general compliance. Milk prices have been increased and there is more stability in price structures than has been before seen in this market.

In other words, due to producer support through their
3894 cooperative associations and in turn through the Bargaining Agency, the surplus control plan that was developed by the producers is bringing about the desired results.

Why a Producers Bargaining Agency?—you ask—now that prices are specified in an Order, which is being enforced by the Governments. In answer, may I say that the Order is not perfect. It was made by man, by milk producers. Time and experience will bring out weaknesses which will be corrected and strengthened by amendments made by producers and approved by them. Producers working through the Bargaining Agency can promptly request change that is desirable and with united support from the Bargaining Agency it will be secured.

The Bargaining Agency is a medium through which there can be a free exchange of ideas and marketing problems can be thoroughly and frankly discussed. It is the logical organization established to take advantage of the opportunities given producers under the Rogers-Allen Law, to which all producers come with their problems and to take advantage of the broad rights that have been given them and get up-to-date information and help. It is a responsible producer service organization to which the Administrator looks for much help and information.

Noncompliance with provisions of the Order by any dealer can best be checked by well-informed producers, whose milk the dealer is purchasing. In fact, the strict enforcement of the Order depends to a great degree upon support of that kind. In short, without sincere support from a united group of well organized cooperative associations, that have the legal right to work together for the common good of all, the Order would fail. The Bargaining Agency offers that service to all producers.

Producers of the Metropolitan New York Milk Shed have made progress during 1938 through the leadership of the Producers Bargaining Agency. That leadership, more experienced than in the past, will be needed to maintain the gains that producers have made and to lead them on to still greater gains.

The Producers Bargaining Agency is a practical service organization working for the benefit of all producers. Its educational accomplishments have been outstanding. Experienced producers are best qualified to help the less experienced. They have confidence in them. The Bargaining Agency has ironed out many individual producer problems and skillfully guided many producers in their desire to legally organize, at least possible expense, to help themselves and to work more effectively for the common good of all. This service must be continued.

As in the past, effort will be made to break our ranks. Some may get faint hearts and falter for awhile. Legal entanglements, into which our surplus control plan may be thrust by dealers, may hinder and delay progress, but united producers will go forward with their cause. An aggressive program must be mapped out for 1939. Our common enemies are on the defensive and they shall be kept there.

The Bargaining Agency was never more needed than right
3895 now and from now on its service will become more necessary to all and I believe more generally appreciated.

A solid foundation has been laid, the plans are drawn, the workers are united, a spirit determined to go forward prevails. All eyes are on the one objective "A living price for milk," day after day, month after month, and year after year. Again we face a new year and again we face the problems squarely and with confidence.

The past year has been filled with problems and hard work, but, with the spirit of determination that has always been shown by cooperative members, the work has been interesting and the year has slipped by quickly.

As your President, I have endeavored to do my part, and I know that your Board of Directors, your Executive Committee, your officers and employees, have taken their work seriously and, at times under most discouraging circumstances, have always done their very best. To them and to the membership I am grateful.

I know that there must be a feeling of satisfaction in the minds of all, as the accomplishments of the year are reviewed. Each has a right to be proud of being a part of this organization and proud of the part he has taken in the constructive work.

As we close the year, let each of us pledge ourselves to do, to the best of our ability, whatever task may come to us. With this spirit, the Bargaining Agency moves forward to face squarely the problems of 1939.

3896 Report of the Secretary—Mr. J. C. Treat

It is my honor and privilege at this time to submit in as brief form as possible my report as Secretary of the Metropolitan Cooperative Milk Producers Bargaining Agency.

The routine duties can be very briefly stated. Minutes of all meetings, including those of Delegate Body, of the Board of Directors and of the Executive Committee have been properly recorded and,

when read and approved, have been filed and placed in the permanent records of the Agency. All papers and records belonging to the Agency have been kept under lock and key and are now in my custody as provided by the By-laws. All bills, when presented in proper form, have been submitted to the Executive Committee and, when approved, have been paid by check, countersigned by me as Secretary as provided for by resolution. The Treasurer's report and the financial statement, which is printed in detail in the report in your hands, will show that the funds of the Agency have been properly handled and guarded in a business-like manner. A list of the cooperative members of the Agency is also printed. The foregoing constitute and describe briefly the routine duties of Secretary for 1938 and as a report is respectfully submitted.

Other special responsibilities came to me as Secretary during 1938. I am not referring to duties as Director or member of the Executive Committee which duties have also taken more than the ordinary amount of time.

Early in January, the books of the Agency were subpoenaed as evidence in a lawsuit brought by Sheffield Producers Association against several producers who had broken contract. On January 21, all books, files, and records were subpoenaed by Attorney General Bennett. The subpoenaed materials were examined at the office and records which required more study, were taken away for examination. All this material has been returned.

Dealers' attempts to block producers' efforts in organizing resulted in action by Federal Trade Commission, which required personal attention on my part. The investigation took up several days of my time as witness. That our records have been kept in proper and orderly manner was proven from the comment of the investigators. Much credit for this is due Miss Stevenson.

As a member of the Executive Committee and as Secretary, there rests upon me some of the responsibility for seeing that the Agency is solvent and financially responsible. I feel justified in calling several problems, relating to this matter, to your attention. The Agency must carry on its work and meet any emergency that may arise. Always forcefully meeting an emergency tells the whole story. To do this, the Agency must be solvent at all times and funds must be available for use when needed. In other words, our expenses cannot exceed our income. On this point we can all agree.

3897 All kinds of service are requested and sometimes demanded of the Agency. This service the Agency is well equipped to give. There is no use of enumerating the types of service or the wide territory over which it is spread, for much of it has already been mentioned in the President's address. We know that service of this type costs money and we all know that money does not grow on bushes. All funds that come to the Bargaining Agency have to come from the cooperative associations that make up our membership.

Has the Bargaining Agency been really worth the cost? From a cold financial point of view should it be continued? What has the service meant to the producers in dollars and cents? Can we not roughly answer this as individuals? You remember the benefits the producers received while agencies were bargaining for prices last year. You know that millions more dollars were received by producers during 1937 as a result.

I will not attempt to make any estimate as to the increased income last year, but I do know and you know that conservative estimates, made by officials well qualified to judge, indicate that the milk producers of the Metropolitan Milk Shed received in their milk checks for September and October, the two months just past, two and a half million more dollars than they would otherwise have received. Mind you—this was secured when producer prices in other states were falling. Make your own estimate as to the total financial value to producers of the service rendered by the Bargaining Agency since it was formed. You place the dollar value where you may and I will be satisfied for the comparison that I am about to ask you to make.

Do you know that since the Agency was first formed less than 17 months ago until November 1, 1938, this Agency received from all sources combined $164,826.74? For this investment, the producers received the benefits that you have estimated. Perhaps this is not $75.00 profit for every dollar invested, but most certainly it is more than $50.00. We can all agree that even in boom times, no one heard of investments of that kind, especially when the money invested was paid in installments over a 17 month period.

Certainly producers are glad to have an opportunity to make such investments and to share in the cost of the Bargaining Agency and would even be willing to put in more money to take care of the greater service that is demanded and which, in turn, would bring still greater returns. Let us look at the record—as Al Smith would say—and see if they have. An investigation of the books shows that probably less than 70% of the producers have paid total cost of this service. It shows that all have had the benefits and that some co-operatives, not many, that have been members of the Agency and financially able to carry their full share of the expenses, have criticized and complained and growled about the Agency and its activities, but have contributed not a cent to the cause for months or in some cases not at all.

I realize the difficulties that new groups have in becoming organized, so that they can demand that their dealer set aside from
3898 the value of milk purchased, a sum that can be paid directly to the cooperative and thus the cooperative gets funds from which it can pay its share of its expenses in the Bargaining Agency. All this is known and well understood. There is a general desire on the part of most cooperatives to do their full share in every way and they are doing all within their power to overcome every obstacle

that prevents them doing so, but what about some well established collecting cooperatives where Boards of Directors have the money in their own hands? What have some of them done? They have received the benefits and have contributed not one cent. I wonder if the producers, making up these cooperative associations, know the policy that has been followed by their officials. I cannot believe that they do. I believe firmly that all producers want to do their full share for the good of the cause.

The attitude of the Agency has been, from the beginning, that of a big brother. Service has been rendered freely to all. As President Rolfe said—the Agency is the logical organization that all producers come to for personal help and advice. This service the Agency must continue to render, but it is time that we state plain facts. Someone will have to pay the cost.

We must remain solvent. We are bound together for common good of all. We share equally in the markets. Producers want to share equally in giving service by paying their share. Producers must have the facts.

Perhaps some one may say these are matters that should not be included in the Secretary's report. Be that as it may, I know that I do not like to bring this to your attention. It is a matter that needs to be told. It demands the attention of all producers and I never intentionally dodge a responsibility.

Relief will no doubt come to non-collecting cooperatives as they become qualified for cooperative service differentials as provided for in Federal-State Order. There may be delays due to slight changes in by-laws or past history of policy of cooperative. We are striving to secure greater producer control and every group should work to reach a point where it can get all the benefits that are intended. When that point is reached by any group, that group will be in position to do its full share for the common good of all. Do not be discouraged but rather buckle in and get your share by doing your share.

In closing, I apologize for so long a report, but I cannot apologize for having brought the bare cold financial problem to your attention. Those who would ride without paying their share of cost may apologize if they so choose. I am merely endeavoring to carry out the duties that you have placed upon me.

I want to thank the delegates, my associates on the Board of Directors, and the employees of the Agency for their tolerance and cooperation.

3899 Cooperative Members

Adams Producers Cooperative, Inc., Ellisburg, N. Y.; Adams Center Milk Producers Coop., Inc., Adams Center, N. Y.; Addison Cooperative Milk Producers Ass'n, Inc., Addison, N. Y.; Amsterdam Milk Producers Cooperative, Inc., Amsterdam, N. Y.; And-Well Milk Producers Cooperative, Inc., Andover, N. Y.; Antwerp Milk Producers

operative, Inc., Antwerp, N. Y.; Bear Lake Cooperative Milk Producers, Bear Lake, Pa.; Bennington County Cooperative Creamery, Inc., Manchester Depot, Vt.; Blossvale Milk Producers Cooperative Ass'n, Inc., Taberg, N. Y.; Bridgewater Milk Producers Cooperative, Inc., Bridgewater, N. Y., Brown & Bailey Milk Producers Coop. Ass'n, Inc., Potsdam, N. Y.; Cooperative Dairymen of Cannonsville, N. Y., Cannonsville, N. Y.; Central Mohawk Milk Producers Coop., Inc., Fultonville, N. Y.; Chateaugay Milk Producers Coop., Inc., Chateaugay, N. Y.; Chester Milk Producers Cooperative, Inc., Chester, N. Y.; Circleville Milk Producers Cooperative, Inc., Circleville, N. Y.; Clockville Milk Producers Cooperative Ass'n, Inc., Clockville, N. Y.; Conesus Milk Producers Cooperative Ass'n, Inc., Webster Crossing, N. Y.; Coventry Dairymen's League Coop. Ass'n, Inc., Coventry, N. Y.; Dairymen's League Cooperative Ass'n, Inc., New York, N. Y.; Delhi Cooperative Producers, Inc., Delhi, N. Y.; East Freetown Milk Producers Cooperative, Inc., East Freetown, N. Y.; Ellenburg Milk Producers Cooperative, Inc., Ellenburg, N. Y.; Evans Mills Dairymen's League Cooperative Ass'n, Inc., Evans Mills, N. Y.; Fair Haven Milk Producers, Inc., Fair Haven, Vt.; Ft. Edward Milk Producers Cooperative, Inc., Ft. Edward, N. Y.; Frankfort Milk Producers Cooperative Ass'n, Inc. Frankfort, N. Y.; Gouverneur Cooperative Dairymen, Inc., Gouverneur, N. Y.; Gracie Dairy Cooperative, Inc., Cortland, N. Y.; Goshen Dairy Cooperative, Inc., Goshen, N. Y.; Holland Patent Farmers Cooperative, Inc., Holland Patent, N. Y.; Indian Castle Dairy Cooperative, Inc., Indian Castle, N. Y.; Keuka Milk Producers Cooperative Ass'n, Inc., Prattsburg, N. Y.; Kirkland Milk Producers Cooperative, Inc., Clinton, N. Y.; Lafargeville Milk Producers Coop., Inc., Lafargeville, N. Y.; Lafayette Milk Producers Coop., Inc., Lafayette, N. Y.; Lakeville Milk Producers Coop, Inc., Lakeville, N. Y.; Leon Milk Producers Coop., Inc., Leon, N. Y.; Liberty Valley Cooperative Milk Producers Ass'n, Inc., Liberty, Pa.; Lisbon Producers Cooperative, Inc., Lisbon, N. Y.; Little Falls Dairy Co., Inc., Little Falls, N. Y.; Malone Milk Producers Coop., Inc., Malone, N. Y.; Marshall Milk Producers Coop., Inc., Paris Hill, N. Y.; Mettowee Valley Cooperative Milk Producers, Inc., W. Pawlet, Vt.; Middlebury Cooperative Milk Producers Ass'n, Inc., Middlebury, Pa.; Mississquoi Valley Milk Producers, Inc., Enosburg Falls, Vt.; Montgomery Eastern Dairy Coop., Inc., Fort Hunter, N. Y.; Nicholson Cooperative Milk Producers Ass'n, Inc., Nicholson, Pa.; North Blenheim Cooperative Milk Producers, Inc., N. Blenheim, N. Y.; North Country Producers Cooperative Ass'n, Inc., Canton, N. Y.; Oriskany Valley Milk Producers Coop., Inc., Deansboro, N. Y.; Osceola Milk Producers Cooperative Ass'n, Inc. Osceola, Pa.; Oswegatchie Milk Producers Cooperative, Inc., Heuvelton, N. Y.; Otselic Valley Milk Producers Cooperative Ass'n, Inc., Cincinnatus, N. Y.; Otter Valley Milk Producers, Inc., East Dorset, Vt.; Philadelphia Milk Producers Cooperative Ass'n, Inc., Philadelphia, N. Y.; Pierpont Manor Milk Producers Cooperative,

Inc., Ellisburg, N. Y.; Poland Milk Producers Cooperative Ass'n, Inc., Poland, N. Y.; Portville Milk Producers Cooperative, Inc., Portville, N. Y.; Richmond Cooperative Ass'n, Inc., Richmond,
3900 Vt.; Rupert Milk Producers, Inc., Rupert, Vt.; Sauquoit Valley Farmers Coop., Inc., 491 French Rd., Utica, N. Y.; Sheffield Producers Coop. Ass'n, Inc.; Sherburne Dairy Cooperative, Inc., Sherburne, N. Y.; Slate Hill Milk Producers Cooperative, Inc., Slate Hill, N. Y.; Slate Valley Cooperative Milk Producers, Inc., Fair Haven, Vt.; Steamburg Milk Producers Cooperative, Inc., Steamburg, N. Y.; Van Hornesville Milk Producers Cooperative, Inc., Van Hornesville, N. Y.; Wampsville Milk Producers Cooperative Ass'n, Inc., Wampsville, N. Y.; Watertown Milk Producers Cooperative, Inc., Westfield, Pa.; Youngs-Maybury Cooperative, Producers, Inc.

NOTE.—The above list includes all cooperatives who have filed all papers and paid initiation fee.

3901 Report of the Treasurer—E. C. Bardin

The by-laws provide that the Treasurer shall have custody of all moneys and securities of the corporation and shall keep regular books and accounts. This has been done as the financial statements and the auditor's report indicate. As Treasurer, I am bonded and as far as I know all duties and responsibilities of the Treasurer have been properly taken care of. I have at least endeavored to see that they were.

There is not much that can be said about my report, except that it is quite evident that we are building up no surplus of money.

I second what Secretary Treat has said. His report is much to the point. I too have a few things that I would like to say about the year's work and my observations.

With field men and with directors, I have traveled approximately twenty thousand miles, spreading the gospel of cooperation. I have not tried to discuss the detail of the Order, but have dealt with the broad general program.

I sometimes wonder whether we of the Bargaining Agency realize the size of the job we are undertaking and the meaning of our accomplishments to date. We have built and have put into operation the greatest program for cooperative marketing that has ever before been attempted. It is the greatest because it is producer-built and producers share equally in the market and it gives all, including distributors, equal opportunity. Mr. Baldwin and others who have attended meetings outside of the New York Milk Shed, where farm leaders from all parts of the country have assembled, have told me of the inquiries and the interest in the work that we are doing. I say to you that the eyes of the Nation are on our work, but far more important, the hope and the future of thousands of farm families

that make up this Milk Shed, are dependent on the success of our work. Success depends upon our doing our duty. We must not fail. Success depends upon you, me, and every other producer doing his full share. Each of us have a definite and sacred responsibility. We must not allow the hope of the farm people to be crushed as a result of our neglect. It is a terrible thing to destroy the hope of those who for years have fought to gain for themselves " a living price for milk." Upon those who fail to do their share, whether it is by refusing to cooperate with his neighbor, or by neglecting to give help that is needed by his cooperative association, or by failing to contribute his share to the expense involved, rests a burden that I would not want to carry.

If one knew the condition of our farm homes as I know them; if he had covered as much of the Milk Shed and had talked with as many farm people as I have this year; if he really knew the farm family and the hard work that has to be done by the father, mother, and children to get a simple wholesome living on the farm; if he 3902 knew the fear that the older members have of losing their homes and of their loved ones even going hungry, in spite of their slaving work, in contrast with the wealth and luxury that the dealer takes for directing the distribution of his milk; and then if he also knew the hope that brightens the eyes of all in the family at the thought of securing at last, month after month, "a living price for milk," due to the united producers supporting their Milk Marketing Agreement and making it effective, how could he or any human being, living in a Christian land, think of dragging the Agreement into unnecessary court litigation or cheat by conniving with chiselers or by failing to see that from his milk check his share is paid to carry on the work. We are, all of us, vitally interested, aside from the financial benefits, in the success of this undertaking.

Upon those who deliberately set out to wreck this surplus control plan and on those who fail to be as helpful as possible in making it work, rests a crushing load. When he is alone with his thoughts, his heart must be heavy. He can get little real satisfaction from the few dollars that he may gain as a reward for causing confusion and the misery that will result from it.

Those who do their full share, plus a little more for good measure, know the satisfaction that comes from a clear conscience and the knowledge that he is constructive and helpful to his fellow men.

I agree one hundred per cent with Secretary Treat when he says that all producers who have the facts and who are free to act want to help. Let us hope and let us use our best efforts to see that soon all shall share in the satisfaction that comes from being a part of this—the greatest program for cooperative marketing that has ever before been attempted.

3903 Financial Statement, Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., December 1, 1937, to June 1, 1938

PROTECTIVE FUND

Balance in fund Dec. 1, 1937		$3,845.22
Receipts from Co-operatives		15,769.24
Total		19,614.46
Loans to general fund		14,500.00
Balance on hand June 1, 1938		$5,114.46

GENERAL FUND

RECEIPTS

Balance in bank Dec. 1, 1937		$2,935.23
Receipts from cooperatives		47,755.68
Loans from protective fund		14,500.00
Total receipts for period		$65,190.91

DISBURSEMENTS

Employees' salaries		$12,933.75
Employees' expenses		11,671.56
Board of directors' salaries		5,334.50
Board of directors' expenses		9,621.51
Publicity		3,142.67
V. R. Tompkins, salary	$891.00	
V. R. Tompkins, expense	1,280.39	
Printing Market News	1,171.28	
Printing and mimeographing		1,088.65
Telephone and telegraph		2,447.80
Postage		1,372.82
Office rental		431.00
Office supplies and expense		1,335.44
Legal services:		
Edmund F. Cooke, fees		2,725.00
Edmund F. Cooke, expenses		1,265.40
Social security and unemployment insurance		746.03
Advertising:		
Radio		4,405.51
Publications		3,730.20
Miscellaneous		1,088.92
Advanced for certificates of inc	$40.00	
Expense of annual meeting, banquet, etc	370.70	
Refunds to co-operatives	56.82	
Expenses for serving on committees and attending meetings	437.19	
Miscellaneous	184.21	
Total disbursements		63,338.59
Balance on hand June 1, 1938		1,852.32

BOARD OF DIRECTORS

	Salary	Expenses
H. S. Rolfe, president	$870.00	$1,080.56
L. A. Chapin, vice president		600.00
J. C. Treat, secretary	1,030.00	1,736.70
E. C. Bardin, treasurer	852.00	1,179.67
Sherrill A. Hufcut, executive committee	110.00	283.67
F. H. Child—employee	95.00	756.05
J. A. Coulter	25.00	45.65
Joe Davis		
Dr. R. E. Davis	325.00	581.35
Warren Davy	235.00	276.86
Joe Humphrey	35.00	159.40
Earl Laidlaw	45.00	52.98
W. A. Mather	105.00	254.93
L. E. Maynard	325.00	115.40
H. H. Evans	330.00	483.30
Ralph Norton	250.00	399.55
F. H. Sexauer		
Dr. K. A. Shaul	320.00	423.29
E. H. Skillman	172.50	229.40
H. S. Stannard	65.00	119.98
E. C. Strobeck	145.00	242.80
A. J. Williams		
	5,334.50	9,621.51

June 1, 1938, to September 1, 1938.

PROTECTIVE FUND

Balance in bank June 1, 1938	$5,114.46	
Receipts from co-operatives	9,566.93	
Total	14,681.39	
Loans to general fund	10,500.00	
Balance in bank Sept. 1, 1938		$4,181.39

GENERAL FUND

RECEIPTS

Balance in bank, June 1, 1938	$1,852.15	
Receipts from co-operatives	36,325.56	
Loans from protective fund	10,500.00	
Total receipts		48,677.71

DISBURSEMENTS

Employees salaries	$7,205.90	
Employees expenses	7,050.47	
Board of directors salaries	2,610.00	
Board of directors expenses	3,971.31	
Publicity	1,326.33	
V. R. Tompkins, salary	$297.00	
V. R. Tompkins, expense	611.58	
Market News	417.75	
Printing and mimeographing	2,888.37	
Telephone and telegraph	589.57	
Postage	1,084.00	
Office rental	300.00	
Office supplies and expenses	362.89	
Legal services:		
Edmund F. Cooke, fees	1,575.00	
Edmund F. Cooke, expenses	733.10	
Unemployment insurance and social security	382.81	

GENERAL FUND—Continued

DISBURSEMENTS—continued

Advertising:			
	Radio		$7,029.05
	Publications		7,979.79
3905	Miscellaneous		810.56
	Refunds to cooperatives	$44.71	
	Meeting at Winfield	50.00	
	Expense on hearings, halls, witnesses, etc.	556.83	
	Miscellaneous	159.02	
	Total disbursements		$45,229.9
	Balance on hand Sept. 1, 1938		3,[illegible]

BOARD OF DIRECTORS

	Salary	Expense
Homer S. Rolfe, president	$345.00	[illegible]
L. A. Chapin, vice president		
J. C. Treat, secretary	440.00	1,[illegible]
E. C. Bardin, treasurer	410.00	[illegible]
Sherrill A. Hufcut, executive committee	55.00	[illegible]
F. H. Child—employee		
J. A. Coulter	75.00	[illegible]
Joe Davis	20.00	[illegible]
Dr. R. E. Davis		
Warren Davy	100.00	[illegible]
J. R. Humphrey		
Earl Laidlaw		
Wm. A. Mather	20.00	[illegible]
L. E. Maynard	15.00	[illegible]
Ralph C. Norton		
Fred H. Sexauer	135.00	[illegible]
Dr. K. A. Shaul	130.00	[illegible]
H. S. Stannard		
E. C. Strobeck	135.00	[illegible]
A. J. Williams	40.00	[illegible]
G. L. Dumont	20.00	[illegible]
	70.00	[illegible]
	2,010.00	[illegible]

September 1, 1938, to December 1, 1938.

PROTECTIVE FUND

Balance on hand Sept. 1, 1938	$4,181.39	
Receipts from co-operatives	4,622.56	
Total receipts		$8,803.9
Loans to general fund	7,200.00	
Payments to producers for diversions	1,246.68	
Total disbursements		8,446.6
Balance in fund Dec. 1, 1938		357.3

GENERAL FUND

RECEIPTS

Balance in bank, Sept. 1, 1938	$3,378.56	
Receipts from co-operatives	21,859.84	
Loans from protective fund	7,200.00	
Loan from Lincoln Bank	1,000.00	
Total receipts		33,438.4

GENERAL FUND—Continued

DISBURSEMENTS

Employees salaries		$6,504.36
Employees expenses		6,565.96
Board of directors, salaries		1,522.50
Board of directors, expenses		3,559.06
Publicity		1,279.32
V. R. Tompkins, salary	$297.00	
V. R. Tompkins, expenses	736.32	
Market News, printing	246.00	
Printing and mimeographing		1,757.85
Telephone and telegraph		1,574.42
Postage		342.45
Office rental		262.50
Office supplies and expense		610.16
Legal services:		
Edmund F. Cooke, fees		1,850.00
Edmund F. Cooke, expenses		964.53
Unemployment insurance and social security		334.36
Advertising:		
Publications		2,871.91
Miscellaneous		1,349.60
Note at bank	$1,000.00	
Advanced for certificate of inc	120.00	
Miscellaneous	229.60	
Total disbursements		31,348.98
Balance in bank December 1, 1938		2,089.42

BOARD OF DIRECTORS

	Salary	Expenses		Salary	Expenses
Homer S. Rolfs, president	$225.00	$370.95	Earl Laidlaw	$10.00	$30.90
L. A. Chapin, vice president		900.00	Wm. A. Mather		
J. C. Treat, secretary	330.00	743.41	L. E. Maynard		
E. C. Bardin, treasurer	437.50	530.45	Ralph C. Norton		
Sherill Hufeut, executive committee	55.00	112.06	Fred H. Sexauer		
			Dr. K. A. Shaul	125.00	293.53
F. H. Cloyd			H. S. Stannard	105.00	129.55
J. A. Coulter	5.00	10.90	E. C. Strobeck	20.00	23.67
Joe Davis			A. J. Williams	45.00	127.60
Dr. R. E. Davis			G. L. Dumont	150.00	253.79
Warren Davy					
J. R. Humphrey	15.00	23.15	Totals	1,522.50	3,559.06

3907 Report of the Executive Secretary—C. H. Baldwin

The President's address and the reports and remarks of your Secretary and of your Treasurer have already given an accurate and rather complete picture of the activities of the Agency since our last Annual Meeting.

This report should, no doubt, be confined to the educational and organization phase of our whole program.

In order that we may all better understand the problem and know it as some of us see it, can we not accept the following as fact:

1. We as a class (farmers) are very positive in our opinions. Our work compels us to make up our own minds.

2. We are apt to lack tolerance towards those who differ with us. We do not always give others the same right to their opinion as we claim for our opinions.

3. The big majority of people are sincere and intend to be right, honest, and helpful, but there is always the exception that proves the rule and there are the demagogues who stir up popular prejudice to gain influence.

4. There are always a few (the chronic agitator appealing to emotion, the muck rakers and the cheap blackmailers) who seem to live to create confusion and thrive on the misery they create.

5. There are those who are afraid they cannot stay in business unless they can chisel and have unfair advantage over competitors, and, therefore, use very questionable methods to cover up their inefficiencies and to keep producers divided.

6. Milk producers have been given the leavings so long that in their desperation they have followed unsound leaders at various times, which have caused them to lose money and have left them in still greater misery and confusion. As a result of this experience producers are naturally suspicious. They have been stung.

7. Understanding through education, with all the conflicting ideas is at best slow, yet progress depends upon it. Once the average producer understands the facts, he will make the right decision. Nevertheless, he does not intend to be stampeded in making decisions.

I am going to take it for granted that all believe these to be axioms that are recognized in the science of public relations as it applies to the dairy industry. Recognizing these as facts, your educational and organization program was built.

As I said last year—"Due to the inherent makeup of the Agency it must always be a democratic organization with control remaining in the hands of the producers themselves." You are to be
3908 congratulated on having had the understanding and the foresight to have adopted that principle in the by-laws of the Agency.

The Rogers-Allen Law merely gave permissive rights to producers. The Agency made that right democratic by its liberal by-laws. The policy of the Agency, which has recognized the axioms that I have mentioned, has created among producers a desire to know the truth, has invited honest study and has encouraged cooperation of all.

One of the proofs of the wisdom of this policy is the producer surplus control plan that has been so often mentioned today. The producers found the need and took the time and with sound, deliberate thought, followed by firm action, developed their own surplus control plan during 1938. When the well informed producers presented their plan to other producers, it was no wonder that support was found. And later, when it was presented by the Government vote, it was no wonder that it was overwhelmingly approved by voting producers who, by voting, were only expressing their indi-

al opinions and proclaiming to all that they had done their very est in developing a program to help themselves. They said in effect "It is the best we know how to do under present conditions."

After it was adopted, they told the World that they intended it hould have a fair trial. They knew that weaknesses might develop s time went on, but they also knew that they built the plan and hat they could make changes or even discard it when they so de- ided. It was their plan and they expected that the destructive ele- ents, that we have recognized as a groveling minority that is al- ays with us, will, true to their nature, attempt to destroy it. That s a certainty. It cannot be otherwise. Accordingly, producers ntend to defend and improve their plan.

As long as the policy and the program of the Agency is kept in he hands of the producers and we keep in mind that once the aver- ge producer understands the facts, he will make the right decision, he producers will go forward with their program for greater and till greater efficiency in production, processing and marketing, with nore equitable returns to the efficient. That will mean "A living rice for milk" to the efficient producer. The progress that is made epends upon how quickly and how well the producers understand he problems and the possibilities. That, in turn, depends upon the ffectiveness of the educational program. Organization follows edu- ation as sure as day follows night.

Progress has been made during 1938 and that progress has been lue to catching up the loose ends and combining the gains that edu- ation has made over a long period. This was made possible by the ights given under the Rogers-Allen Law, the Bargaining Agency nd its democratic policy.

I know full well the popular cry for action that always goes up rom those who do not know and from those who would tear down. I know there are those who criticize the slowness with which the Agency has moved at times. There may be some who criticize the "Big brother" attitude that Mr. Treat has mentioned as having 909 been the policy of the Agency from the beginning. I know there are some who believe farmers can be stampeded or rounded p as a flock of sheep. I will admit that this possibly could be done. We have all seen examples of it in the milk strikes, in mob action and y milk control. Action secured under pressure, force or emotions, enerally lasts as long as the compelling power can retain control. f it is action secured by compulsion or by dictatorship, it is not operative effort. Such action cannot be used in the democratic olicy of the Agency remains in force.

Producers are interested in building their own program and if it s to be lasting, it must be on a foundation that is sound and four- quare with the facts. They already have that. The program will rogress and return dividends to producers in keeping with the esire and the understanding of facts by the average producer. hat understanding depends upon your educational program.

Democracy cannot exist without a well informed public; neither c
this Agency nor its program.

The pests of various kinds are always busy spreading propagan
and attempting to create strife in producers' ranks. That is th
nature. They live for that purpose. It cannot be otherwise. Th
fore, our duty is to adopt an efficient and effective means of help
all producers in their desire to know the truth and accordingly m
the right decisions. It is said that an army can move no faster th
its slowest unit; therefore, our interest in all producers. That is t
reason for the "Big brother" policy.

We must be sure to keep in touch with all producers, especia
the unorganized. It must be done in the most efficient way, in ke
ing with the finances and the importance of the work. It is going t
take patience, time and money.

Mr. Treat in his report suggested a comparison of costs and r
turns and gave the total income of the Agency since it started
Taking these figures, it appears that the average producer's sh
of the expenses of the Agency has been less than $3.00 for the seve
teen month period, or at about the rate of $2.00 per year. For th
investment, whether he paid it or his brother producer paid it fo
him, he received from $100.00 to $150.00.

Not all people are members of the Church. It would be desirab
if they were, and all contributed to the cause. Not all, who are me
bers, contribute to the upkeep of the Church. It would be nice i
they did. The Church goes on and no church member would want t
see the country in which he lives try to get along without the influ
ence of the Church. Perhaps for a time longer, the informed pro
ducers will have to carry the load.

It would be nice if every producer could be a member of th
Agency and thereby carry his share, which would be very little o
the responsibility. They contribute twice that amount to milk a
vertising and never know it, but that is aside from the point.

You have a plan that is worth selling. We are all always salesm
whether we realize it or not. I believe that the education
3910 policy of this Agency must be made more effective and that a
constructive forces should be coordinated to bring that abo
and to that one point I suggest most careful attention.

When considering any program, I call your attention to your fie
force. In them you have an organization that knows the power
loyalty to a cause. They have gained the friendship and confiden
of producers with whom they have come in contact. Always willin
and sincere, they have done their best. They take no credit for r
sults that have been obtained, but instead congratulate the produc
for having been able to choose so well and to have put into effect
constructive a program. It is a pleasure to see field men devel
this loyalty to a cause and this grand philosophy.

In closing, I wish to express appreciation for the constructive s
gestions and the advice we have received from many producers. I

rs coming from them have been evidence to me that they were terested and we were working along the right lines.

I wish I might mention all those individuals who have given unual help to our educational program during the past year. This, course, would be impossible. I must mention a few and place first my list the American Agriculturist and its Editor, Ed Eastman ho is a great big brother to every farm family that is honestly iving to better its condition. He has cheered us on many times hen skies were black. And then I must mention Dr. A. K. Getman the State Department of Education, a true friend of agriculture d a great educator. His assistance and advice have been very helpl. Another is Ed. Babcock who has the reputation of doing his own inking and who has never turned me down when I have come to m for advice and help. Nor can I forget Ed. Barlow whose skill telling a story briefly and effectively has attracted wide attention. he State College of Agriculture and the Extension Service, the nference Board of Farm Organizations and all that it represents, e State and Federal authorities and our Bargaining Agency Market ews, the public press generally, have all been helpful.

There has never been lack of work that needed to be done and many nds have joined in doing all that was possible. Any neglect that ay have been observed has not been due to lack of interest or the sire to do all that was humanly possible. The experience that the ar 1938 has brought has been interesting to all.

As a last word, I acknowledge my appreciation for the patience and mpathetic understanding of the Board of Directors and my associes. I say thank you one and all, and history will record for all of us at 1938 in the New York Milk Shed was a year of progress in operative effort.

11 *Defendants' Exhibit No. 60*

INUTES OF A MEETING OF MILK PRODUCERS ORGANIZATIONS HELD AT HOTEL MARTIN IN UTICA, N. Y., MAY 29, 1937, AT 10 A. M.

The meeting was held pursuant to the following notice:

Important Notice

Notice of meeting to be held at the Hotel Martin, Utica, N. Y. turday, May 29, 1937, at ten o'clock, Standard Time.

The committee which was appointed at the meeting of the organd milk producers co-operatives to wait on the Governor, with refence to the Rogers-Allen Milk Bill, met today with others invited Chairman Rolfe to consider what would be done by organized ilk producer co-operatives under such bill which is now law. This eeting was held as a preliminary to a larger meeting which is to held Saturday, and to which all interested organized milk proucer co-operatives are asked to attend.

This committee considered prevailing conditions in the market and discussed various prices and suggestions as to operation under the new law. It has approved of a rough outline of a charter and by-laws of a new Co-operative Association to be formed, to act as a producers bargaining association for the New York Metropolitan milk marketing area. This committee has been appointed to complete the terms of such proposed organization and to submit the results of their efforts to the meeting Saturday for its action. It was the prevailing opinion of the meeting that such an association should be formed now as a preliminary step toward having a production area designated by the Commissioner and to take advantage of the opportunities afforded to producers under the new law.

It was the sense of the meeting that there is at present no need for such action as to upstate marketing or production areas.

Please arrange to attend.

Dated May 25, 1937.

LLOYD C. ANDERSON,
Secretary of the Meeting,
by order of the Committee.

On roll call the following were present: A. G. Walkley, Conesus Cooperative; L. A. Chapin, Dairymen's League; Ernest C. Strobeck, Dairymen's League; A. A. Turner, Cannonsville Cooperative; A. W. Poole, Sheffield's, Dexter, N. Y.; H. J. Henry, Sheffield's, Albany, N. Y.; R. P. Kinney, Sheffield's, Amenia, N. Y.; Sherman Wilcox, Cannonsville Cooperative; Homer S. Rolfe, Sheffield's, Ogdensburg, N. Y.; Harold Evans, Central Cooperative, Hamilton, N. Y.;
2912 E. C. Bardin, Sauquoit Cooperative, W. Winfield, N. Y.; Fred B. Morris, College of Agriculture, Ithaca, N. Y.; C. H. Cooper, Schuyler Junction Cooperative; W. W. Hall, Schuyler Junction Cooperative, Ilion, N. Y.; W. R. Youngs, Oriskany Valley Cooperative, Deansboro, N. Y.; C. L. Dickinson, Agriculture Writer, Dryden, N. Y.; Alfred J. Williams, Sheffield's, Franklinville, N. Y.; Lynn E. Maynard, Philadelphia Cooperative, Philadelphia, N. Y.; J. R. Humphrey, Farmers Cooperative, Holland Patent, N. Y.; H. W. Mitchell, Coventry Cooperative, Coventry, N. Y.; E. L. Carrier, Gracie Cooperative, Cortland, N. Y.; K. A. Shaul, Sheffield's, Cohoskill, N. Y.; J. H. Barker, Camden-Western Cooperative; W. M. Coates, Camden-Western Cooperative; Ralph C. Norton, Boonville Farms Coop. Inc.; W. E. Davy, Coventry Cooperative, Coventry, N. Y.; S. P. Emert, Coventry Cooperative, Coventry, N. Y.; Herbert L. George, Tri County Milk Producers, Boulville, N. Y.; Lloyd C. Anderson, Crowley's Milk Producers Cooperative Assn., Binghamton, N. Y.; Frank C. McLean, Crowley's Milk Producers Cooperative Assn., Binghamton, N. Y.; Elwyn H. Skillman, Crowley's Milk Producers Assn., Binghamton, N. Y.; E. H. Sheldon Little Falls Cooperative, Little Falls, N. Y.; C. H. Baldwin, Holstein Friesian Assn., Albany, N. Y.; V. R. Tompkins, Mutual Dairy, Metuchen, N. Y.; Henry M. Brown, Sauquoit Cooperative, Utica, N. Y.; Edmund F. Cook, Brown & Bailey Cooperative, Buffalo, N. Y.; George C. Lee,

Dairymen's League, New York City; Frank B. Lent, Dairymen's League, New York City; F. H. Sexauer, Dairymen's League, Auburn, N. Y.; H. H. Rathbun, Dairymen's League, New Hartford; R. D. Cooper, Former Pres. Dairymen's League, Syracuse, N. Y.; J. C. Treat, Conesus Cooperative, Honeoye Falls, N. Y.; Earl Laidlaw, Producer, Gouverneur, N. Y.; Raymond Cooper, Pr... N. Y. State Grange, Oswego, N. Y.; L. R. Dale, Otselic Valley Cooperative, Lebanon, N. Y.; R. Carlson, Sheffield's Chatham Center; F. H. Child, Amsterdam Cooperative; Charles Francisco, Amsterdam Cooperative; Ernest Backus, Cannonsville Cooperative; J. A. Coulter, Dairymen's League; Watertown, N. Y.; B. J. H. Rickert, Guernsey Breeders, Syracuse, N. Y.; George A. Fitch, Lowville Cooperative, Lowville, N. Y.; E. S. Foster, N. Y. State Farm Bureau Federation, Ithaca, N. Y.; Karl N. Riebrandt, Dairymen's League, Port Leyden, N. Y.; W. C. Ceas, Sheffield's, Bloomville, N. Y.

Homer Rolfe acted as chairman and Lloyd C. Anderson acted as secretary.

Mr. Rolfe stated that the Governor's Committee which had been selected to wait on the Governor in connection with the Rogers-Allen act had not found it necessary to take any action before the Governor and that he thought it advisable for them to form a nucleus for further action on industry matters. This committee had met on the 25th. The Secretary was requested to read the minutes of this meeting which he did. These minutes were approved.

Mr. Rolfe then read a telegram from E. R. Eastman as follows:

"Chairman ROLFE,

"*Care Cooperative Milk Meeting, Hotel Martin, Utica, N. Y.*

"I regret that it is impossible for me to attend Dairy Cooperative Meeting today but wish your work Godspeed; if you can work out a program that all of you can support it will be the most con-
3913 structive, far reaching move for Dairy Farmers in many a long year. American Agriculturist has worked for repeal of state price fixing of milk because I believe selling milk is the dairymen's job; we have also urged both Legislature and the Governor to pass the Rogers-Allen Bill because Dairymen could not accept responsibility for milk marketing if it is illegal for them to cooperate but now you have the responsibility for selling your members milk and they are looking to you to come through with a program; no single individual nor cooperative can solve the problem but all cooperatives working together can bring the farmer fair and living prices for his milk; all progress is made by compromise; you will each have to give and take; eyes of all citizens are watching you now to see how you come through with this grave responsibility. I know you will not fail and I pledge the wholehearted and complete support of American Agriculturist first to the cooperative movement in general and in particular to any united program which you will adopt and put into action.

"E. R. EASTMAN.

"*President and Editor American Agriculturist.*"

Nominations were then called for for permanent Chairman and Secretary. Mr. Rolfe was unanimously elected permanent Chairman and Lloyd C. Anderson was unanimously elected permanent Secretary.

Mr. Evans was called up to make a report in behalf of the committee which met in New York City to prepare a draft for the proposed certificate of incorporation and of the by-laws. He said in part that 4 of the committee met with the Legal Department of the League at New York City and at that time drew up an outline for the Certificate of Incorporation and of the By-Laws. A great many matters were discussed and they were all hashed over with the Dairymen's League and Sheffields. We were fighting for checks and balances and so were the League and Sheffields and others represented there. That he believed the documents presented represented the true compromise thought of this committee.

Mr. Sexauer was next called upon and he said he didn't know of any more he could do but to support Mr. Evans' statement and then there was a very earnest discussion of what should be set up. We went on the theory that any program that was not almost unanimously adopted should not be adopted at all. He personally felt very greatly gratified with the attitude and responsibility which the committee of 14 adopted in Utica when they selected this committee.

Mr. Skillman was called upon and he said he didn't know as there was anything he could add. That when the committee was called together it was suggested that Mr. Sexauer should act as chairman but he said "no" and Sheffields said "no" and Mr. Evans was appointed chairman of that committee.

Mr. Laidlaw said there wasn't anything he could add. That he wanted them all to understand that he was one of the sponsors of the Rogers-Allen Bill and now that we have the law he was inclined to take the position that as it is the law of the land we all ought to operate under it. This group offers more constructive opportunities than anything we have ever had. He believes that the industry is at the cross-roads to a greater extent than ever before.

3914 He regrets we are not in a position to negotiate a price for June now. He hoped enough progress could be made so this marketing organization can be in affect by the 15th or 20th of June to call the dealers together to negotiate a price for July. If something isn't done to make a price for July we are going to have trouble. If Sheffields have to negotiate a price of $1.30 for 3.5 milk that means we are going to have a lot of dairymen in New York who will cause trouble. If you take off the transportation differential and consider that many producers only have 3% milk and then take off the farm trucking the dairymen only get about $.85 a hundred. This Committee is going to offer a constructive program or you are going to have the darndest milk strike you have ever had. We must proceed with all possible haste consistent with sound progress.

Mr. Rolfe said that he wanted to say that Laidlaw hasn't magnified the situation at all.

Mr. Henry said that he couldn't add anything to what had been said about the committee's work. He doubts if the committee believed it has done a perfect job. He thinks it has submitted a plan which is pretty sound. He suggested that a discussion of the by-laws and the plan submitted would be helpful.

Mr. Treat said that he really believes there is actual sincerity in the plan. This is the most serious moment he has ever seen in his life in regard to farm industry, and he hopes we will be able to carry on in the spirit that has been manifest during all these meetings.

The Secretary was then asked to read the proposed Certificate of Incorporation which he did as follows:

Certificate of Incorporation of Metropolitan Co-Operative Milk Producers' Bargaining Agency, Inc.

We, the undersigned, desiring to form a cooperative corporation, do hereby certify as follows:

1. The name of the proposed corporation is Metropolitan Co-Operative Milk Producers' Bargaining Agency, Inc.

2. This corporation is formed under and pursuant to the provisions of Article 4 of the Cooperative Corporations Law of the State of New York and its objects and purposes are to be those of a cooperative, nonstock dairy corporation for the mutual help of its members not conducted for profit, for the purpose of assisting its members by performing services connected with the production, manufacture, preservation, drying, canning, storing, handling, utilization, marketing, or sale of dairy products produced by the members of the constituent corporations which in turn are to be members of this corporation or any one or more of the kinds of service above specified.

To carry out such other objects and purposes as may be authorized under and pursuant to said Article 4 of the Cooperative Corporations Law and as are further authorized by said Cooperative Corporations Law for corporations organized pursuant to Article 4 thereof, and in order to effectuate the purposes set forth in Section 258–1 of the Agriculture and Markets Law.

3915 3. The office of the corporation shall be located in the Borough of Manhattan, City of New York, County of New York, and State of New York.

4. Its duration shall be perpetual.

5. The number of its directors shall be not less than fifteen nor more than thirty-five. The initial board shall consist of fifteen directors and the number shall be increased from time to time to give representation to additional members.

6. The names and post office addresses of the persons constituting the Board of Directors until the first annual meeting of the corporation are: Name_____ Post Office Address_____

7. The amount of corporate indebtedness for which the individual members or directors of the association shall be personally liable shall be Five Dollars ($5.00).

8. All the subscribers are of full age, at least two-thirds of them are citizens of the United States, at least one of them is a resident of the State of New York, and of the persons named as directors at least one is a citizen of the United States and a resident of the State of New York.

9. The property rights and interests of the members of the corporation in its capital funds shall be on a pro rata basis of amounts contributed.

10. The membership of the corporation shall be limited to cooperative associations organized under or subject to the provisions of the Co-operative Corporations Law of New York state or of similar laws of any other state and organized and controlled by milk producers.

In witness whereof, we have made, signed, acknowledged, and filed this certificate in duplicate.

Dated this ____ day of _____ 1937. Name _____
Post Office Address_____.

Mr. Rickert moved that we incorporate and that this Certificate be adopted. The motion was seconded and unanimously adopted.

There was some discussion as to whether we should proceed so fast and it was felt that it would be better to have a roll call on the motion. Mr. Cook suggested that a motion be made that we reconsider the vote by which the motion was carried and he moved accordingly. This motion was seconded and carried, and Mr. Rickert offered the following motion: He moved that we incorporate by adopting and signing the proposed certificate. My suggested motion is as to all those who are actually in a position in this market to become members.

3916 Mr. Treat seconded the motion and there being no discussion the vote was called for by associations. Mr. Rolfe said that this vote would only apply to those who operate in the New York Metropolitan market.

On roll call the following response was had: Crowley's Milk Producers Cooperative Assn. (In favor), Little Falls Coop. (In favor), Sauquoit Coop. (In favor), Brown & Bailey (In favor), Dairymen's League (Yes), Conesus Cooperative (Yes), Otselic Valley Cooperative (Yes), Sheffield Producers Cooperative (Yes), Amsterdam Cooperative (In favor of the motion but needs to be ratified by the Board of Directors), Cannonsville Cooperative (In favor), Guernsey Breeders (Yes), Lowville Cooperative (Favor very much but it will have to be taken up with Directors), Rondout Valley Producers Assn. (No response), Tri County Milk Producers (Believe will be in favor), Central Cooperative (Yes), Schuyler Junction Cooperative (Yes), Oriskany Valley Cooperative (Personally in favor), Philadelphia Cooperative (Yes, personally in favor but it must be taken up with the Board), Coventry Cooperative (Yes), Gracie Cooperative (Yes), Camden-Western Cooperative (Personally yes),

Boonville Cooperative (Yes, subject to approval of Board), Horton Producers (Laidlaw) (Personally favorable but it is subject to our incorporating).

The motion was accordingly carried.

The Secretary was then requested to read the proposed bylaws. Before doing this he explained to the meeting that with reference to the Certificate which had been approved, that Directors should be decided upon, and inasmuch as most of those here present would probably join, and although some were not qualified as yet to join under the statute it would be better and leave a better feeling if the entire meeting joined in the selection of the first directors. Then the Certificate should be signed, acknowledged, and forwarded to the Department of State at Albany for their approval. That the bylaws should be gone over and while they didn't necessarily have to be binding upon the incorporators, he felt that the incorporators would feel bound by whatever action this meeting took. He further stated that practically every association here represented would have to have the direct action and approval of its Board of Directors before it could become a member and the meeting should proceed with that understanding. This met with the approval of those present. He then proceeded with the reading of the bylaws and the following action with respect thereto occurred:

Article 1, Sec. 1. Approved.

Article 2, Sec. 1. Objects.—Approved without correction.

Article 3, Sec. 1. Membership.—Approved without change.

3917 Article 3, Sec. 2, was amended to read as follows:

"Any member may withdraw at any time from membership in the corporation upon 30 days' written notice addressed to the Secretary."

The reason for the elimination of the part of the proposed bylaws was that there was a feeling that this was covered by the statute and that so long as an association had producers under contracts who had delivered milk into the market for 2 years they would be qualified to be members for a period of 2 years after they ceased to deliver milk and that if there was any question about it it could be tried out and determined in a proceeding to expel the member.

At this time Mr. Anderson stated that it was the opinion of the committee that until such time as the different associations entered into actual contracts with the Bargaining Agency that it was under no contractual relation to it.

Before this section was amended a committee composed of Messrs. Cooke, Anderson, and Sexauer was appointed to draft the amendment and the foregoing was upon their report.

At this time Mr. Evans moved that a Chairman designated committee act as a nominating committee to present a list of original directors. The motion was seconded and carried and the chairman appointed on this committee Messrs. Chapin, Kinney, McLean, Treat, and Evans.

Article 3, Sec. 3 was amended as to the second paragraph on the 5th and 6th lines so that it reads

"* * * producers represented in the Association, provided * * *".

Article 4, Secs. 1 and 2, were completed so that the fiscal year of the corporation commences December 1st and ends November 30th, and the annual meeting of the corporation is to be held the second Tuesday of December in each year.

Article 4, Sec. 3, was amended by having the last line of this section read as follows:

"* * * thereof, at least five (5) days by mail or 48 hours by telegram or telephone, before the date and time of such meeting."

Article 4, Sec. 4, was amended in the second paragraph so that the 10th line of the second paragraph reads as follows:

"* * * per cent (75% of the entire number of producers represented in the Association and also * * *"

Except as above noted the remainder of Article 4 was approved.

Article 5, Sec. 1. Quorum.—Was approved without change.

Article 6, Sec. 1. Directors and Officers.—Was approved without change excepting that Mr. Anderson said that it was the committee's intention that the bylaws read as all directors should be elected at large, but that the League and Sheffields could not have more than the number stated but that any other association conceivably could have all of the directors and that it was intended only to limit Sheffields and the League. The draft did not state the committee's intention.

Mr. Lent said that that was so and the change could be made.

3918 Article 6, Sec. 2, after considerable discussion was amended as follows:

"The officers of the corporation shall include the President, Vice President, secretary and treasurer who shall be elected annually by the Board of Directors for the term of one year. The president, vice president, secretary, and treasurer shall be elected from among the directors. Vacancies shall be filled for unexpired terms by the board in the manner provided for original elections.

"The Board of Directors shall appoint an executive secretary and an assistant treasurer which appointees shall perform such duties as shall be from time to time designated by the board. Such appointees need not be directors."

A new Sec. 3 was inserted to read as follows:

"SEC. 3. There shall be an executive committee consisting of 3 directors, including the president, as ex officio a member thereof, elected by the Board of Directors from their number, which committee shall have such powers and duties as the Board of Directors shall from time to time give them."

Old Sec. 3 was renumbered Sec. 4 and approved without change.

Old Sec. 4 was renumbered 5 and approved without change.

Article 6, Secs. 1 and 2.—Duties of Directors.—were approved without change.

Sec. 3 was amended by changing the last sentence to read as follows:

"The secretary shall give each director written notice of such meetings and the purpose thereof at least 5 days by mail or 24 hours by telegraph or telephone previous thereto."

The last paragraph of Sec. 3 was approved without change.

Article 8. Duties of Officers.—Secs. 1 and 2 were approved without change.

Sec. 3 was approved without change excepting for changing the word "company" in the second line to read "corporation."

Article 9, Sec. 1. Finances.—was approved without change excepting that the "certificates of indebtedness" was amended to read "certificates of capital participation."

Article 10, Secs. 1 and 2. Accounts and Audits.—were approved without change.

Mr. Cook said that one of the rocks upon which many associations foundered is the failure to fully acquaint the membership with the receipts and disbursements and he thought it would be a good idea to audit the books more often than annually. The best way to allay suspicion is by acquainting everyone with just how much money is taken in and how much is being expended. It was thought that the statute covered this point.

3919 Article 11, Seal.—was aproved without change.

Mr. Dale moved that the by-laws as submitted and amended be adopted by the charter members of the corporation as the bylaws of the corporation. The motion was duly seconded and unanimously carried.

Mr. Cooper suggested that there should be some official organ set up for giving information to the membership and spoke of the Dairymen's League News and Sheffield Producers publication and he thought such an organ was well worth while.

Mr. Maynard said he though that would be a good thing.

Mr. Dale pointed out that this might run into a lot of duplication as there were all ready a number of publications in the field.

Mr. Sexauer said that he thought the expense would be prohibitive and there would be overlapping of effort. He thought the organization might furnish a tear sheet which could be included with the regular publications and sent out without additional expense.

The nominating committee was then called upon to report and the report was given by Mr. Treat, The nominees for directors were as follows: Messrs. Sexauer, Coulter, Chapin, Williams, Rolfe, Skillman, Evans, Treat, Bardin, Norton, Maynard, Childs, Davy, Fitch, and Humphreys. It developed that Mr. Sheldon was not present and as it was intended that directors should be original charter members, Mr. Bardin was nominated in his place.

Mr. Anderson outlined various procedure which could be followed in connection with additional nominations, voting, etc. Additional nominations were called for but none were made. Whereupon on motion duly made, seconded, and unanimously carried, the nominations were closed and it was then moved that the Secretary cast a ballot for the nominees, which motion was seconded and carried and the secretary cast a ballot in favor of 15 nominees and they were so declared elected.

Mr. Dale said that a committee should be appointed on publicity and on motion duly made, seconded, and unanimously carried, Messrs. Maynard, Williams, and Chapin were appointed a committee on publicity.

Mr. Sexauer spoke on the advisability of uniformity and organization of unorganized groups, form of contracts, etc. He also spoke on the matter of immediate finances. He said that it was going to take some money to put this thing across and the big fellows are going to have to provide most of the money. He didn't think any one wants to have the large fellows contribute all of it. That there had been a discussion as to an assessment of $.10 per member as original contribution. It would mean about $3,500.00 for $3,700.00 to the League and $1,400.00 for the Sheffield group.

Mr. Rathbun spoke with reference to the progress made and the need for action.

The following resolution was presented to the secretary to be read at the meeting:

"Resolved: That we, the reprepresentatives of the various milk marketing cooperatives, commend Charles H. Baldwin for his constructive leadership in bringing the cooperatives together in
3920 this promising movement to stabilize and improve the milk industry in New York State."

"Be it further resolved: That we extend our appreciation to the Holstein Association for making Mr. Baldwin's services available and urge that his services in this regard be continued until a satisfactory degree of stability is attained."

The resolutions were seconded and unanimously adopted.

The directors for the new association were asked to meet together immediately following the adjournment of this meeting to consider and elect temporary officers, to discuss ways and means of selling bargaining agency idea to associations not members, to discuss and develop a uniform producer contract and to consider the advisability of asking each of the members to contribute $.10 per member to the new association as initial contribution. These suggestions were put in the form of a request for the directors so to act. The motion was seconded and carried.

The meeting then adjourned.

LLOYD C. ANDERSON, *Secretary.*

3921 The undersigned milk producer cooperative corporations hereby apply for membership in the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., and agree as follows:

1. To abide by the charter and the bylaws adopted at a meeting of said corporation held at Utica, New York, on June 8th, 1937.

2. To promptly furnish to the Secretary of said corporation formal papers required under the bylaws to effectuate the foregoing.

Dated at Utica, New York, this 8th day of June 1937.

(s) Conesus Milk Producers Co-operative Assoc., Inc., by J. C. Treat, Pres.; (s) Amsterdam Milk Producers Co-op., Inc., F. H. Child, Del.; (s) Crowley Milk Producers Co-op. Assn., Inc., E. H. Skillman, Pres., F. C. McLean, Sec.; (s) Brown and Bailey M. P. Co-op. Assn., Inc., by Edmund F. Cooke; (s) Sheffield Producers Co-op. Assn., Inc., by K. A. Shaul, Sec.; (s) Dairymen's League Co-op. Assn., Inc., Fred H. Sexauer, Pres.; (s) Sauquoit Valley Farmers Co-op. Assn., Inc., E. C. Bordin; (s) Philadelphia Milk Producers Co-op. Assn., Inc., Lynn E. Maynard, Pres.; (s) Central Milk Producers Co-op. Assn., Inc., Pres.; (s) Lowville Producers Dairy Co-op., Inc., George A. Fitch, Pres., Lowville, New York; (s) Boonville Farmers Co-op., Inc., Ralph C. Norton, Pres.; (s) Schuyler Junction New York Milk Shed Coop., Inc., Charles H. Cooper, Pres.; (s) Cannonsville Coop., A. A. Turner, Pres.; (s) Otselic Valley Coop., L. R. Dale, Representative; (s) Wampville Coop., Ralph Goff, Pres., Oneida R. D. #2; (s) Poland Milk Producers Assn. Coop., Inc., Grant Hines. Pres.

3922 *Defendants' exhibit no. 61*

ORGANIZATION MEETING, TEMPORARY BOARD OF DIRECTORS, METROPOLITAN CO-OPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., HOTEL MARTIN, UTICA, N. Y., MAY 29, 1937

E. H. Skillman acted as temporary chairman and immediately H. Evans of The Central Co-operative placed in a nomination for Homer Rolfe of Sheffield Producers, to be president of the organization. This nomination was seconded by J. C. Treat of Conesus Co-operative. Nomination was approved and Mr. Rolfe was chosen. He immediately assumed the office and acted as Chairman of the meeting.

L. A. Chapin of the Dairymen's League was nominated and elected for the office of Vice President.

J. C. Treat of Conesus Co-operative was nominated and elected for the office of Secretary.

H. H. Evans of The Central Co-operative was nominated and elected for the office of Treasurer.

After a discussion it was decided to select the officers already elected along with Mr. E. H. Skillman, of the Crowley Producers, to constitute the temporary Executive Committee of the organization.

A short discussion on the matter of a selection of an Executive Secretary for the organization was carried and it was decided to offer the position to Charles Baldwin, of Albany, New York, former State Secretary of Agriculture. This action was unanimously approved by the directors.

It was moved and approved to solicit 10¢ per member as an initiation fee from all groups to start the financing of the organization. This was approved.

It was decided that the Executive Committee should meet
3923 Tuesday morning, June 1, 1937, in New York City.

All directors were present in addition to Mr. Henry, of Sheffields, Mr. Lee, of the Dairymen's League, and V. R. Tompkins, of the Mutual group.

3924 TEMPORARY EXECUTIVE COMMITTEE MEETING, METROPOLITAN CO-OPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., NEW YORK CITY, JUNE 1, 1937

The following were present at this meeting—Messrs. Rolfe, Chapin, Treat, and Evans. Mr. E. Skillman was absent.

The following were present on invitation—Mr. W. J. Birdsall, Department of Markets, State Department of Agriculture, Albany, N. Y.; Mr. E. S. Bird, Bureau of Markets, State Department of Agriculture, Albany, N. Y.; Mr. H. J. Henry, Sheffield Producers, and V. R. Tompkins, Publicity of Mutual group.

The matter of a uniform contract for the producer to use was discussed. Also the details in the formation of their cooperatives was taken up.

Matters pertaining to Certificate of Incorporation and changes were also taken up. Mr. Birdsall took a prominent part in this phase of the meeting.

I. Application form for membership in the Metropolitain Bargaining Agency was discussed and approved. Herewith submitted:

Whereas, Metropolitan Co-Operative Milk Producers' Bargaining Agency, Inc., was organized at a meeting of representatives of about twenty-three dairy cooperative associations at Utica, N. Y., on May 29, 1937, and a representative of this association took part in such meeting;

Now, therefore, be it resolved that we approve of such organization and confirm all acts of our representative in participation in such organization, and,

Be it further resolved that this association formally apply for membership in such corporation and that the officers of this association be authorized to take such steps as may be necessary and proper in joining said association.

3925 IL Uniform credentials of representatives from cooperatives and their power to act on behalf of their respective cooperatives, prepared and approved.

After much discussion the copy herewith presented was the one suggested. This form to be sent to each group accompanied by a letter explaining the meaning of the power given each delegate. In each instance it was explained that cooperatives could use this form if desired, or formulate the designated power for their delegate in matters of business with the parent body.

Copy follows:

Resolved that_____ be appointed as a delegate of this association to attend all of the meetings of members of Metropolitan Co-Operative Milk Producers' Bargaining Agency, Inc., for the period of one year from date unless such appointment be sooner revoked, to the end that this association may have the representative in such corporation as authorized by the bylaws thereof, and that said delegate shall have full power and authority to act for and in behalf of this association in the completion of the organization of said corporation and shall exercise such rights and powers in its operation as are conferred by the bylaws of Metropolitan Co-Operative Milk Producers' Bargaining Agency, Inc., to its members.

Further resolved that_____

Further resolved that_____ be, and hereby is, appointed as an alternate delegate with full power to act in place and stead of said _____ in case of his inability to attend any meeting or meetings of said Metropolitan Co-Operative Milk Producers' Bargaining Agency, Inc., such authority to continue for a period of one year unless sooner revoked.

3926 The action of the Board of Directors at Utica in setting up a membership fee of 10¢ per producer as initiation fee approved by the Executive Committee.

After considerable discussion with Mr. Bird and Mr. Birdsall in laying out a compaign to organize the unorganized producers into cooperative groups, and also invite into membership the organized cooperatives, these two gentlemen offered their full cooperation and furnished the organization with an up-to-date list of cooperatives and their official family to use in the campaign.

Meeting adjourned until Wednesday morning, June 2, 1937, at 10 A. M. at New York City.

3927 TEMPORARY EXECUTIVE COMMITTEE MEETING, METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., NEW YORK CITY, JUNE 2, 1937

The meeting was called to order at 10:30 A. M. The following were present: Messrs. Rolfe, Treat, Chapin, and Evans. Mr. E. Skillman was absent.

Mr. H. Henry and V. R. Tompkins were present on invitation.

The initial topic was the matter of delegation of power to delegates selected by member cooperatives. Action taken at Tuesday's meeting was approved.

Mr. Chapin suggested that a letter accompany each form sent out, explaining in simple language that the form was a mere suggestion, but that each cooperative could designate just what powers their delegates could be clothed with in the meetings, discussions, and matters pertaining to contracts, etc.

A general discussion was held on the matter of a model form of contract used by the various cooperatives. It was the thought in mind that the one used by the Montgomery & Eastern Cooperative was very good while simple. A copy of this contract is to be sent to all member cooperatives of the Metropolitan Bargaining Agency for them to study.

At this point Attorney Miller informed the meeting the Certificate of Incorporation as presented at Albany needed certain changes—as suggested by Mr. Sharp of the Secretary of State's office at Albany—in the wording. These changes do not in any way change the meaning and purposes of corporation but were mere technicalities of law.

The committee decided to rewrite it and make the changes as suggested and resubmit it to Albany for final approval.

The committee decided to hold a general meeting Tuesday, June 8th, at the Hotel Martin, Utica, N. Y.

A discussion on the matter of an initiative in forming a dealers
3928 bargaining agency was taken up. It was the concensus of opinion that steps should be taken immediately to inform the dealers that we are ready to meet with them in the near future.

It was decided to immediately start an organizing campaign throughout the state as soon as the meeting ratified the Certificate of Incorporation, Bylaws, Board of Directors, Officers and Executive Committee and employees selected.

The Bylaws were carefully checked and after considerable discussion certain proposed amendments were suggested. These amendments are as follows:

AA. Proposed Amendments to By-Laws of Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc.

Amend Article IX by the addition of an additional section to be numbered section 2 to read as follows:

"SECTION 2. There shall be an initiation fee for each Cooperative association applying for membership in the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., of ten (10) cents

for each member of the association so applying for membership, to be paid when such association is accepted as a member. The fee, however, shall be limited to those members of the applicant association whose milk is qualified for shipment to the metropolitan market.

"There shall also be a service charge of not less than two mills nor more than five mills per hundredweight for the milk equivalent of all milk or cream sold for fluid consumption by a member association in the metropolitan markets, such dumpage charge to be paid by each member association to the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., as soon as the latter be-
3929 gins to function in the negotiation and sale of milk of its members, the amount of such charge to be determined from time to time at a membership meeting.

"The Board of Directors shall have power to waive or defer, for such periods as within its judgment seems sound, the collection of initiation fees or service charges it it determines that any member association does not have means of financing the payments of such fees or charges or that its milk cannot be sold to a distributor under a contract which will allow for the deduction of funds for such financing."

Financial matters were discussed and the Committee decided to employ an Executive Secretary at a salary of $5,000.00 per year, subject to negotiations. The name of Mr. Charles Baldwin was offered as a possible selection for that office.

The Committee recommends that all members of the Board of Directors and all officers receive a per diem of $10 a day and expenses on all committee meetings and work in connection with official business of the organization.

The Committee decided to recommend that a Publicity Dept. be set up whose duty would be to edit and see to the publication of the organization bulletin, to send out bulletins to the official family of the organization, to check on press clippings and assist the officers in keeping the organization's activities before the producers.

This committee recommends that V. R. Tompkins be employed to handle this work at $100.00 per month and expenses. All expenses pertaining to this department are subject to the approval and audit of the Executive Committee.

In connection with the work of the Publicity Dept., the committee recommends that an official semimonthly magazine be issued
3930 and sent express prepaid to each member group, office, or plant, and sufficient copies to take care of all producers who are members of these groups be supplied.

A discussion was held as to whether or not we should call for a blended price of three classes in our anticipated meeting with a Dealers' Bargaining Group who may meet with us in the near future. All members of the Committee present took an active part in this discussion and expressed their views. A tentative plan as follows was suggested:

Class 1—Flat price for all milk sold in fluid form.

Class 2—Flat price for all milk used for cream sold for fluid consumption. Changeable prices on cream for ice cream.

Class 3—Blended price on Federal Evaporated Milk-Butter and cheese.

At a later date the matter of an audit-on classification of dealers' books to see that the producer receives the payment for his milk in the class which it was actually used, will be taken up. These audits should be made by C. P. A. in the employment of the Metropolitan Bargaining Agency.

Meeting adjourned subject to call of President Rolfe.

3931 *Defendants' Exhibit No. 66*

METROPOLITAN CO-OPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC., HOTEL ONONDAGA, SYRACUSE, NEW YORK

Special news. Issued by Tompkins.

AUGUST 10th, 1938.

Producers—By the time this bulletin reaches you, the Bargaining Agency will be on the firing line carrying out a program which was decided upon at a delegates meeting held Thursday August 11th at Syracuse. Further details will be sent you in our next issue of The Market News, which will be off the press in a few days. Remember—the dealers are fighting this order which has been drawn up solely for your benefit. Support it!!

Milk Measure up to Farmers

WASHINGTON, Aug. 6th—A Federal-State marketing program, designed to regulate the handling of milk of the nation's richest market, the New York metropolitan area, awaited the approval of more than 60,000 Northeastern dairymen.

Secretary of Agriculture Wallace approved the program and ordered a referendum to be held on August 20 among milk farmers in seven States serving the New York market. The pact must be approved by two-thirds of the dairymen before it becomes effective.

Representatives of New York's $2,000,000,000 dairy industry claimed strong support for the agreement among milk farmers, but predicted that it would precipitate a bitter controversy between dealers and the producers.

The proposed agreement establishes minimum prices for nine classes of milk, provides a marketwide pool arrangement to assure uniform prices to all producers and assesses dealers for the cost of administering the act.

At hearings preceding the drafting of the final agreement dealers lodged strong protests against the regulatory provisions. One large

New York distributor denounced the marketing pact as "discriminatory, economically unsound, and unenforceable."

Secretary Wallace, however, declared that the program "takes into consideration the consumer and distributor, as well as the dairyman."

He described the aim of the marketing pact as "to help producers and co-operative associations of producers get a reasonable price with a stable market for their milk, to treat handlers (dealers) equitably, and to assure the consumer a steady, safe supply of milk and milk products."

The Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., of New York, representing 40,000 producers, sought the Federal order after they said State control legislation had failed to stabilize conditions in the New York market. Dairymen in other States, serving the New York market, were not affected by the State's marketing regulations. About one-third of the milk received in the New York area comes from outside the State.

The Federal order, if approved at the referendum, would complement a similar order by the New York State Agriculture Commissioner and, in the opinion of Federal and State officials, provide effective control in the metropolitan market.

3932 Minimum prices for fluid milk in the proposed Federal-State pact range from $1.80 to $3 a hundred pounds during the months of April through July and from $2.05 to $3.25 during the months of August through March. They are based on the price of 92-score butter on the New York market.

On the basis of the New York wholesale butter price range of 25 to 29.9 cents a pound, the minimum price of fluid milk for the months of August through March would be $2.45 a hundred pounds. During last June the price averaged from $1.39 to $1.70 and producers received as little as $1 a hundred pounds.

Secretary Wallace said the nine classifications of milk, established in State control law, were retained in the proposed Federal-State agreement "because of the large territory of the New York milk shed, the wide variations in conditions of production and climate and the great variety of the possible manufacturing outlets for milk which is not used in the top-price fluid classes."

The agreement would require handlers to pay producers a higher price for quality or grade A milk and provides freight differentials.

An administrator for the pact would be selected by the Secretary of Agriculture and the New York State Commissioner of Agriculture and would be authorized to require periodic reports from handlers, showing deliveries and tests of milk received, the use made of this milk, and payments to producers.

The referendum will be conducted in New York and parts of Pennsylvania, New Jersey, Maryland, Connecticut, Massachusetts, and Vermont.

New York City—

Milk Price Raised by "Independents"

A rise of 1 cent a quart in the price of milk set by the so-called independent distributors—as apart from that sold by the Borden Company and Sheffield Farms—has been effected, it became known.

Subject to further reverberations of the recent price war, and to the possible ramifications of the dispute between distributors and retailers over the amount of ice the latter get from the former, the move will raise the over-the-counter price of a bottle of milk to 8 or 9 cents, and of a paper container to 9 or 10. The usual deposit will apply to bottle sales.

The increase was attributed to the end of the "flush" season, usually May to July, by Leroy A. Van Bomel, president of Sheffield Farms. He confirmed the rise in the price of milk distributed by Breakstone Brothers, like Sheffield a subsidiary of National Dairy, whose milk is delivered in Sheffield trucks.

Pointing out that "milk is commanding a very much higher price," Mr. Van Bomel said Breakstone's price to the stores had gone up from six to seven cents for bottles, and seven to eight cents for containers. He said this did not necessarily imply a rise in the price of the standard Sheffield milk, but revealed that a conference between producers' and dealers' bargaining agents was scheduled for later this week.

Other sources, agreeing that the end of the flush season and recent weather factors had tended to eliminate surplus, indicated they would not be surprised if an increase in the Borden and Sheffield milk, which makes up more than half of that consumed in the metropolitan area, followed.

3933 Charles Ackerman, head of the United Independent Retail Grocers and Food Dealers Association, said its membership was "very much upset" about the increase, but could do nothing about it. The association recently threatened a sales stoppage as an outgrowth of the ice question, but the action never materialized. The association held a meeting last night to discuss the price rise.

Although Mr. Ackerman and a spokesman for one of the distributors whose rate went up agreed that Reid's Union Dairy shared in the increase, this was denied by a spokesman for the Borden Company, reached at his home. Reid milk is controlled by Borden's in an arrangement similar to that between Breakstone and Sheffield. The Borden spokesman said, after some telephoning, "There has been no change in Reid prices."

UTICA, N. Y., Aug. 2nd.—Allegations of "price slashing," made at New York City milk distributors by a dairy farmers union official, were referred today by Attorney General Bennett to the State Law Department's Anti-Monopoly Bureau.

The allegations were made by Archie Wright, organizer of the union, which claims a membership of more than 13,000 up-State dairymen.

In a letter to Mr. Bennett, Wright appealed for "an immediate investigation of the activities of milk dealers in price raids."

The union leader declared several large distributors and retailers, through their subsidiaries, had engaged in "recent raids on wholesale milk prices in New York City."

NEW YORK, CITY, Aug. 5th.—

Deal to Call Off Milk War Probed

One of the large independent milk companies, charged with conducting a ruinous price war, was under investigation today by Attorney General Bennett.

The company, selling an unadvertised brand of milk, is said to have offered to stop cutting prices if other dealers agree to stabilize the price of unadvertised brands at 7 cents a quart wholesale.

New in the field, the company reputedly has built up a large business through its price-cutting practices.

Bennett's office has not ceased its quiet investigation of milk companies since its report to the Legislature in March. At that time Bennett said investigation indicated severe and cutthroat competition in the wholesale end of the independent milk field.

Some of the small milk companies have charged that not only has this large independent company called for a stabilized wholesale price, but has virtually demanded that the price be stabilized.

Further, the large company has allegedly warned the small group of companies that whoever fails to meet the standardized price will face a ruthless price war and ruin.

An upward trend in milk prices, wholesale and retail, is expected at this time because excess milk from farmers is falling off rapidly as it always does in July and August.

3934 Usually, an upward revision in prices comes in July, but it is said to have been delayed among the unadvertised brands because of the violence of the price war.

Pay by test, Jersey Producers Request

New Jersey representatives of the Inter-State Milk Producers' Co-operative appeared before the New Jersey Board of Milk Control at its public hearing on July 22, and asked for establishment of milk prices according to the butterfat content of milk. H. T. Borden, manager of the South Jersey Market, asked that a price be set for higher testing milk that would be in keeping with the higher cost of production. It was pointed out that with the present price of $2.76 per hundred pounds of 3.5 percent milk the Grade B producer is paid 78.87 cents per pound of butterfat, while the producer of 4.5 percent milk is paid 70.23 cents per pound of butterfat and 5 percent milk returns 67 cents per pound.

Requests from producers in New Jersey also favored adjusting retail prices according to the butterfat content of the milk, suggesting

that Grade B milk testing more than 3.7 percent butterfat sell as an extra cent per quart. Some producers went further and asked that B milk testing more than 4.2 percent should sell at 2 cents above the milk testing under 3.7 percent.

In the face of the demand from some quarters that the retail differential on Grade A milk be reduced, it was brought out forcibly that the present differential should be maintained because of the extra cost of producing and processing Grade A milk. Instances were cited where the Grade A market disappeared when the price margin between Grade A and Grade B milk was reduced.

A group of New Jersey dealers asked that the producer price of Grade A milk be reduced to $2.76 and Grade B milk to $2.53 per hundred pounds. The dealers, in making this request, called attention to the rich pastures and abundant feed crops.

The Board is taking the requests of the various groups under consideration but as yet no announcement is available.

"The Committee" Tells the Farmers

From Dairymen's League News, July 12, 1938

Time was when the city slicker went to the country to get easy money from the farmers. Those days are in the past. Today the general run of city slickers do not attempt to fleece farmers. They have found that the average farmer is too smart for them. Now they work their urban brothers selling them most anything from worthless stocks to gadgets peddled from a sidewalk stand. It has been a long time since a farmer bought a gold brick or the Brooklyn Bridge.

Certain milk dealers, however, still appear to think themselves pretty slick and farmers just as gullible as they were in the horse and buggy days. Evidence of the low regard one dealer outfit has for the average farmer's mind came to light last week in a lengthly report that was being circulated by hirelings of the dealer outfit. The report is headed: Report of committeemen on their investigation of the Boston federal marketing order made June 6 to June 8 inclusive.

It is signed: The Committee.

3335 It is a long report. It purports to reveal a lot of things wrong with the Boston order and to show widespread dissatisfaction among New England dairy farmers with the plan. It tells of $2,000,00 being held in escrow pending court decisions. (The actual figure is approximately $1,500,000.) The report makes the startling assertion that were it not for the federal order this $2,000,000 would have been paid to farmers. Most people will disagree with that claim. Had it not been for the federal order in Boston the dealers would probably have had that much more added to their profits.

In the report of The Committee nothing is said about the dealer tactics that plunged New England dairymen into a plight that made

it necessary for them to seek government help. Nothing is said of the fact that dealers fought the plan from the start. Nothing is said about the fact that the dealers have spent a small fortune in litigation trying to prevent the plan becoming wholly effective.

Ommission of facts is not surprising. Neither is distortion of facts surprising. These are common dealer practices. The surprising thing about this report is that even a dealer and his hirelings would be so cocksure as to think they could hoodwink farmers with such a sleazy document. It is a strain on the credulity of farmers to assume that they can be convinced that a three day investigation could cover the New England territory and provide accurate data for such a sweeping report.

And, it is a strain on the intelligence of farmers to expect them to accept as worthy of any consideration whatever a report signed: The Committee. What is this committee? What responsible body created The Committee? Who are the men on The Committee? Why are not their names on the mimeographed copies of the report that are being circulated among farmers?

These are questions that most farmers will ask themselves, and concluding that there's a nigger in the woodpile they will properly value the report for just what it is—dealer propaganda.

Milk Dealers Assailed

SYRACUSE, Aug. 8th.—Charges that New York City milk dealers "have already started a campaign to scuttle" the Federal State milk marketing program, "and are attempting to brow-beat farmers into voting against it" were made today by Leon A. Chapin, Franklin County dairy farmer.

"Before the ink was dry on the official document which was signed in Washington, Aug. 5, dealers began condemning the plan under which farmers hope to attain a living price for milk," said Mr. Chapin, who is vice president of the Metropolitan Cooperative Milk Producers' Bargaining Agency.

"This is a fight to the death to determine whether milk dealers are going to continue dominating farmers and setting their own price on his milk, or whether the farmers are going to have a voice in determining what they shall receive," said Mr. Chapin.

Farmers will vote on the proposed order Aug. 19 and 20.

3936 Where Do We Go From Here Producers?

Producers and friends of the producers—Have you read the above statement by Mr. Chapin? Here is a gentleman who does not have much to say, and when he does he means it. Most of us feel that he is absolutely right in making the accusation. Hardly had the order been issued when several executives of large milk concerns made attacks on the order declaring it illegal and finding so many faults that we wondered if all of the brains in the world were not

stored up by these large executives. Somehow or other, some people, as they grow higher in their positions of life, assume an attitude that no one else but themselves knows anything about the milk business. We do not intend at this time to discuss any political cooties, misguided editors, and news writers; or some of the leeches that fasten themselves on the producers with the one thought in mind of making a dollar. Let us talk now in plain language about milk, this Federal Order, and present conditions.

How many of you farmers want to have many milk checks like you have been receiving lately when milk has been down as low as 72¢ per hundred? Every one of you have been hit in some way or another, except those that manage to secure side money from the "pie counter." You want to make a fair living for yourself and family and the officials of the Bargaining Agency have done everything they possibly can in the past year to better your conditions. Up until February of this year things were going along at a nice level and most of you were contented with your price of milk. However, the continued sniping, and seemingly the work of an "unseen hand" was at work to disrupt the Bargaining Agency. Each week when you look into certain farm journals you found that we were all robbers, controlled by the milk trusts, and etc. However, none of these gentlemen who have become rich off of the backs of farmers have ever attended the Bargaining Agency meetings and listened to the serious discussion which was for one purpose—and that was to put the milk business in the State of New York and adjacent territory on an even bounce so that the producers could get a fair return from their milk.

Finally it was decided that the only recourse was to ask for a Federal Order. This was done, and a great many of you know how the opposition lined up many high powered attorneys and speakers who did their best to confuse the issue and even attempted to filibuster the order by stalling at the New York City hearings. After these hearings an order was presented which may not of pleased all of us, but it was better than anything that had been offered by the opposition. Please keep this fact in mind that the opposition has never offered you anything, but they have continually lambasted any plan that your leaders presented.

Now the final order is here and you are in the midst of a campaign which is being waged for and against the approval of what Washington feels is a fair proposition for the producers who furnish milk to New York City.

The mere fact that the opposition almost unanimously does not like this final order, is enough in itself to convince you that you should vote for it and go out and fight for it every step of the way.

Your leaders in the Bargaining Agency have only been elected to those offices by your votes and if you had attended a few of the recent meetings, you would of seen how some very capable men have gone down in defeat, simply because a majority vote had

decided that possibly the other candidate or candidates presented better qualifications to represent you producers. Your writer has been going around the New York milk shed for the past seven
3937 years and he received his initial baptism acting as a newspaper man covering the big strike. Since that time we have attended hundreds of meetings and we personally have a mailing list of 4,900 persons that we know and have talked with in regards to milk. We receive on the average of 50 letters a week in regards to this subject. Tis' true, some of them have not been so pretty, but most of them have been fair, and from all of this knowledge gained through these years we have been able to judge the characters and capabilities of a great many producers and officials of small co-operatives.

With this thought in mind—we have often set back and digested the qualifications of the present official family of the Bargaining Agency. All in all, they a pretty sincere bunch of high class fellows, and don't let anyone tell you that they ever will sell you out by offering you any plan, expecially this Federal Order which is for your benefit. They want to secure for you the best possible prices for your milk, but they have in mind, however, to keep the industry on an even level and not make it so spotty as it has been in the past.

About the only way that you can express your approval of the officials that you have selected in the Bargaining Agency is to approve of the Federal Order that is now up for your consideration. By voting for this order you simply vote for something that is for your own protection.

Washington—

The Agriculture Department geared up its publicity machinery for a vigorous campaign to "sell" to 60,000 farmers in seven northeastern states a milk marketing program for the New York metropolitan area, the nation's biggest milk market.

Secretary of Agriculture Wallace signed the marketing order last week and called on the milk producers to approve it at a referendum August 20. It must be approved by two-thirds of the producers before it becomes effective.

New Jersey will participate in the referendum which will be conducted by secret ballot. Sixteen polling places have been assigned New Jersey.

Farmers entering the polling places will be handed a blue ballot which they will mark and sign and then drop in the ballot box. When the polls are closed the ballot boxes will be sealed and shipped to Washington, where they will be opened at AAA headquarters.

The result of the referendum is not expected to be announced for three or four days after the polls close.

In New York the producers also will vote on a state marketing order to complement the federal order. The state ballots, which will be pink, will be placed in a separate box and sent to Albany for counting.

Commissioner Noyes in urging support of the orders, emphasized the need of milk control and described the proposed orders as: "fair and reasonable." He was confident, he said: "that if adopted it will stabilize conditions in our milk industry, which cannot be assured in any other way."

Support yourself by voting for these orders.

3938 *Defendants' Exhibit No. 67*

Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., Onondaga Hotel, Syracuse, N. Y.

Immediate release.

DRAFTING MILK MARKETING ORDER FOR NEW YORK

SYRACUSE, February 7.—Actual drafting of a proposed federal and state milk marketing order for the New York city market started here today.

Officers and directors of the Metropolitan Cooperative Milk Producers' Bargaining Agency were in conference with representatives of the Agricultural Adjustment Administration and the New York State Department of Agriculture and Markets.

The meeting resulted from a series of discussions by directors of the Bargaining Agency, which at the end of last week asked Secretary of Agriculture Henry A. Wallace and Commissioner Holton V. Noyes to lend their aid in drafting an order under the Agricultural Marketing Act and Rogers-Allen law.

It is expected that all of this week and perhaps longer will be needed to write the order, which must be drafted to meet the requirements of both the federal and state governments. When the order has the approval of both governmental agencies it will be presented to dairy farmers for open discussion at hearings and will be voted upon by dairymen, according to Edmund F. Cooke of Buffalo, attorney for the Producers' Bargaining Agency.

"The Metropolitan Cooperative Milk Producers Bargaining Agency has taken leadership in presenting to dairymen a concrete plan for solution of many of the difficulties confronting the industry," said Mr. Cooke in a statement today.

"The Bargaining Agency does so with no thought or intention of excluding from the conferences necessary to develop and mature a practical plan, any representative of organized or unorganized groups, but because the Agency is the only recognized legal agency under the law clothed with the power and authority to initiate such a movement. No unorganized group and no group incorporated but not a member of the Agency need feel any apprehension regarding its rights. The Agency assumes the responsibility which the law imposes upon it, by initiating a plan for the control of surplus and

stabilization of prices to producers, but it recognizes too its responsibility to guarantee and protect minority rights.

"The meetings of the officers and directors of the Producers Agency are held in an atmosphere tense and surcharged with the necessity of immediate action. Conditions by which we are surrounded, 3939 create that atmosphere. When we survey the New York market we find that prices are rapidly sliding. Unless the decline can be stopped, the price to producers for milk must fall lower and lower. The political activities of the New York City administration in behalf of cheap milk persist in aggravated form.

"It is not in New York City alone that the situation cries aloud for remedy. Among producers exist evils of their own fabrication, evils which are destructive of any attempt to procure a fair and stabilized price. Small groups of producers insist upon conniving with notorious chiselling dealers at prices below those set by the Producers Bargaining Agency. In several instances these producers are willing to sell to these dealers without any commitment by dealers as to prices. These producers, with their 5,000 or 6,000 cans of milk in the hands of unconstructive dealers, are responsible more than any other factor for prevailing conditions.

"The question is: How long will producers as a whole, tolerate a collusion between producers and dealers which is destructive of a fair price to all producers? Unless farmers are satisfied to accept economic domination by a wilful minority some remedy must be sought and applied.

"To a greater or lesser extent, farmers have been confronted by indentical situations year after year, and the only effect upon a large part of the industry has been discussion without remedy or action. In those years, concentrated action was difficult because the major portion of the industry was unorganized. That situation has been completely reversed. In the Producers Bargaining Agency more than 50,000 of the less than 70,000 producers in this Milk Shed are represented through 102 cooperatives.

"That force combined with the active support of many producers not members of the Agency should be effective enough to eradicate many of the destructive influences which now block progress. To the aid of these producers backing a constructive program must be brought every aid designed by state and federal government for establishing processes of stable and orderly marketing to preserve and develop this vital industry. There remains but one alternative. That involves invoking state and federal assistance in the establishment of a federal and state order.

"Farmers have their choice between disorder, confusion, and financial failure, and the adoption of a rational system of orderly business conduct. Other milksheds equally distressed and oppressed have through state and federal assistance achieved the stabilization. No oppressive measures have been engaged to obtain results. No valid reason exists for doubting that farmers here can attain as much. The

results will depend upon the dairymen; upon the equality and integrity of their leadership; and the intelligence and activity of every producer. Continuing without remedy the future outlook is without promise. With governmental assistance farmers can expect helpful results."

3940 *Defendant's Exhibit No. 67–A*

METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., ONONDAGA HOTEL, SYRACUSE, N. Y.

Immediate release.

SYRACUSE, April 5—Dealer opposition to a proposed federal milk marketing order stood today as the "main obstacle to be overcome in the battle to obtain for farmers a living price for milk," said Homer S. Rolfe of Lisbon, president of the Metropolitan Milk Producers' Bargaining Agency.

Directors of the Producers' Agency met at the Onondaga Hotel and spent the day examining the latest draft of the proposed marketing order. Mr. Rolfe expressed the belief that within another ten days the order will be in such shape that application can be made to Secretary of Agriculture Henry A. Wallace and New York State's Commissioner of Agriculture and Markets Holton V. Noyes to call public hearings.

"We are proceeding as rapidly as possible with the final drafting of the order in which we have been helped by assistants of Secretary Wallace and Commissioner Noyes," said Mr. Rolfe. "Only a few minor details remain to be worked out and then the order will be ready for public presentation to dairy farmers by the federal and state governments.

"Despite our haste in getting this order ready to prevent a complete collapse of farmers' milk prices, it is evident that the dealers are equally as fast in laying plans to prevent the order becoming a reality. Some of the Bargaining Agency directors indicated today that dealers are already working throughout the milk shed to block adoption of the order. It is apparent that the dealers are going to present a united front in opposition to the order when it comes to public hearings. We have information indicating that they are contemplating making use of various consumer groups in their fight against the farmers attempt to obtain a fair price for milk. We know that some dealers have already started work among different groups of farmers to create opposition to the order by planting false statements, nurturing petty zealousies, and promoting group animosities.

3941 "It is plain that if we are to succeed in enlisting the governmental aid available to farmers to obtain a better income there will have to be a general uprising among producers in demand for this kind of help. I am confident, however, that the hard pressed

dairymen of this state will give this movement their full support and free themselves from the dealers' yoke that has dragged them down during the last decade."

3942 *Defendant's Exhibit No. 67-B*

Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., Onondaga Hotel, Syracuse, N. Y.

Immediate release.

SYRACUSE, April 7—Officials of the Metropolitan Cooperative Milk Producers' Bargaining Agency returned from Albany today with the announcement that formal requests for joint state and federal public hearings upon the proposed milk marketing order will be made this week.

Leon A. Chapin, North Bangor, vice president; J. C. Treat, Honeyoe Falls, secretary; and Earl C. Bardin, West Winfield, treasurer of the Producers' Agency, were in conference with Commissioner of Agriculture and Markets, Holton V. Noyes, Wednesday. Also present at the conference were representatives of the United States Department of Agriculture.

Bargaining Agency officials announced upon their return, that at Wednesday's conference the draft of the proposed marketing order which is to be the basis for public hearings was completed.

Next step is the formality of making a formal request to Secretary of Agriculture Henry A. Wallace and Commissioner Noyes to call public hearings. That will be done this week and it is expected that announcements calling the hearings will be issued next week. It is understood that several hearings will be held throughout the territory. Two weeks must elapse between issuance of the call for hearings to comply with requirements of governmental procedure.

Bargaining Agency officials were elated over the progress that has been made in the last fortnight toward providing dairymen an opportunity to enlist state and federal assistance in their attempt to obtain a living price for milk.

After public hearings have been held the Secretary of Agriculture will provide means by which dairy farmers may vote on the marketing order.

MCMPBA/L/4-6-'38.

3943 *Defendant's Exhibit No. 67-C*

The Onondaga, Syracuse, New York

Franklin D. Walker, Post-Standard, Syracuse, N. Y.
R. De B. Wickersham, Associated Press Bureau, % Syracuse Herald, Syracuse, N. Y.
Roy Fairman, Syracuse Herald (Mail), Syracuse, N. Y
City Editor, Journal (Mail), Syracuse, N. Y.

Le Roy E. Fess, Buffalo Evening News (Mail), Buffalo, N. Y.
L. B. Skeffington, Democrat-Chronicle (Mail), Rochester, N. Y.
Editor, Times-Herald (Mail), Middletown, N. Y.
News Editor, Binghamton Sun (Mail), Binghamton, N. Y.
News Editor, Binghamton Press (Mail), Binghamton, N. Y.
Franklin R. Little, Journal (Mail), Ogdensburg, N. Y.
Editor, Telegram (Mail), Malone, N. Y.
Paul Williams, Utica Press (Mail), Utica, N. Y.
News Editor, Norwich Sun (Mail), Norwich, N. Y.
Robert Stillwill, Democrat (Mail), Cortland, N. Y.

3944 Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., Onondaga Hotel, Syracuse, N. Y.

Immediate release.

SYRACUSE, March 28—The Metropolitan Cooperative Milk Producers' Bargaining Agency is moving forward on two fronts this week to bring about improvement and stabilization of dairy farmers' prices for milk.

Charles H. Baldwin, executive secretary of the Agency, declared today that the directors of the Agency are going to "develop an alternative plan for price stabilization to be ready in case of any failure or delay in obtaining federal and state aid."

Officers of the Agency are in Washington today and Tuesday conferring with Department of Agriculture officials on a plan to obtain joint federal and state government assistance.

"Delegates of the Producers' Agency," said Mr. Baldwin, "have decided that it would not be wise to have all their eggs in one basket. They have instructed the directors to formulate an alternative plan and laid down the nine fundamental features upon which such plan shall be based."

The nine fundamental features were enumerated as follows:

1. Survey of all available milk supplies, both controlled and uncontrolled.

2. Formulate detailed methods of temporary control of supplies at present uncontrolled.

3. Formulate detailed methods for disposal on best possible basis of any supplies unsold at stabilized prices fixed by Producers' Bargaining Agency.

4. Formulate detailed methods for supplying, through absolutely controlled channels, milk necessary for children, hospitals, etc.

5. Formulate detailed methods of allocating, as well as possible, the benefits of serving dealers who pay the prices established.

6. Formulate methods of allocating, as well as possible, the burdens of surplus disposition of milk which loses its market by refusal of dealers to pay prices.

3945 7. Formulate detailed methods of contracting firmly with dealers who buy at established Bargaining Agency prices.

8. Investigate legal methods of cooperating with other producer groups to accomplish stabilization.

9. Contract with such groups, insofar as legally possible, to carry out the stabilization program.

Mr. Baldwin said the Agency is hopeful of obtaining joint action by the United States Department of Agriculture and the New York State Department of Agriculture and the New York State Department of Agriculture and Markets to provide methods of controlling milk prices paid farmers.

"There is always the danger," he said, "that selfish dealers may succeed in blocking our efforts. We know that efforts are being made in that direction now. It is for that reason that the delegates of this Agency have instructed the directors to draft an alternative plan which can be put into effect any time it is needed."

MCMPBA/L/3.28.'38.

3946 *Defendants' Exhibit No. 67–E*

For the Dairymen's League News Issue of July 20, 1938

New York Milk Shed dairy farmers, angered by dealer propaganda against the proposed Federal and State milk marketing order and delay in voting, have sent representative leaders to make thorough investigations of actual conditions in the Boston Milk Shed where a Federal milk Marketing order is now operating.

Not one, but many dairy interests in the New York milk shed are represented by independent investigating groups studying dairying conditions in New England this week. Last week's News reported the extensive tour made by E. C. Bardin, President of the Sauquoit Valley Farmers Cooperative, Inc., and Treasurer of the Metropolitan Cooperative Milk Producers Bargaining Agency. This week the visiting groups include some of the most liberal and some of the most conservative of the dairy leaders of the New York area.

Stanley and Felix Piseck, Poland, N. Y., dairy leaders who have been stormy firebrands of many tense situations in the history of milk marketing during recent years, are making a personal tour of inspection in the Boston area to see for themselves what the Federal marketing order there is doing for the farmers. Stanley Piseck, strike leader who warned dealers during the recent series of Federal and State hearings not to try the farmers' patience too far, made the following statement before leaving with his brother for Boston:

"Can it be that Federal assistance is as unpopular among producers in the Boston area as the dealers would have the farmers believe? Or are these reports distorted and magnified to give a false impression? That's what we're going to find out!"

Mr. Piseck said that no thinking dairy farmer was in favor of letting the dealers continue to classify milk and set prices as they saw fit. We as producers must control the "surplus." "I know," he said,

"that producers in the New York Milk Shed are quite thoroughly dissatisfied with present-day prices and with the dealer control that causes them. I can understand how some producers in the Boston area, even with Federal assistance, may still be dissatisfied with present prices; dissatisfaction always has and always will be present in some meaure—that's the germ of progress any industry needs. But the poisoned statements, the exaggerated reports, that are being spread by dealers, milk brokers, and farmers under their control, are too far-fetched to be believable. I think the only farmers who know the facts and who still oppose farmer control of the market are
3947 getting paid by the dealers to spread this false propaganda.

But these misinformers are no longer leaders. Their one time leadership has crumbled. Leadership to be successful and endure must be sincere."

"We are determined to get first-hand information," Mr. Piseck said, "and we are doing our bit at this time to help farmers to know the truth about what is going on in the Boston Milk Shed where a Federal Marketing Order is being tried. The propaganda-spreading dealers representatives from now on will have to build more than spooks and hobgoblins to hide behind. Mere rumors and stories will not hold water when the facts are available to everybody."

Distrust of dealer propaganda is not confined to any one dairy group. At the very hour that the Piseck brothers were crossing the Massachusetts State Line on their way to Boston, another party of New York Milk Shed dairy leaders was filling another automobile for a similar expedition. In the car were Homer S. Rolfe, of Ogdensburg, N. Y., a director of Sheffield Producers Cooperative Association, Inc., and president of the Metropolitan Cooperative Milk Producers Bargaining Agency; Ross Kinney of Amenia, N. Y., and D. D. Burditt of Vermont, directors of Sheffield Producers. These men will spend several days studying conditions in the Boston Milk Shed and will call also on the Commissioner of Agriculture of the State of Vermont, as well as other Vermont officials and producers.

Two other outstanding dairy leaders now on their way to New England for the same purpose are J. C. Treat, president of the Conesus Cooperative and secretary of the Metropolitan Cooperative Milk Producers Bargaining Agency and Ernest Strobeck, of the Executive Committee of the Dairymen's League Cooperative Association and a Director of the Producers Bargaining Agency. Mr. Treat and Mr. Strobeck will visit many dairy farmers at their farms throughout New England and will return with first-hand information on what the farmers themselves think of the Federal Marketing order as it is operating right now in New England.

It has often been pointed out by New England farmers that although the marketing order there was voted in by only a slight majority over the required percentage, the farmers are now for the plan by more than five to one. Milk Prices there have been higher than they would have been without the order and even with about 25 cents a

hundred held back by the dealers the farmers still receive more than they would have received without the order. When the courts decide on the question of the 25 cents a hundred, the farmers will receive this amount of back payment for all milk they have delivered since August 1937, amounting to more than a million and a half
3948 dollars, if the decision is in their favor as they expect. They will also receive this increased amount for all future milk delivered.

Reports of several of the New York Milk shed investigating parties have been coming in day by day to Charles H. Baldwin, executive secretary of the Metropolitan Cooperative Milk Producers Bargaining Agency, from the various touring groups.

"The different parties of New York Milk Shed farmers have encountered various conditions," Mr. Baldwin said as the News was going to press, "but one common reaction is expressed by all. Every man who goes through the Boston Milk shed and witnesses conditions there with his own eyes reports the farmers there strongly behind the marketing order. As Mr. Bardin said upon his return last week, 'Seeing a handfull of disgruntled producers or dealer stooges might give dealer representatives the information that they desire. Casual Comparison of prices in various sheds without considering the factors that differ so widely might also give figures for comparison which would well serve the dealer. To get a true picture, representative producers living in various parts of the shed must be interviewed. There are other very important factors covering market conditions in Boston that have to be given consideration.' All thorough studies report dairymen in New England as saying that without the Federal order they would be completely at the mercy of the dealers, just as farmers in the New York milk shed are now. There's no doubt but that the order is successful in the Boston area and that a similar order, coupled with the additional support of a State order, would greatly benefit farmers in the New York area."

New York Milk Shed farmers, Mr. Baldwin declares, would benefit even more than Boston farmers have, for various reasons. For one thing, he points out that while in the Boston area the State and Federal officials are working independently, in the New York area the Federal and State department of agriculture officials work hand in hand and have already joined cooperatively in working out identical marketing orders which will throw the coordinated authority of both Federal and State governments on the side of the farmer when the marketing plan is voted into operation. Besides, Mr. Baldwin points out that there is a much greater percentage of membership in the Metropolitan Co-operative Milk Producers Bargaining Agency here than there was in the New England Milk Producers Association before the Boston order was put into effect. And as Government officials
3949 have frequently pointed out, both here and in Boston, the better organized farmers are in any area, the better any marketing order will operate.

"The feeling among farmers of the New York Milk Shed," Mr. Baldwin declares, "is overwhelmingly in favor of the proposed Federal and State marketing order. I believe that the farmer vote on the plan will be the most decisive victory for farmer control of the market and A Living Price for Milk ever seen in the history of our milk shed."

3950 *Defendants' Ex. No. 68*

SHEFFIELD PRODUCERS CO-OPERATIVE ASSOCIATION

Certain information about the Association and the computation of milk prices paid its members, from May 1933 to and including March 1938. Prepared at request of Federal and State officials, for submission on May 16, 1938, relative to certain proposed milk marketing orders.

3951 SHEFFIELD PRODUCERS CO-OPERATIVE ASSOCIATION

Foreword

The Association has been requested by Federal and State officials to make available information about the prices paid its membership in recent years and the manner in which they were computed, for the light this information would cast upon the proposed milk marketing orders to be considered at public hearings of May 16-20, 1938. This information is presented in a sincere desire to co-operate with those officials by making readily available information which they consider to be of public interest. The Association does not present this information either in support of the proposed orders or in opposition to them.

Organization

The Association was incorporated on May 6, 1927, under article 8 of the Co-operative Corporations Law of New York State. Prior to August 1, 1937, its membership was composed exclusively of persons producing milk and delivering it to plants of Sheffield Farms Company, and its membership still is composed primarily of such persons. From 1922 until 1927 Sheffield producers were organized in an unincorporated association known as "Sheffield Farms Company Producers." The 1927 certificate of incorporation was
3952 amended July 29, 1937, to provide that the Association could sell to other dealers than Sheffield Farms Company.

Membership

In 1922 there were about 3,000 Sheffield producers, in 1927 there were over 10,000, in November 1934 there were about 15,000, in July 1937 there were about 13,000, and at the present time there are less

than 11,000. These producers are mostly in New York State, but there are substantial numbers in Pennsylvania and Vermont, which are now a greater percentage of the total membership than in previous years.

Membership Contract

Prior to November 1934 no separate written contract was executed between each Sheffield producer and the Association, but since then all Sheffield producers have been required to sign the marketing contract as a necessary condition of membership in the Association. Information about the contract and the reasons for its adoption, together with its text, is to be found in "The Sheffield Producer" for November 1934. A duplicate original of the contract is given to each producer signing it.

The Sheffield Producer

This is a monthly magazine or pamphlet printed for the Association and distributed to all its members. It has been published
3953 each month commencing with May 1927. Until recently it was distributed through the plants and milk haulers of Sheffield Farms Company, but it is now published at Cobleskill, New York, under the immediate supervision of the Association Secretary and distributed to the members by mail from Cobleskill.

Directors

There are 17 directors of the Association, corresponding to the 17 districts into which the membership is divided. A director for each district is elected once in three years, or when a vacancy occurs. Election is by vote of the delegates of the respective district. A local section is composed of the members delivering to a particular plant, and each local section elects one delegate to participate in the district election of a director.

Sheffield is Association's Principal Customer

The Association owns no plants or other facilities, and does not physically handle any milk. Its main function is to bargain with Sheffield Farms Company monthly for the price to be paid its members for the milk delivered during each month. Until August 1937 Sheffield Farms Company was its only customer, necessarily by terms of the certificate of incorporation. Since then a few sales of milk have been made to affiliated companies, but Sheffield Farms Company remains substantially the only customer. The milk is all delivered to Sheffield plants and paid for by checks mailed on the 15th of each month from the Company to each producer.

395 Association Is Principal Sheffield Source

In every month in recent years Sheffield Farms Company has received milk from sources other than the Association, and in some months it has purchased substantial quantities from such sources. These consist of groups of producers delivering to Sheffield plants but not members of the Association, purchases from affiliated companies, and purchases of milk and cream in the open market. However, the Association has at all times since 1922 been the principal source of supply for Sheffield Farms Company.

Quantities of Milk Handled

The volume of the milk sales from the Association to Sheffield Farms Company is shown by the following figures, which are the total pounds for each recent year:

1925	708, 303, 961	1932	1, 327, 943, 532
1926	840, 732, 370	1933	1, 241, 597, 086
1927	901, 700, 813	1934	1, 302, 837, 505
1928	955, 084, 072	1935	1, 340, 759, 797
1929	1, 022, 080, 495	1936	1, 403, 509, 034
1930	1, 183, 227, 771	1937	1, 112, 270, 668
1931	1, 293, 401, 571		

3955 According to the Ernst & Ernst audit, Sheffield Farms Company handled in 1936 a total of 1,446,278,346 pounds of milk, so far that year the milk supplied by the Association was about 97 percent of the total milk handled by the Company.

Manner of Computing Price

In five months of 1937 the members of the Association were paid flat prices agreed upon and announced in advance of each month. With that exception, and excepting about 20 percent of the total milk, described as "interstate" and sold at a flat price during the last two years of State milk control, the price has always been upon the classified plan, at least since 1926. Before and since the period of State milk control the class prices were and are negotiated in advance of each month. From May 16, 1933, to March 31, 1937, they were set by State milk control officials, as to the milk under their control. Since July 1, 1937, the class prices have been those negotiated by the respective Bargaining Agencies.

A tabulation is appended which shows the more important steps involved in recent years in figuring out the actual producer prices from the class prices. Practically all of this data has been published in The Sheffield Producer or otherwise distributed to the members, but this may be its first publication in composite form.

Inasmuch as it is impossible, within reasonable limits of space, to show all the details of the computation, and some of the data
3956 is not strictly comparable throughout all the period covered, the following comments may be important:

"Total Pounds Delivered" of course means the total milk supplied from the Association to Sheffield Farms Company. In some recent months small additional quantities were delivered for use by other dealers for prices at least as favorable to the Association. In every month shown the Company handled some milk from other sources and hence not included in these figures.

"Class 1 Price" and "Class 2–A Price" is the price set by the New York State milk control officials to and including March 1937. Where the price changed during a month the average is weighted according to days at each price, but not according to quantities of milk handled by the Company. The class prices for July 1937 and subsequent months are those set by the Bargaining Agency, which also set the flat prices for September and October of the same year.

"Percent Class 1" and "Percent Class 2–A" has a peculiar significance from February 1935 to March 1937, inclusive, because of the way "interstate" milk was reported during that period. In January 1934, for instance (and the same was true for all months except those just indicated), each percentage expresses the relationship between the total milk sold from the Association to the Company and the portion of it used for the particular purpose. That report shows:

	Percent	Price
Class 1, Fluid Milk, N. Y.	59.276	$2.305
1-A, Fluid Milk, N. J.	7.714	2.11

The present tabulation combines the percentages and quotes only the New York price.

3957 But the report for January 1936, for instance, is prepared along different lines. It shows:

	Percent	Price
Class 1, Fluid Milk, N. Y.	54.704	$2.45
1-A, Fluid Milk, N. J.	6.001	2.33

etc., making up 100 percent of the New York produced milk, and then shows that this was only 78.132 of the total milk sold from the Association to the Company, the remainder being produced in other States and not classified. Assuming that the "interstate" milk was used 90 percent for Class 1, the percentage from January 1936 comparable with that of two years earlier would be 67.11 instead of 60.705 shown in the tabulation. Upon the same assumption pricing the "interstate" milk for January 1936 at $1.70 instead of $2.45 was equivalent to a special allowance of $.1278 per hundredweight upon the total milk delivered that month. The assumption is approximately the fact, but exact figures about use of the "interstate" milk are not in the Association's files.

"Pounds transferred" includes milk received at one plant and transferred to another for better utilization. "Extra plant handling cost" is the rate per hundredweight allowed for extra handling of that milk and "average cost of hauling" is the average amount per hundredweight allowed for hauling it from plant to plant. "Allowance for hauling and handling" is the total allowances for those services on transferred milk, expressed in cents per hundredweight applicable to the total milk delivered.

"Allowance for mailing checks, etc.," which has been uni-
3958 form at $.0225 throughout the period involved, covers a range of services such as are performed by some other associations for their members, as stated in a Federal Trade Commission report made in 1936. The nature of the "special allowance" is probably best indicated by the name it received in early 1934, "discounts to meet competition." Those allowances taken in February, March, and April 1934 were not permanently retained by the Company, but were used to increase payments in May and June of the same year. The "special differential" paid in August 1936 was an arbitrary increase of 10 cents per hundredweight added by the company to what would otherwise have been the price. The allowances made in recent months have not been broken down in statements to producers but are lumped together as "service differentials per contract." These are shown under the heading, "total allowance." The "interstate" milk factor was not included in that total for the period during which it existed.

Subtracting the total allowances and the milk publicity tax item from the classified value of the milk results in the figure described as "net price to Association." No such figure is used in the actual accounting, but that figure (subject, of course, to differentials for butterfat and freight, and Grade A premiums) is the amount per hundredweight which is the net cost per hundredweight to the Company, assuming that the tax is a general expense. The Association is paid dues of $.005, and the members are paid the amounts shown as "net price to members," which is for milk of 3.5 butterfat, delivered at plants in the 201–210 mile freight zone, exclusive of Grade A premiums.

3950 Month	Total pounds delivered	Class 1 price	Class 2-A price	Per cent class 1	Per cent class 2-A	Pounds transferred	Extra plant handling cost	Aver. cost of hauling	Allow. for hauling and handling	Allow. for hauling hacks, etc.	Special allowance	Interstate milk			Milk publicity tax	Net price to assn.	Assn. dues	Net price to members
												Price	Per cent of total	Total allowance				
1933																		
May 16-31	77,380,295	$1.88	$1.30	40.701	13.55	20,226,576	$0.1545	$0.085	$0.0675	$0.0225				$0.09				
June	142,621,841	1.88	1.30	42.62	14.06	39,077,840	.1465	.071	.063	.0225				.085		$1.355	$0.005	$1.38
July	114,770,190	2.079	1.395	52.08	18.28	26,068,215	.1418	.0797	.0529	.0225				.0774		1.90	.005	1.595
Aug	91,258,510	2.305	1.55	66.01	14.59	11,508,320	.1426	.0718	.0286	.0225				.0511		1.915	.005	1.91
Sept	100,281,434	2.305	1.55	59.15	16.90	19,378,385	.25	.0924	.0662	.0225				.0887		1.80	.005	1.795
Oct	102,999,562	2.305	1.55	60.11	17.16	21,324,611	.26	.1017	.0753	.0225				.0978		1.755	.005	1.75
Nov	85,281,434	2.305	1.55	70.03	19.96	10,741,280	.26	.1004	.0457	.0225				.0682		1.925	.005	1.92
Dec	88,353,543	2.305	1.55	68.15	20.02	13,475,809	.26	.1001	.0553	.0225				.0778		1.875	.005	1.87
1934																		
Jan	90,914,112	2.305	1.55	66.99	19.396	16,208,786	.26	.10159	.0647	.0225				.0872		1.835	.005	1.83
Feb	82,661,526	2.245	1.48	66.19	18.12	12,654,259	.26	.08937	.0536	.0225	[1] $0.005			.0818		1.81	.005	1.805
Mar	105,877,190	2.175	1.40	57.17	15.74	22,949,392	.26	.09035	.0762	.0225	[1] .0406			.1393		1.61	.005	1.605
Apr	121,046,819	2.175	1.40	48.32	13.81	34,134,204	.26	.09581	.1006	.0225	[1] .0125			.1356		1.51	.005	1.505
May	145,684,768	2.175	1.40	43.16	16.178	42,995,393	.20	.09187	.0868	.0225				.08726	$0.0025	1.49	.005	1.485
June	150,951,224	2.358	1.40	39.96	13.68	41,174,009	.20	.093036	.58015	.0225				.06434	.0023	1.58	.005	1.575
July	132,460,834	2.45	1.40	44.97	11.597	27,129,312	.20	.089602	.0595	.0225				.082	.0023	1.62	.005	1.615
Aug	112,615,960	2.45	1.40	49.795	11.93	21,149,182	.20	.087595	.064	.0225				.0765	.0026	1.715	.005	1.715
Sept	100,855,173	2.45	1.40	56.328	12.66	16,717,962	.20	.0885	.0484	.0225				.0719	.0031	1.775	.005	1.77
Oct	98,616,112	2.45	1.40	58.690	13.816	17,383,964	.20	.089973	.0611	.0225	[2] .05			.1236	.0032	1.76	.005	1.755
Nov	80,968,288	2.45	1.40	70.961	20.153	10,029,975	.20	.078596	.0345	.0225	[2] .12			.177	.0040	1.925	.005	1.92
Dec	81,310,476	2.45	1.55	72.057	22.262	8,916,870	.20	.080652	.0308	.0225	[2] .15			.2063	.0041	1.96	.005	1.955
1935																		
Jan	84,317,490	2.45	1.55	68.45	19.852	11,026,918	.20	.08256	.037	.0225	[2] .15			.2095	.0040	1.925	.005	1.92
Feb	79,888,293	2.45	1.55	60.652	20.517	13,398,544	.20	.0923	.049	.0225		$1.60	23.191	.0715	.0036	1.92	.005	1.915
Mar	103,250,532	2.45	1.75	51.523	19.243	22,140,131	.20	.08766	.0617	.0225		1.60	21.661	.0842	.0032	1.855	.005	1.85
Apr	122,456,597	2.45	1.75	40.944	15.812	36,737,087	.20	.09153	.088	.0225		1.70	20.059	.1105	.0026	1.785	.005	1.78
May	148,512,915	2.45	1.75	35.424	13.549	47,363,216	.20	.0893	.0926	.0225		1.55	20.168	.1151	.0023	1.685	.005	1.68
June	162,046,274	2.45	1.75	29.31	14.015	50,608,190	.20	.08815	.0901	.0225		1.45	19.768	.1126	.0021	1.455	.005	1.45
July	139,921,993	2.45	1.75	34.803	12.123	35,925,515	.20	.08689	.0731	.0225		1.55	19.789	.0956	.0022	1.505		1.505
Aug	125,778,350	2.45	1.75	39.839	12.205	23,556,577	.20	.09286	.0663	.0225		1.50	20.13	.0993	.0024	1.555	.005	1.55
Sept	109,199,198	2.45	1.75	45.075	11.430	22,208,019	.20	.08338	.0576	.0225		1.55	20.096	.0801	.0027	1.62	.005	1.615
Oct	99,657,948	2.45	1.75	56.192	14.502	15,177,235	.20	.08806	.0439	.0225		1.60	20.154	.0664	.0031	1.785	.005	1.78
Nov	81,135,222	2.45	1.77	71.124	20.329	9,096,816	.20	.08465	.0316	.0225		1.70	20.981	.0541	.0037	2.015	.005	2.01
Dec	84,594,985	2.45	1.80	65.125	18.267	11,497,000	.20	.0834	.0385	.0225		1.70	21.419	.061	.0037	2.01	.005	2.005

[1] Discounts to meet competition.
[2] Volume differential.

Month	Total pounds delivered	Class 1 price	Class 2-A price	Per cent class 1	Per cent class 2-A	Pounds transferred	Extra plant handling cost	Aver. cost of hauling	Allow. for hauling and handling	Allow. for mailing checks, etc.	Special allowance	Interstate milk			Milk publicity tax	Net price to assn.	Assn. dues	Net price to members
												Price	Percent of total	Total allowance				
1936																		
Jan	87,375,329	$2.45	$1.80	60.705	15.257	14,343,859	$0.20	$0.08279	$0.047	$0.0225		$1.70	21.868	$0.0695	$0.0035	$01.965	$0.005	$01.96
Feb	85,007,136	2.45	1.80	60.831	15.359	14,101,970	.20	.08205	.0468	.0225		1.60	22.078	.0693	.0036	1.96		1.96
Mar	108,067,677	2.45	1.89	53.248	12.363	24,096,516	.20	.08637	.0639	.0225		1.60	20.062	.0864	.0031	1.84		1.84
Apr	126,244,736	2.45	1.80	40.462	11.702	37,646,130	.20	.08995	.0865	.0225		1.575	19.204	.1090		1.695	.005	1.69
May	161,290,258	2.45	1.694	34.043	9.182	50,310,710	.20	.08606	.0892	.0225		1.55	18.97	.1117	.0035	1.555	.005	1.55
June	166,508,681	2.45	1.65	31.685	12.136	45,539,898	.20	.08519	.078	.0225		1.51	18.661	.1005	.0014	1.59	.005	1.585
July	140,633,066	2.45	1.78	35.328	8.447	35,886,626	.20	.08639	.0723	.0225		1.62	19.009	.0948	.0014	1.77	.005	1.765
Aug	120,828,575	2.579	1.977	41.284	10.325	29,168,320	.20	.08531	.0689	.0225	+$0.10	2.02	19.198	.0986	.0016	2.10		2.10
Sept	117,069,429	2.74	2.05	39.419	9.276	33,605,885	.20	.0892	.083	.0225		1.63	19.308	.1055	.0016	1.965	.005	1.96
Oct	112,146,486	2.90	2.05	42.035	11.884	26,758,417	.20	.08526	.068	.0225		1.51	19.327	.0905	.0018	1.90		1.90
Nov	89,107,849	2.90	2.05	38.857	15.938	15,921,014	.20	.08276	.0505	.0225		1.20	20.4	.0730	.0022	2.02	.005	2.015
Dec	89,319,812	2.90	2.05	37.055	15.885	18,088,240	.20	.08213	.0571	.0225		1.01	21.723	.0795	.0022	1.94		1.94
1937																		
Jan	91,220,637	2.90	2.05	53.422	15.572	21,211,526	.20	.08695	.0667	.0225		1.745	22.959	.0892	.0021	1.895	.005	1.89
Feb	84,276,122	2.90	2.05	51.656	15.927	17,402,377	.20	.08412	.0587	.0225		1.64	23.204	.0812	.0021	1.89	.005	1.885
Mar	106,919,938	2.90	2.05	41.339	13.553	29,664,535	.20	.08664	.0795	.0225		.92	22.069	.1020	.0018	1.785	.005	1.78
Apr	119,776,127	(Flat price)																1.69
May	139,967,027	(Flat price)																1.50
June	140,057,906	(Flat price)																1.40
July	116,062,268	2.00	.75	44.86	14.57	27,758,841	.20	.09028	.0670	.0225				.0895	.0018	1.635	.005	1.63
Aug	72,824,318	2.08	.90	70.241	17.91	6,145,700	.20	.07813	.0322	.0225				.0547	.0037	1.91	.005	1.905
Sept	64,967,762	(Flat price)														2.20		2.20
Oct	64,135,523	(Flat price)														2.20		2.20
Nov	53,458,966	2.574	2.20	87.596	8.5616	549,052	.20	.0757	.03	.0225				.0525	.004	2.435	.015	2.42
Dec	58,665,009	2.63	2.25	81.386	16.242	7,222,691	.20	.09215	.0661	.0225				.0886	.0037	2.445	.005	2.44
1938																		
Jan	62,806,272	2.30	2.15	76.379	19.652	9,406,602	.20	.0923	.0452	.0225	[1].015			.0827	.0033	2.135	.005	2.13
Feb	60,802,680	2.20	2.05	70.002	18.122	11,238,985	.20	.09558	.0548	.0225	[1].03			.1073	.0031	1.965	.005	1.96
Mar	75,399,436	2.1649	2.022	59.849	15.976		.20		.0849	.0225	[1].07			.1774	.0028	1.775	.005	1.77

[1] Special differential.

3960 *Defendants' Exhibit No. 69*

[Copy]

MARKET ADMINISTRATOR FOR THE NEW YORK METROPOLITAN MILK MARKETING AREA

MARKET SERVICE CLAIM

United States Secretary of Agriculture. Order No. 27. Commissioner of Agriculture and Markets for the State of New York. Order No. 126.

SEPTEMBER 1938.

To MARKET ADMINISTRATOR,
95 Madison Avenue, New York City.

(Name of Handler) Queensboro Farm Products, Inc., hereby claims payment for market services at (Name of Plant) _____ located at Blossvale & Clinton, N. Y., as described herein, in the amount of $2,836.70, as follows:

Market Service under Art. VII, Sec. 6, Par. 1 (See particulars on Schedule A, reverse hereof)	$2,836.70
Market Service under Art. VII, Sec. 6, Par. 2 (See particulars on Schedule B, reverse hereof)	
Total	2,836.70

Do not use the following space:
Claim approved for payment in amount certified $_____, _____ 19__ By _____ _____ For Office
(Name) (Title)
Use Only—Differences _____ Amount Certified Correct $_____ Auditor's Initials or Signature _____

We (I) hereby certify that the milk for which claim is made herein under Art. VII, Sec. 6, Par. 1 was received from producers at a plant operated by the undersigned and equipped only for the receiving and shipping of milk to the New York Marketing Area; that no part of such milk as described in Schedule A of the reverse hereof, was transferred between the plants named, during November or December, 19__; that if the utilizing plant is operated by us (me) no Class 1 milk was shipped to the marketing area from the utilizing plant during the month in which said milk was transferred; that the listances specified in Schedule A are correct and represent the shortest distances between the plants named; and that payment for no part of the claim has been previously received.

QUEENSBORO FARM PRODUCTS, INC.,
Handler.

Signed this _____ day of _____ 19__.
By _____,
Title _____.

We (I) hereby certify that the milk for which claim is made herein, under Art. VII, Sec. 6, Par. 2 was received from producers at a plant equipped for condensing or drying; that the Class I milk as described in Schedule B of the reverse hereof was sold in the marketing area during November and December 19__, as stated; that during May and June 19__, no milk in excess of 10 per cent. and no cream in excess of 50 per cent., in terms of equivalent of milk received at such plant, was shipped to the marketing area; and that payment for no part of this claim has been previously received.

_____
(Handler)

Signed this _____ day of _____ 19___.

By _____,
Title _____

Payment References: Date paid _____. Check No. _____. Amount _____.

Schedule A—Details of Claims by Handler Under Article VII, Section 6, Par. 2

Date of shipment	Plant to which shipped		Quantity (milk pounds) and class use of milk shipped to handler: (Caption following columns according to applicable class use)						Diversion payment claimed herein				
									Receiving allowance claimed		Mileage allowance claimed		Total claimed
	Name	Location	Class II-A	Class II-B	Class III-A	Class III-B	Class IV-A	Total shipped	Rate per cwt.	Amount	Miles	Amount	
1938													
Sept. 1-30	Q. F. Pine	Canastota (From Clinton)	391,122	2,219		147,854		541,195	23¢	$1,244.75	25@0.09	$487.09	$1,731.84
	Q. F. Pine	Canastota (From Blossvale)	263,963	1,498		99,784		365,245	23¢	840.06	18@.0725	264.80	1,104.86
Total			655,085	3,717		247,638		906,440		2,084.81		751.89	2,836.70
Total carried forward to page 1													2,836.70

Schedule B—Claims by Handler Under Art. VII. Sec. 6, Par 2

Receiving plant		Class I		Market service claim	
Name	Location	Shipment date	Quantity	Rate per cwt.	Amount
Total					
Total carried forward to page 1					

Amount Rec'd, $2,761.52.

3961 *Defendants' Exhibit No. 72*

DECEMBER 20, 1938.

E. M. HARMON, *Market Administrator,*
N. Y. Metropolitan Milk Marketing Area,
95 Madison Avenue, New York, N. Y.

Dear Sir: Today, I had a telephone conversation with Mr. Noyes in regard to the determination of the five-cent co-operative differential for this co-operative. Mr. Noyes said that this determination was made by him and the Secretary of Agriculture, on termination was made by him and the Secretary of Agriculture, on your recommendation.

Your office has informed us that the determination was made entirely by the Commissioner and Secretary of Agriculture. Now, we want to know where and to whom we are to look for a settlement. If we are not entitled to this five cents, we want to know why we are not, and if we are entitled to it we want to know why we do not receive it.

The farmers in this section feel that your office looks to the Bargaining Agency for advice and guidance and they believe that the Bargaining Agency is not acting in a manner fair or beneficial to them. This feeling was intensified by an article which appeared in a Dairymen's League paper about the Co-operative in Chateaugay. This statement contained statements which were absolutely false and definitely injurious to every co-operative in the state.

If this co-operative is to go along with the Marketing order, as it has done from the beginning, we must have some definite information for them at once. We will consider it a great favor if you can give us some definite information within the next few days.

Yours very truly,

Clinton Co. Dairymen's
Co-op. Association, Inc.
ELMER STAFFORD, *President.*

2 *Defendants' Exhibit No. 73*

MARKET ADMINISTRATOR NEW YORK METROPOLITAN MILK MARKETING AREA

Federal Order No. 27. Issued By The Secretary Of Agriculture
d New York Official Order No. 126. Issued By The Commissioner
Agriculture And Markets. Telephone: MUrray Hill 3-2940. 95
dison Avenue, New York, N. Y.

DECEMBER 23, 1938.

. Elmer Stafford, President, Clinton County Dairymen's Coopera-
ive Association, Inc.,
Plattsburg, New York.

Dear Mr. Stafford: Your letter of December 20 is certainly
ite a surprise. There must be a misunderstanding. This office
s never, at any time, made any recommendation as to the status of
y cooperative in the market with regard to payments from the Pro-
cer Settlement Fund, either to the Secretary of Agriculture or to
mmissioner Noyes. Neither do we believe that Commissioner
yes has in any way indicated that he was acting on recommenda-
ns from this office. Since this is the fact, your insinuation that
s office "looks to the Bargaining Agency for advice and guidance"
just as ridiculous as it is unjust and uncalled for. No powers
atever are delegated to us, either by the Secretary or the Com-
ssioner, and there is no opportunity for doing anything other than
ing right down the road on the Order as outlined. So far as these
perative determinations are concerned, they are made entirely by
e Commissioner of Agriculture and Markets in Albany and by the
cretary of Agriculture in Washington, and our only part in it is
make the proper deductions from the Producer Settlement Fund
d the proper payments to cooperatives when they are due. In the
ht of the facts, your insinuations are unjust and unfair, and we
ent them.

In your last paragraph, you say, "If this cooperative is to go along
th the Marketing Order as it has done from the beginning . . ."
an only reply that your cooperative is not in compliance with the
rketing Orders. We have not received payments to the Producer
ttlement Fund which were due on November 18, nor have we re-
ved the amounts which were due on December 18. As a result,
have been obliged to report your organization to the Secretary of
griculture and to Commissioner Noyes for having failed to make
ur payments in full.

We are anxious to cooperate with every organization in the Milk
ed to the fullest possible extent. In order that there may be no
isunderstanding about this matter, we are sending to both Commis-

sioner Noyes and the Chief of the Dairy Section in Washington, a copy of the letter you wrote us, as well as a copy of this letter to you.

Very truly yours,

(s) E. M. Harmon,
E. M. Harmon,
Market Administrator.

EMH:MSS.

3963 *Defendants' Exhibit No. 77*

Market Service Payments Made to the Borden Company

	Amount claimed	Amount paid
September	$3,673.31	$3,673.31
October	2,713.74	2,713.74
November		
	6,387.05	6,387.05

3964 **Market Service Payments Made to Sheffield Farms Company, Inc.**

	Amount claimed	Amount paid
September	$40,048.94	$38,224.57
October	26,940.87	26,430.99
November	8,875.27	8,875.27
	75,865.08	73,530.80

3965 **Market Service Payments Made to Dairymen's League Coop. Assn. November 1933**

Amount claimed	$6,228.27
Amount paid	6,228.27

3966 **Market Service Payments Made to Sheffield Condensed Milk Co., Inc.**

	Amount claimed	Amount paid
September	$2,127.19	$2,127.19
October	976.65	976.65
November	6,860.14	6,860.14
	9,963.98	9,963.98

37 Co-Operative Payments Made to Sheffield Producers Coop. Assn.

	Amount reserved	Amount paid
tember	$5,949.88	$5,949.88
ober	5,894.88	5,894.88
ember	4,824.50	
	16,669.26	11,844.76

38 *Defendants' exhibit No. 78*

It is further stipulated and agreed by and between the parties as llows:

1. The average daily fluid-milk shipments to New York City for e months of August and September 1938 were approximately as llows: By railroad in tank cars, 1,380,000 quarts; by tank trucks, 60,000 quarts.

In addition to the foregoing, approximately 140,000 quarts daily re shipped by rail and road in 40-quart cans.

2. The allowances for trucking milk, which are provided in Arti- VII, Section 6, Sub-section 1 of Order No. 27 and Official Order . 126, represent the approximate cost of shipping milk by tank ucks.

3. The standard rate approved by the Interstate Commerce Com- ssion for shipments of milk by rail in tank cars from points 201– miles from New York City is 2.7 cents per gallon, equivalent to 2 cents per hundredweight. The freight differentials in Order No. and Official Order No. 126 are approximate to the nearest half- t of the differences per hundredweight between this standard tank- rate for the 201–210-mile zone and such rate for each other ten- le zone. These standard tank car rates are 70% of the standard es for the shipment of milk in 40-quart cans in less-than-carload s. Truck competitive rates have been established at certain points ich are somewhat lower than the approved standard tank car rates those points.

4. Where shipment is made by rail in tank cars or in cans to a city nt not on railroad tracks, there is an additional cost for transpor- ion between the rail terminal and the city plant. Where shipment tank truck is from the country receiving plants to city plants, the k truck delivers the milk to the city plant and the trucker's charge truck-operating cost covers such delivery to the city plant.

3969 *Defendants' Exhibit No. 79*

Milk Tank Car Rates by Ten-Mile Zones From New York City

Mileage zone	Tank car rate		Differential from 201-210 mile	Mileage zone	Tank car rate		Differential from 201-210 mile
	Per gal.	Per cwt.			Per gal.	Per cwt.	
	Cents	*Cents*	*Cents*		*Cents*	*Cents*	*Cents*
1-10	1.4	16.184	15.628	251-260	3.0	34.680	-1.68
11-20	1.5	17.340	13.872	261-270	3.0	34.680	-1.68
21-30	1.6	18.496	12.716	271-280	3.0	34.680	-1.68
31-40	1.6	18.496	12.716	281-290	3.1	35.836	-1.68
41-50	1.8	20.808	10.404	291-300	3.2	36.992	-1.78
51-60	1.8	20.808	10.404	301-310	3.2	36.992	-1.78
61-70	1.9	21.964	9.248	311-320	3.2	36.992	-1.78
71-80	2.0	23.120	8.092	321-330	3.3	38.148	-1.88
81-90	2.0	23.120	8.092	331-340	3.3	38.148	-1.88
91-100	2.1	24.276	6.936	341-350	3.4	39.304	-1.98
101-110	2.1	24.276	6.936	351-360	3.4	39.304	-1.98
111-120	2.2	25.432	5.780	361-370	3.4	39.304	-1.98
121-130	2.3	26.588	4.624	371-380	3.5	40.460	-2.08
131-140	2.3	26.588	4.624	381-390	3.5	40.460	-2.08
141-150	2.4	27.744	3.468	391-400	3.5	40.460	-2.08
151-160	2.5	28.900	2.312	401-410	3.6	41.616	-2.18
161-170	2.5	28.900	2.312	411-420	3.6	41.616	-2.18
171-180	2.6	30.056	1.156	421-430	3.6	41.616	-2.18
181-190	2.6	30.056	1.156	431-440	3.7	42.772	-2.28
191-200	2.7	31.212	.000	441-450	3.7	42.772	-2.28
201-210	2.7	31.212	.000	451-460	3.7	42.772	-2.28
211-220	2.8	32.368	-1.156	461-470	3.8	43.928	-2.38
221-230	2.8	32.368	-1.156	471-480	3.8	43.928	-2.38
231-240	2.9	33.524	-2.312	481-490	3.9	45.084	-2.48
241-250	2.9	33.524	-2.312	491-500	3.9	45.084	-2.48

Compiled from applicable rail tariffs approved by the Interstate Commerce Commission.

3970 *Defendants' Exhibit No. 81*

Total Volume of Milk Sold by League in Fluid Form (Class I) In the New Jersey Market in September, October, and November

September	10,208,500 lbs.
October	10,457,153 lbs.
November	10,143,275 lbs.

3971 Defendants' Exhibit No. 82

Computation of the Actual Base Cash Return to Producers at Solsville, Oneida County, New York

	September	October
Base net cash return 3.5% (201-210)	1.60	1.70
Plus volume differential	.10	
Minus freight	1.70 .02	1.70 .02
Actual net cash base return paid at Solsville	1.68	1.70
Plus certificate of indebtedness	.05	.06
Price paid at Solsville for 3.5% milk including certificate of indebtedness	1.73	1.76

10333 In District Court of the United States for the Northern District of New York

Civil Action No. 32. Consolidated Cause

UNITED STATES OF AMERICA, PLAINTIFF, HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., INTERVENING PLAINTIFFS,

v.

ROCK ROYAL COOPERATIVE, INC., ET AL., DEFENDANT

Final decree

Filed March 21, 1939

This cause having come on to be heard at this term and having been argued by counsel,

It is ordered, adjudged, and decreed that the bills of complaint in the above styled consolidated cause be, and the same hereby are dismissed.

It is further ordered, adjudged, and decreed, that the defendants, Rock Royal Cooperative, Inc., Schuyler Junction New York Milk Shed Cooperative, Inc., Jetter Dairy Company, Inc., and Central New York Cooperative Association, Inc., recover of the intervening plaintiffs, Dairymen's League Cooperative Association, Inc., and the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., the costs of these proceedings, as taxed, for which let execution issue.

To which decree of the court, the plaintiff and the intervening plaintiffs except and their exceptions are allowed.

Done at Albany, New York, this 21st day of March, 1939.

FRANK COOPER,
District Judge.

10334 In United States District Court, Northern District of New York

UNITED STATES OF AMERICA, PLAINTIFF,

v.

HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, INTERVENING PLAINTIFF

v.

ROCK ROYAL COOPERATIVE, INC., ET AL.

John S. L. Yost; Charles J. McCarthy, Special Assistants to the Attorney General.

Harold L. Schilz, Special Assistant to the Attorney General.

E. O. Mather, Senior Attorney, Department of Agriculture.

Ralph L. Emmons, United States Attorney.

Milo R. Kniffen, Counsel, Department of Agriculture and Markets of the State of New ork.

Louis S. Wallach, Assistant Counsel.

Seward A. Miller, 11 West 42nd Street, New York, N. Y.; Edward Schoeneck, State Tower Building, Syracuse, N. Y.; Paul J. McCauley, 70 Pine Street, New York, N. Y.; Attorneys for Plaintiff, Dairymen's League Cooperative.

Edmund F. Cooke, Richard Cooke, Attorneys for Plaintiff Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., Onondaga Hotel, Syracuse, N. Y., and Buffalo, N. Y.

Willard R. Pratt, Utica, N. Y.; Charles W. Jenkins, Depeit, N. Y.; Haskell & Foley, Cortland, N. Y.; Attorneys for Defendants.

Samuel Rubinton, of Counsel for Rock Royal Co-Operative, Inc., 32 Court Street, Brooklyn, N. Y.

Leonard Acker, of Counsel for Central New York Cooperative, 32 Court Street, Brooklyn, N. Y.

Opinion

Filed Feb. 24, 1939

Cooper, J.

10835 . This suit was brought by the Secretary of Agriculture in the name of the United States for a mandatory injunction to compel the defendants to comply with the provisions of order No. 27 issued by the Secretary on August 5th, 1938, effective September 1, 1938.

The order was issued by the Secretary to make effective the provisions of the Agricultural Marketing Agreement act as amended in 1937.

The order is concerned only with milk produced by producers approved by the City of New York for sale in interstate commerce in the Metropolitan Milk Marketing Area, consisting of the counties in New York City and the Counties of Nassau, Suffolk, and Westchester.

Order 27, among other things provides for the payment, by non-cooperative dealers, called proprietary handlers, who buy milk from the producers, of a minimum price to the producers.

It also provides for the payment by all handlers, proprietary or cooperative, under varying conditions, of certain moneys into a milk pool or equalization fund, called Producers Settlement Fund, and also for withdrawals from that fund, chiefly by cooperatives.

This suit is brought to compel payment by the defendants into this Producers Settlement Fund of the following sums in compliance with the terms of order No. 27.

	September	October	November
Jetter Dairy Co	Paid	$14,616.06	$9,038.77
Rock Royal	$3,616.56	3,058.24	1,805.74
Schuyler Junction	1,903.00	1,337.40	737.66
Central New York	20,115.56	19,581.60	11,089.13

Similar amounts are claimed to be due for each succeeding month.

The State of New York has a statute called the Rogers-Allen Law similar to the Federal Act to cover milk produced by like approved producers for sale in intra-state commerce in the Metropolitan milk marketing area and under authority thereof the Commissioner of Agriculture, Farms, and Markets, of New York State, issued his order No. 126.

The two orders are complimentary and are administered by the same administrator appointed by each sovereignty.

The State Commissioner intervened as party plaintiff with
10636 the consent of the original plaintiff as did the Dairymen's League Co-operative Association, Inc., and also the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. But the latter two were allowed to intervene only to help the original plaintiff to defend against acts charged against them by the defendants relating to the referendum, and other things more fully referred to hereinafter.

Three of the four defendants are incorporated cooperative associations and the fourth, the Jetter Dairy Company, is a proprietary handler.

It is not questioned here as the Court understands it, but that the milk of all four defendants reaches the Metropolitan marketing area through the channels of interstate commerce and that they are subject to Federal Order 27 if the Federal Statute and order 27 are valid and are not subject to State Order No. 126.

So the decision here is based on the Federal Order 27 and little attention will be given to State Order No. 126.

Order No. 27 is lengthy and somewhat complicated. That order is attached to and made a part of this memorandum. Parts of it will be referred to herein.

The Secretary contends that Order 27 was appropriate and necessary to effectuate the provisions of the Statute and asks that the defendants be compelled to comply with it by paying the aforesaid sums.

The defendants assert, on various grounds to be more particularly referred to later herein that the order is invalid, that its approval in the referendum of producers was procured by misrepresentation of its terms, that its terms, operation, and effect, and the statute under which it was issued, are so discriminatory that it will confiscate the defendants' property, if enforced, and both statute and order are unconstitutional in operation and effect.

10637 The statute involved in the present case under which the Secretary of Agriculture purported to issue Marketing Order No. 27 is the Agricultural Marketing Agreement Act of 1937 (Act of June 3, 1937, Public, No. 137, 75th Congress).

That act reenacts and amends some of the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended by the Act of August 24, 1935 (49 Stat. 750).

The purpose of the act is set forth in the "declaration of policy" contained in section 2 of the Act. That purpose is to establish prices to farmers at a level which will give agricultural commodities a purchasing power, in relation to articles that farmers buy, equivalent to the purchasing power possessed by such commodities in the so-called "base period."

The attainment of the farmers purchasing power at such level is to be had by creating and maintaining orderly marketing conditions for agricultural commodities in interstate commerce through the exercise by the Secretary of Agriculture of the powers conferred by the Act.

The goal sought through the act is to regain for the farmers the favorable financial conditions which they enjoyed without any economic or marketing control during the base period which was about 25 years ago and before the world war.

The regulation of marketing conditions in agricultural commodities in interstate commerce through the machinery provided in the Act is merely a means of reaching and thereafter maintaining the goal sought. The act is in no sense an emergency measure, but is to continue until the Secretary determines that the exercise of the powers therein conferred is no longer necessary or, possibly, is ineffective to obtain the desired object.

The means provided for attaining this object is the issuance by the Secretary of Agriculture of orders applicable to persons engaged in the handling in Interstate Commerce of certain agricultural commodities. Milk is one of the specified commodities (Section 8 (c) (2)).

Orders are to be issued when the Secretary has reason to believe that the issuance of the order will tend to effectuate the declared policy of the act with respect to the particular commodity involved when he so finds upon evidence introduced at a hearing of 19338 which he has given due notice (Section 8–C (3) (4)). Such an order may be issued with respect to the commodity if the handlers of not less than 50% of the volume of such commodity produced or marketed out of the particular area defined in the order shall sign a marketing agreement which regulates the handling of the commodity in the manner provided in the order (Section 8–C (8)).

Should 50% of such handlers refuse to sign such an agreement an order may nevertheless be issued if the Secretary determines that their failure so to sign the marketing agreement tends to prevent effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of the producers (Section 8 (c) (9)).

Whether an order is issued in connection with a marketing agreement under Section 8–C (8) or without such agreement under Section 8 (c) (9), the order must be approved by two-thirds of the producers of such commodity or the producers of two-thirds of the volume thereof, who during a representative period, to be determined

the Secretary, were engaged in the production of such commodity for sale in the marketing area to which the order applied (Section 8-C (8) and (9)).

In order to determine that approval, the Secretary may conduct a referendum of producers, and if two-thirds of those represented in the referendum approve, that is sufficient (Section 8 (c) 19).

In conducting such referendum the secretary shall consider the approval or disapproval by any cooperative association of producers bona fide engaged in marketing the commodity or product thereof, covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such cooperative association of producers (Section 8 (c) (12)).

A number of terms and conditions are set forth in the act, one or more of which must be contained in all orders.

These terms and conditions include provisions prohibiting unfair methods of competition and unfair trade practices and, except in the case of fluid milk or cream to be sold for consumption in fluid form, provision for sale of commodities only to be at prices fixed by the handlers and also a provision for the selection of the agency to administer the order.

Besides these general terms common to all orders, the Statute states particular terms or conditions to be included in orders relating to milk and its products. Section 8 (c) 5.

None of these terms and conditions need be included in the order but the order must contain at least one of them.

The first term provides for classifying milk in accordance with the form or the purpose for which it is used, fixing a minimum price for each such used classification, which all handlers shall pay for milk purchased from producers or associations of producers, and a time when payment shall be made. Section 8 (c) (5) (a). The prices fixed are to be uniform for each classification of milk, subject, however, to certain differentials. The classification of milk is to be determined not by the character of the milk sold by the farmer or the handler but by the form in which, or the purpose for which, the handler uses it. The farmers all sell milk in fluid form, varying no doubt as to the grade and quality but still fluid milk. The handler may resell or use such milk in different forms for different purposes. Some he may sell as fluid milk, some he may convert into butter or cream and some he may manufacture into ice cream or other manufactured milk products. Its subsequent use determines the class into which falls the milk he buys from the farmer and the price he has to pay.

The second term or condition is designed to secure for each farmer a uniform price for all the milk he sells regardless of the classification in which it falls. Section 8 c (5) b.

This equalization provision may take one of two forms. It may provide for the payment of uniform prices either (1) to all producers selling to the same handler, or (2) to all producers selling to all handlers, irrespective of the uses made of the milk by the particular handler to whom it is delivered. In either case the uniform prices are subject to certain adjustments for market differentials, grade, and quality of the milk, and point of delivery of the milk. These two alternative provisions may be designated as "dealer equalization" and "market equalization." The first alternative, that of "dealer equalization" secures to the producers selling to one dealer a uniform price for the milk they deliver to him. If different rates have been fixed for different classifications of milk, the dealer may not attribute all the milk of one class he buys to a particular farmer or group of farmers, and all the milk of another class to other farmers. He must allocate among all his farmers equally all classifications of milk he purchases. The second alternative, that of "market equalization" secures to all farmers in the market covered by the order a uniform price for all milk delivered. It is immaterial that the particular handler to whom a farmer sells, buys milk of only one classification. Each farmer in the market is to be paid a price based on his pro rata share of all classifications of milk purchased by all dealers in the production area. The principle of allocation is extended from allocation among all producers of each dealer to allocation among all producers selling to all dealers. In both cases, however, the uniform prices may be subject to certain adjustments.

10340

It will be seen that the first term providing for payment by the handler on the basis of the use to which he puts the milk purchased, and the second term, providing for receipt by the farmer of a uniform price regardless of the use to which the particular milk he sells is put, appear to be inconsistent and to leave open a gap between the amount the handler must pay and the amount the farmer is to receive. This gap will not appear if the provision for uniform receipts by farmers is that of "dealer equalization." The handler will pay to all his farmers as a group a total amount based on his total purchases of milk of all classifications. That total amount will be allocated among all his farmers. But if the provision for uniform receipts is that of "market equalization" the gap is clear. The handler is to pay only on the basis of his own use, and the farmer is to receive on the basis of the use of the entire market. The handler may, therefore, have to pay more or less than his farmers are to receive.

This gap is bridged by the third term that may be included in a milk order (Section 8c (5) (C)), providing a method for making adjustments in payments as among handlers, to the end that the total sums paid by each handler shall equal the "value" of the milk purchased by him at the rates fixed in accordance with the first term. By virtue of this provision in any order handlers who, on the basis of their own use, should pay more than the amount their farmers are entitled to receive, may be required to pay the excess to other handlers who, on the basis of their own use, should

10341

pay less than their farmers are entitled to receive. The first term, therefore, fixes the "value" that the handler "owes" for his milk. That "value" may be greater or less than the "price" he has to pay his farmers, fixed in accordance with the second term. If greater, he pays the excess to other handlers. If less, he pays the requir d "price" to his farmers and collects the difference from other handlers whose "value" was greater than the "price."

The fourth term (Section 8c (5) (D)) provides that producers who were not regularly selling milk during a thirty-day period prior to the effective date of the order shall be paid at the rate for the lowest use classification for a period of two calendar months.

The fifth term (Section 8 (c) (5) (E)) is a provision for rendering market information and for verification of weights, sampling, and testing of milk sold by producers, for whom such services are not rendered by a cooperative marketing association qualified under the "Capper-Volstead Act." Appropriate deductions to cover these services are to be made from payments to producers.

The sixth term (Section 8c (5) (F)) provides that cooperative marketing associations, qualified under the "Capper-Volstead Act" may blend the proceeds of all sales in all markets in all use classifications and distribute to producers in accordance with the contract between the association and its producers, thus in effect exempting such associations from the "market equalization" provisions which may be imposed upon competing handlers. The last term Section 8c (5) (G) provides that no milk order shall prohibit or limit the marketing in the area covered by the order of milk produced in any production area in the United States.

Orders, once effective, may be terminated or suspended by
10342 the Secretary, whenever he finds that the order obstructs or does not tend to effectuate the declared purpose of the Act (Section 8c (16) (A)), and must be terminated when termination is favored by a majority of producers engaged in production of the commodity for sale in the marketing area during a representative period, provided such majority have produced more than 50 per cent of the volume of the commodity (Section 8c (16) (B)).

Violation of an order renders the handler subject to a fine (Section 8c (14)). Jurisdiction is vested in the district courts to enforce, and to restrain violation of, any order, regulation, or agreement made pursuant to the Act (Section 8a (6)).

A handler subject to an order may seek administrative relief by petition to the Secretary stating that an order or obligation imposed thereby is not in accordance with law, and praying that it be modified or he be exempted from it. Section 8c (15) (A). The ruling of the Secretary, after hearing on the petition, is subject to review in equity in the District Courts. Any proceeding brought under Section 8a (15) to enforce the provisions of an order abate whenever a final decree is entered in proceedings to review the ruling of the Secretary on the petition (Section 8c (15) (B)).

Order No. 27 in Article III classified milk in 9 classifications, viz, Classes I, II–A, II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B.

Class I may be called fluid milk.

Class II–A is cream with certain exceptions.

The remaining classes relate to various products made from fluid milk.

Article IV fixes the minimum prices for milk in the various classes with variations for certain months.

Article V relates to reports of handlers.

Article VI relates to the determination of uniform prices by formulas therein contained.

Article 7 relates to payment to producers.

Article 7, Section 1, exempts cooperatives from paying the uniform price to their producers.

Article VII, Section 6, provides for certain service payments to all handlers who come within the provisions thereof.

Article VII, Section 7, provides for payment to the Pro-
10343 ducers Settlement Fund.

Article VII, Section 8, provides for payments out of the Producers Settlement Fund.

All of the defendants are handlers as defined in the order. None of them have facilities for the manufacture of milk products and none of them are engaged in marketing milk outside the marketing area.

The order established prices to be paid for milk according to its utilization. The price of milk for fluid consumption known as Class I is fixed arbitrarily, depending upon the market price of butter. The price of Class II–A milk (cream for fluid consumption) is likewise fixed arbitrarily. The price for fluid milk has been $2.45 per cwt. since September 1, 1938.

Prices for milk manufactured into various milk products, are the assumed values thereof, based on market prices of the products into which the milk is manufactured which products are sold in country wide competition. The prices for milk used in the manufacture of milk products is determined monthly by the Administrator by the use of formulae therefor contained in the order.

All handlers purchasing milk from producers are required to report to the Administrator monthly, a statement of the amounts of milk purchased by such handler, and the utilization thereof (Article V, Section 2).

Based on the reports of all handlers, the Administrator computes the total value of the milk of such handler, based on the prices provided in the order (Article VI, Section 7). The result of such computation is the "net pool obligation."

Upon these same reports, the Administrator computes a "uniform" price which is the average price payable to producers for milk for each month, subject to certain differentials in part referred to hereinafter (Article VI, Section 2). Such involves also subtracting

certain special payments to handlers under Article VI, Sections 5 and 6.

Each handler, which is not a co-operative association of producers on or before the 25th of each month, is required to pay to each producer the "uniform price" for all milk delivered by producers during the preceding month and which was sold in the marketing area (Article VII, Section 1).

10344 Cooperative associations which are handlers are not required to make payment for such milk delivered to them by producers at the "uniform price" or at any fixed or stated price.

All handlers are required to pay into the Producers Settlement Fund on or before the 18th day of each month the difference between $2.45 per cwt. and the uniform price for all Class I milk (fluid milk) Article VII, Sec. 8.

Handlers selling milk outside the marketing area are under no requirement to pay the producers the uniform price for such milk nor to pay into the Producers Settlement Fund the difference between the uniform price and the actual market value of such milk. Such handlers are permitted to "blend" prices paid or purported to have been paid for such milk sold in the outside market, with the uniform price announced by the Administrator for milk sold in the marketing area, thereby reducing the actual price paid to producers by such handlers for milk sold by them in the marketing area in competition with the defendant and others in like situation whose milk is sold entirely in the marketing area. This permits handlers selling in the outside market by blending milk so sold with milk sold in the marketing area to pay the producers at less than the order price and less than the actual value, if the price figured by the handlers for sales in outside markets (called "unpriced milk") is lower than the actual market value.

Cooperatives are not only exempted from paying the uniform price or any fixed portion thereof to producers but are permitted to blend prices of milk received in the production area and sold in the outside marketing area.

Other discriminations in favor of cooperatives and large dealers are briefly referred to hereinafter.

The laudable purpose of the statute to procure for farmers prices for their milk commensurate with their purchasing power at specified periods of better balance of purchasing power is not criticized or condemned. Nor is there any denial that the production or sale of milk presents peculiar problems due in part to excess supply at certain times and almost scarcity at others.

The challenge is to the means set up in the statute and order 10345 for dealing with the conditions. hTese means constitute, defendants claim, such gross discrimination as to drive defendants out of business and confiscate their property by the arbitrary discrimination therein provided and without any lack of efficiency on the part of the defendants.

The defendants contend that the order was put forward by the Metropolitan Co-Operative Milk Bargaining Agency in connection with the Dairymen's League, that it was designed for and has the effect of, in connection with the destructive marketing conditions in the Metropolitan area, driving out of business competitors not enjoying special price and other favorable arrangements with cooperatives; that the vote in the referendum of producers was brought about by misrepresentation as to the terms and effect of the order both on the part of agents of the Secretary of Agriculture and the State Commissioner, as well as by the Bargaining Agency and the Dairymen's League; that the referendum was thereby unfair and that the Dairymen's League alone cast two-thirds of the favorable votes cast.

Consideration will be given first to the legislation and the activities of the Bargaining Agency and the Dairymen's League in connection with the legislation and the preparation, promulgating and adoption of the order and the Referendum preceding its issuance by the Secretary.

The Rogers-Allen law was enacted first in 1937 by the Legislature of the State of New York as Chapter 383 of the Laws of 1937. Its provisions, so far as they relate to milk are similar to the provisions of the Agricultural Marketing agreement as amended in 1937.

The amendments to the Federal Agricultural Marketing Agreement Act became effective on June 3, 1937. One of the amendments was the insertion in the act of Section 8 (c) 19, providing for a Producers Referendum to determine whether or not an order is approved by two-thirds of the producers.

The intervening plaintiff, the Dairymen's League, in cooperation with the New York State Conference Board of Farm Organizations, of which it is the sole member representing milk producers, actively sponsored and supported the enactment of the Rogers-Allen Law.

After the enactment of the Rogers-Allen law and almost
10346 immediately after the amendment of the Agricultural Marketing Agreement Act, viz, on or about the 7th of June 1937, the Dairymen's League in conjunction with representatives of other cooperative organizations of the State, organized and incorporated the Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., under the Cooperative Corporations Law of the State of New York. This Metropolitan Bargaining Agency consisted entirely of cooperative associations. Among its directors were several representatives of the Dairymen's League and Sheffield Producers Cooperative Assn., Inc. another large cooperative. While these two cooperatives never had a majority of the Board of Directors of the Bargaining Agency, it is clear that they exercised an important if not the dominating influence over the activities of the Bargaining Agency.

After the Incorporation of the Bargaining Agency in 1937, it set about inducing producers selling milk to proprietary handlers to form cooperatives for the purpose of joining the bargaining agency.

Many were so formed, including all three cooperatives of the producers delivering milk to the Defendant Jetter Dairy Company, though only one joined the Bargaining Agency. In some instances the Bargaining Agency advanced the fee for filing certificates of incorporation.

By June of 1938 there were 193 cooperative associations, most of which were members of the bargaining agency. The membership of these cooperatives included a very large percentage of all the producers. Many of these producers delivered milk to proprietary handlers and many to cooperative handlers.

In July 1937 Mr. E. Harmon, then connected with the Dairy Section of the Federal Department of Agriculture, and later Federal and State Administrator of orders 27 and 126 addressed a meeting of the Bargaining Agency relative to Federal Aid in a marketing program and spent three days monthly commencing with November 1937, at least some portion of which was spent in conference with the representatives of the bargaining agency and others about the marketing program.

About November 1st, 1937, the Bargaining Agency appointed a lawyer's committee to draft a form of marketing agreement in order to regulate the sale of milk in New York City.

0347 The original draft of such agreement and order was presented to the committee by Mr. Allen D. Miller, one of the attorneys for the Dairymen's League.

Early in 1938, the Bargaining Agency presented to the Secretary of Agriculture of the United States and to the Commissioner of Agriculture and Markets of the State of New York, respectively, petitions for the issuance of Federal and State orders under the Agricultural and Marketing Agreement Act as amended in 1937 and of the State Rogers-Allen Law, and presented therewith proposed marketing agreement and proposed order regulating the handling of milk in the New York Metropolitan marketing area.

On April 29, 1938, the Secretary of Agriculture and the State Commissioner of Agriculture gave notice of hearings to be held on the proposed order and marketing agreement commencing May 16, 1938, at Albany and continuing at Malone on May 19th, Syracuse on May 18th, Elmira on May 19th, New York City on May 20th, 24th, 25th, and 26th, and again at Albany June 3rd, 4th, and 7th. Hearings were held at these places on these dates. The State Commissioner of Agriculture gave notice of like hearings on the like proposed State order. The hearings were conducted jointly by the Secretary of Agriculture and the State Commissioner of Agriculture through jointly appointed representatives.

Commencing in April 1938, radio addresses were made by representatives of the Bargaining Agency urging the adoption of the agreement and order. The Dairymen's League News and the Bargaining Agency publications, which were widely distributed among the milk producing farmers urged the adoption of the proposed agreement and order.

The Secretary of Agriculture caused to be printed and sent out to producers and others the proposed order and agreement and also certain pamphlets.

The pamphlets purported to explain the meaning and intent of the agreement and order, the latter of which is complicated and not easily intelligible to the man of ordinary education.

The pamphlet "Explanation of the Federal State Marketing Plan" explaining Order 27 states:

"The hearings on the marketing agreement program were 10348 called at the request of the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., which claims a membership of cooperative associations representing over 40,000 producers."

Under the heading "Principal Provisions" appears this:

"3. The establishment of minimum prices which handlers are required to pay producers of each class of milk."

Under "Producers to decide" appears this:

"The definition (handler) specifically includes any cooperative association that operates plants or any cooperative association which causes milk to be delivered to plants of handlers and collects payment for such milk."

These Provisions would undoubtedly lead the farmer-producer who received the pamphlet to believe that the uniform price would be paid to all producers by all handlers, proprietary or cooperative.

True, at a later point the pamphlet also says under "Uniform Pool Prices for Producers":

"The order requires handlers to pay a uniform pool, or blended price calculated by the market administrator, to all producers delivering milk in any month unless the handler has received milk and sold it as Class I milk outside the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable (It does not say on that portion of the milk sold in the marketing area). For the remainder of each producers milk the handler may pay such prices as he sees fit * * *"

But this is so involved and technical and appears on the last page of the pamphlet and would hardly be likely to lead the farmer to doubt that all producers would receive the minimum uniform price fixed by the administration.

On or about August 5th, 1938, the Secretary of Agriculture tentatively approved the proposed order and a marketing agreement and sent it out to all handlers who would be subject to the provisions of the order, but the requisite 50% of the handlers failed to sign the marketing agreement.

The failure of 50% of the handlers to sign the marketing agreement required the approval of the order by two-thirds of the producers.

In August 1938 there were 54,111 producers whose dairies had been approved for Grade B Milk and 6,109 for Grade A Milk or a total

of 60,220 producers. They were located in New York, Pennsylvania, New Jersey, Massachusetts, Connecticut, and Vermont.

About 420 County milk receiving stations for Grade B Milk and 86 for Grade A Milk or a total of 506 had been approved within this territory.

10349 Of these the Dairymen's League operated 109 stations receiving milk from 11,391 producers. In addition thereto Bordens operated 65 approved milk receiving stations receiving milk from 8,404 producers, all of which producers are members of the Dairymen's League. Bordens pays the Dairymen's League for milk received at these plants and the League pays the producers. The total number of producers included in the Dairymen's League Membership is upwards of 19,500. Dairymen's League does 34% of the milk business in the Metropolitan area.

Sheffield Farms, Inc., and Sheffield Farms Condensed Milk Company operate 87 approved milk receiving stations receiving milk from 10,334 producers. The greater part of these producers deliver milk to Sheffield Farms, Inc., and are organized as a cooperative association known as Sheffield Producers Cooperative Association.

The Department of Agriculture of the United States in August 1938 issued a printed pamphlet under the Seal of the Department. In that pamphlet appears this:

"The Order (27) requires handlers to pay the uniform pool or blanket price, calculated by the market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class I Milk ouside the marketing area * * *.

"Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to all producers at uniform rate except for the transportation and other differentials."

The last above paragraph quoted from the Government pamphlet is identical, word for word, with a paragraph contained in the Dairymen's League News of August 16, 1938, on Page 5.

These statements were incorrect. There is nothing in the order requiring payment of a uniform price to all producers or that the uniform price or any stated price or any price determinable under the order be paid to producers of the cooperative associations even for milk sold in the marketing area.

About this time a pamphlet issued by the Bargaining Agency was entitled "Mr. Dairyman—Save This Booklet." The Plan it explains may save your farm." On Page 1 under the heading "Principles Upon which the order is Based" appears this:

"The fundamental requirements of the industry which the 10350 order seeks to establish are five in number, viz:

"1. An equal purchase price to be paid by all dealers for milk for the same use.

"2. An equal share to each producer of the benefits of the flu market."

These are not accurate statements, for the Dairymen's League an other cooperatives are not required to pay a price equal to th paid by proprietary dealers.

Had this order been prepared by and for the Dairymen's Leagu and other large cooperatives, it could hardly have been more favo able to them.

The Dairymen's League and Metropolitan Bargaining Agen publications were sent broadcast to producers urging them to vo for the order and assuring that they would receive a higher pri than they had before received, and radio addresses to like effe were made.

Following this and on August 19, 1938, and for several days there after the Secretary conducted a referendum. The State Commi sioner of Agriculture conducted a referendum on State Order 1 at the same times and places.

The referendum was held at the times and places set forth i a schedule of polling places issued by the Secretary prior to th referendum, 308 polling places were designated, of which 233 wer in New York, 35 in Pennsylvania, and 16 in New Jersey.

Prior to the referendum there was sent to each known eligibl producer a copy of the proposed order as issued by him on Augus 5th, the schedule of polling places, and a pamphlet prepared b him entitled "Questions and Answers on the Federal and State Mil Program for New York," and another pamphlet also prepared b him entitled "New York Milk, Explanation of Federal State Mar keting Plan, contained in Order 27."

About 70,000 copies of these documents were sent through Fed eral and State Agencies to such producers.

The Metropolitan Bargaining Agency, whose largest and most in fluential member was the Dairymen's League, spent $108,637.91 t promote the adoption of this order covering salaries, publicity, print ing, radio, etc., of which $12,385.00 was for radio addresses, $7,979.00

which $12,385.00 was spent during the period between June 1
10351 and September 1, during which time took place the last o
the hearings and all the efforts to obtain signatures to the agreement by 50% of the handlers and to procure two-thirds of the producers to vote favorably on the Referendum.

Prior to the referendum, a list of cooperative associations entitle to vote for their members was compiled. There were about 22 co-operatives found entitled to vote for their members. A letter wa sent to each declaring the requirements for voting for their members The 22 co-operatives cast 24,903 votes, of which 24,580 were in favor of the order and 323 were against it.

On the referendum held August 19th for several days, 45,664 vote were cast out of a total of 60,220 producers qualified to vote, bu 7,017 of the 45,664 were rejected as invalid, leaving 38,627 valid votes

Of these, 38,627, 33,663 votes, or 87.1% were in favor of the issuance of the order. Of this 33,663 favorable votes, 22,297, or slightly more than two-thirds, were cast by the Dairymen's League, Inc., alone as a corporation for its members and other producers delivering milk to it. It had only about 19,500 members.

Of the 7,017 votes rejected as invalid, 5,110 votes were in favor, and 1,437 against the order, making a total of 6,547. These were rejected because either the voters were members of co-operatives which had voted for their members or because they were not qualified to vote. 470 voters, of 7,017 rejected, failed to mark their ballots for or against the order.

Had it not been for these misrepresentations the order might not have had the approval of two-thirds of 38,627 votes counted as valid. 12,876 negative votes would have defeated the order. No one knows how these producers, not voted by the cooperative associations, would have voted had they but been correctly informed of the terms and effect of the order, nor how many of the 14,576 voters who did not vote at all, nor the 7,017 whose votes were declared invalid, would have voted had there been no misrepresentation of the terms and effect of the order.

The statute (Section 8 (c) (12)) is mandatory that the—

"Secretary shall consider the approval or disapproval by any co-operative association * * * as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such co-operative association of producers."

10352 That this applies to approval upon a referendum is made clear by Section 8 (c) (19).

So great was the power and voting strength of the Dairymen's League that no order which it opposed could be approved, for it controlled more than one-third of the entire number of producers entitled to vote.

This, urges the defendants, may explain why the order contains so many provisions claimed to be discriminatory in favor of large co-operatives and against proprietary handlers and small cooperatives.

Nor is it affected by the fact that some of the provisions in the order were the same as in previous but generally futile attempts by state action to beneficially regulate the milk industry.

This is not to be taken as suggesting that the Dairymen's League would not approve an order that was beneficial to the milk industry, but it must be an order which the Dairymen's League believes will be beneficial.

The secretary has no right to exclude from voting any cooperative "engaged in marketing the commodity or product thereof, or in advancing the interests of the producers of such commodity." Section 8 (c) (12). Yet the Secretary found only 22 of 193 cooperatives who were entitled to and desired to vote for its members.

The defendant, Schuyler Junction, N. Y., Milk Shed Co-operative made no application to the Secretary for qualification to vote for its

members and did not apply for a co-operative ballot and when it attempted, through its President, to vote in the Referendum for its members the President was told that he could not do so. Upon his insistence that his ballot be taken, it was taken, but the President was told that it would not be counted. This was probably error. The statute fixes the qualification for co-operatives and no application is necessary. The burden seems to be on the Secretary to ascertain whether a cooperative meets the requirements of the statute and he may not make any additional qualifications such as applying for the right to vote or for a ballot.

The statute says the Secretary "shall' regard the approval or disapproval of a co-operative which complies with the statutory requirements. There seems no reason to doubt that Schuyler Junction
10353 Co-operative was entitled to vote and its vote should have been received and counted.

It seems that letters under date of July 8, 1938 (Exhibit 14 to Stip.), purporting to be authorized and directed by the Federal Secretary and State Commissioner of Agriculture were sent to these 193 co-operatives or so many of them as were then known to exist. The letters said:

"It is expected that simultaneous referenda will be conducted by the Secretary and Commissioner to ascertain if and when such order is perfected for the New York Market."

Certain information and requirements were sought from and presented to these co-operatives, at least some of which was not necessary to determine their right to vote.

In any event they were required to furnish the required information, determine their intention to vote for their members, and have such information in the hands of the representatives of the Secretary at Washington and the Commissioner at Albany not later than July 16, 1938. The co-operatives were in the same letter notified—

"In the event the requested information is not submitted, or the Secretary determines that such association is not qualified, the member-producer will be given an opportunity to vote individually and any vote submitted by such co-operative will be disregarded."

Here we have the cooperatives required to give information and determine within eight days, less time out for transportation of mail from Washington and to country districts and back to Washington, whether they favored an order not yet definitely known and whether they wished to vote as a co-operative for or against such order.

Assume four days for transportation (two days each way) that leaves four days for the collection of the information, calling meetings of directors, and determination whether the co-operative would vote for its members on an unknown order and in a Referendum not yet called and not held within a month thereafter. It is not surprising that only 54 out of the 193 co-operatives replied within this lim-

ited time and that only 22 had time to determine and so inform the Secretary and the Commissioner that they would vote for their members.

It is reasonably clear that the producers were led to believe that equal uniform prices for all producers would be received under order No. 27.

We have, then, a favorable vote obtained or influenced by misinformation as to the terms and effects of the order.

10354 We have also the Dairymen's League alone casting in favor of the order two-thirds of all the votes cast in favor of the order.

Should the conscience of the Court be satisfied that the order should be enforced when it was adopted on such a referendum and under the circumstances here shown? Manifestly not unless the Secretary's finding is binding on the Court, despite the fact that some of the misinformation was contained in departmental literature sent to producer voters.

It is said that the Secretary cannot be held responsible for the acts of the Bargaining Agency and the Dairymen's League. There can be little doubt of the cooperation between Federal and State Agents with the co-operatives to bring about a favorable vote for the order in the Referendum. Of this, the Secretary himself was probably unaware and relied on his subordinates. Indicative of Co-operation is the misleading statement in the Department's published statement of August 1938, taken verbatim from the Dairymen's League News of August 16, 1938.

After the order became effective on Sept. 1, 1938, strenuous efforts were apparently made to persuade or coerce proprietary handlers to sign the marketing agreement, every handler signing the agreement estopped himself from any legal attack on the order after signing and for a period of 31 to 59 days after he should withdraw from the marketing agreement.

Specific instances of diversion of withholding of milk from dealers until they signed the marketing agreement appear in the record and some of them were the result of official pressure, but not directly by the market administrator.

Effort was made to persuade at least one producer to withhold milk from the defendant Jetter Dairy Company. Publications by the Bargaining Agency and the Dairymen's League, letters by officers thereof, frankly suggest pressure, if not more, to persuade the handlers to sign the marketing agreement.

In the Dairymen's League News of Sept. 20, 1938, on the front page appeared an article headed—

"PRODUCERS READY TO DIVERT MILK FROM NON-COMPLYING DEALERS

"League gets thanks from Bargaining Agency for its offer of marketing facilities.

10855 "Volunteer Enforcement Agents—100 Strong Working the Roads Last Week

"This action followed a meeting of delegates of the Metropolitan Cooperative Milk Producers' Bargaining Agency in Syracuse, Sept. 10th. The delegates voted to have 100 farmers go out as volunteer enforcement agents to 'crack down' on delegates who have not signed the marketing agreement.

"* * * The Dairymen's League Plants are open * * * and others, too," said Mr. * * * (A state official). "Call me up. I'll tell you where to put your milk. You won't have to divert very long before these dealers will be ready to sign up."

In the Bargaining Agency's "Milk Producers' Market News" for October 1938, appeared this:

"Please bear in mind that our able Secretary who is in charge of the 'Minute Men' is doing a fine job and these men are on the watch at all times for disturbances, chiseling, and other items that are not for the best interests of your producers."

Other statements of suggested coercion and force are frequent.

On September 21, 1938, an officer of the Bargaining Agency issued a letter which was circulated among the producers, including those of the Jetter Dairy Company.

Among other things the letter said:

"* * * almost every dealer in the Metropolitan Market has signed the agreement. In some instances it has been necessary to exert producer pressure and the willingness of producer to cooperate in withholding or offering to withhold their milk until their dealer signed, has been encouraging and gratifying."

From Sept. 1, 1938, to December 1, 1938, the Bargaining Agency has spent $31,348.96.

It is not an unreasonable inference under the evidence of persuasion, pressure, and coercion that no small part was spent in obtaining the signatures by handlers to the marketing agreement to prevent litigation which the agency asserted had impaired the effectiveness of the order in the Boston Marketing area.

The record shows clear evidence that the Dairymen's League and the Bargaining Agency, aided by some officials not Federal, brought about the signing of the marketing agreement by nearly all the handlers.

Efforts were made to persuade the producers of the cooperatives delivering to the defendant Jetter Dairy Company and others who had not signed the marketing agreement to transfer their milk to other handlers, by representations that the producers delivering to Jetter and others might not be paid for their milk.

1083 It is urged that these post-referendum happenings are not relevant either as to the referendum or as to the terms, conditions, or validity of the order or of the statute. The question is not free from doubt. But they seem to this Court to fit in to and illustrate the design to prepare, present, and secure, the approval of this order, first by the public authorities and then by the producers in the Referendum on this order, apparently so greatly desired by the Dairymen's League, the Bargaining Agency, and the large co-operatives and large handlers, and also to aid in understanding the operation and effect of the order.

Without doubt, the Secretary of Agriculture hoped and believed order No. 27 and its complimentary State order No. 126 would remedy the chaotic milk situation in the Metropolitan Area, which had been a vexatious and seemingly unending problem to legislative bodies and executive authority. Undoubtedly the State Commissioner of Agriculture had like hope and belief.

It may be assumed that the Bargaining Agency and Dairymen's League Cooperatives believe that these orders would solve the milk problem when they prepared and put forward their proposed order or orders. The results, however, have not justified such expectations.

The results of the operation of the order would not ordinarily be a matter of judicial concern, but if such results have the effect of taking the property of one set of handlers without compensation and giving such property to another set of handlers, amounting to what the defendants call confiscation, it bears upon the validity and constitutionality of the order and the statute.

It is agreed here that handlers must receive not less than 9¾ cents per quart for milk in glass bottles sold to stores and other retail dealers in order to pay for full butter fat content and all other charges and make full payment under the order to producers.

This price is based upon efficient operation and makes no allowance for inefficiency.

About September 1st, the price to retail distributors was advanced to 9¾ cents per quart. Within two weeks cut throat competition under the order reduced this price to a level of from 8 to 9 cents per quart and milk was being sold generally at that price to 1085 dealers and store trade in the metropolitan area. This is about the same price that prevailed before the order became effective.

Some time prior to September 1st, 1938, the Jetter Dairy Company had been selling to one Weintraub thirty cases of milk daily and the price of the milk on that date was 9¾ cents per quart. On September 4th, 1938, the Dairymen's League solicited said account and by selling milk at nine cents per quart acquired 10 cases of said trade. Gold Medal Farms, Inc., by the same price cutting on the same date also acquired 10 cases of the trade of the said Weintraub. In order to retain the balance of 10 cases of such trade the defendant Jetter Dairy Company was compelled to reduce its price to nine cents per quart on September 5, 1938.

The Sheffield Farm Company offered one Herman Laven milk at 9¾ cents per quart on all milk purchased and in addi thereto delivered 13 quarts per case instead of 12 quarts, the ex quart of milk further reducing the price ¾th cents per quart, mak a net cost to Lavender of 8¼ cents per quart.

The Sheffield Company, a subsidiary of National Dairy Produ Corporation, also sold milk to one Rose Paley. This Company g her 35 cases of free milk to induce her to buy Breakstone milk, latter being also a subsidiary of National Dairy, and its milk be sold by the Sheffield Company.

The Dairymen's League also gave the same Rose Paley 35 cases free milk to procure her using the Dairymen's League Milk.

The Sheffield Company delivered milk to Mrs. Paley at 9¾ ce per quart and collected that amount and rebated to her in cash at t rate of ¾ cents per quart. The Dairymen's League billed milk to M at nine cents per quart.

The Grand View Dairy Company, which had been selling M Paley milk refused to give her any free milk and she discontin buying from it and obtained all her milk from Sheffield's and t Dairymen's League, who made the aforesaid concessions.

The practices above referred to were general throughout the ma keting area and therefore the price of milk to grocers and oth retail distributors was lowered to a price varying from 8 to 10358 cents per quart. Producers who sell directly to the grocer r retail distributors are not subject to the order, selling the own milk and do not have to pay the producers a uniform price n do they have to pay into any producer's settlement fund.

One of these, the Balsam Dairy Company, a producer dealer, ow ing a large number of cows and free from the order, selling milk Brooklyn, sold milk to Israel Hoch in September and October Brooklyn at 8½ cents per quart and presumably since.

From September 1st, 1938, to January 1, 1939, the defendant Jett Dairy Company lost 240 cases of daily sales of milk to competito by reason of these concessions. The Jetter Dairy Company handl a minimum of 40,000 quarts per day. The result—a loss of 1 ce to 1½ cents per quart has been from $400.00 to $600.00 per day.

The average quantities of fluid milk sold by the Dairymen League, including milk distributed directly by the Dairymen League and milk sold by the Dairymen's League to Distributors du ing the months of September, October, and November, 1938, was ap proximately 26,000 forty quart cans or a total of 1,640,000 quart daily, constituting about 34% of the fluid milk in the marketing are

If the Dairymen's League had to pay the same uniform price t producers as does the Jetter Dairy Company and other independe proprietary handlers, on the same basis of sale at 1 to 1½ cents belo the cost price of 9¾ cents per quart, the Dairymen's League woul lose from $10,400.00 to $15,600.00 per day. But the Dairymen League does not pay the uniform price to these producers and is no

required by the statute or the order to do so. It may deduct such losses from its price paid to producers. Besides that, it may recoup itself in other ways by service charges and milk sales out of the district.

The amount paid to producers by the Dairymen's League for Class I Milk, at the base for 3.5% butter fat content in the 200 mile zone in cash and certificates of indebtedness to be taken as cash are as follows: September, 1.75%; October, 1.81%; November, 2.01%.

10359 While the uniform price fixed by the administration on the same basis of 3.5% milk for the 200-mile zone was as follows: Sept., 1.87%; October, 1.91%; November, 2.10%.

It will be seen that the uniform price which the proprietary handlers paid to the producer was greater than that paid by the Dairymen's League to the producers as follows: September, 12 cents; October, 10 cents; November, 9 cents per cwt.

Another source of great discrimination in favor of the large milk operators who can sell in the outside market is contained in the provision that the handler may blend the price of milk sold in the outside market with the milk in the Metropolitan area.

The Dairymen's League sold large quantities of milk, called unpriced milk in New Jersey, averaging more than 10,000,000 pounds per month.

The producers' price of milk in New Jersey is fixed by the State Board at $2.76 per cwt. It is not established in the evidence that the Dairymen's League received that price for its milk produced in the New York Production area and sold in New Jersey.

While the Dairymen's League offered the defendants almost all the things they desired about their prices and quantities, etc., the prices at which the Dairymen's League sold in New Jersey was not disclosed and the Court did not require its disclosure.

The New Jersey State Board fixes the resale price of milk sold to stores at 12 cents per quart, in rural districts and 13 cents per quart in the three heavily populated districts.

This compares with prices of 8 to 9 cents per quart received for such milk wholesale in the Metropolitan area.

It is a reasonable inference that its milk was sold at about the fixed price in New Jersey or at very little less than that price, if such price was not obtainable.

10360 The records of the Dairymen's League show that they sold about 20% of their entire sales in New Jersey.

If they sold at the base price of 2.76 per cwt. in New Jersey, the difference between the amount which the Dairymen's League received from this New Jersey Milk and the price it paid to the producers for September is $1.01 per cwt. ($2.76–$1.75). For October the difference was 95¢ per cwt. ($2.76–$1.81). For November the price was 75¢ per cwt. ($2.76–$2.01).

The price which the Dairymen's League paid to its producers for this large quantity of milk (10,208,500 lbs.), amounted for the Sep-

tember milk to $178,648.00. This is on the basis of about $1.75 per cwt. Assuming a sale price of $2.76 per cwt., this leaves about $103,195.00 profit on this milk sold in New Jersey in September from which must be deducted transportation charges and certain other expenses but which could not be measurably greater than on milk sold in the marketing area.

This sale was in the fixed price market in New Jersey whereas the sales in the Metropolitan area were in the competitive market with no prices fixed and where the milk sold at from 1 to 1½ cents per quart less than it cost for production and delivery.

Strenuous objection was made by the defendants against disclosing prices which the group of handlers, of which Aarun J. Rubenfeld is the head, received in the New Jersey market, where most of his direct sales of fluid milk was made and where 99½ per cent of all the milk from the State Hill plant was sold as fluid milk.

It hardly admits of doubt that higher prices were received in the New Jersey market where fixed selling and resale prices have long been maintained than in the Metropolitan market area where unbridled competition exists.

It is quite true, as urged, that the defendants might have applied to the Secretary of Agriculture for a modification of Order No. 27 in some or all of the respects in which they are aggrieved thereby.

But it is not to be supposed that there could be quick action upon such an application for modification of the order and in the meantime great detriment might result to the handlers.

10361 The handler must comply with the order during such time as it takes for the Secretary to entertain, hear, and decide the application for modification of the order and for such further time as it takes for a Court to decide whether modification should have been granted.

The statute also provides.

See also U. S. vs. Melvin Child Andrews (D. C. Mass., January 18, 1939, not yet reported) where any substantial amount of money is involved administrative relief is of little value.

But the order could not be amended in the two most important particulars, viz, cooperatives are exempt from payment of the uniform price to producers and the order is required to permit cooperatives to blend prices received in outside markets with prices received in the marketing area. Adjustment through a scheme such as the Producers Settlement Fund is also provided by the statute so administrative relief would be futile.

Furthermore, it is the Government and not the handler which brings this suit. Also, the power does not lie with Congress to require one whose property is being taken in violation of the 5th amendment to pursue some prescribed administrative remedy during which time his property continues to be taken before he can apply to the Courts for protection and relief.

In a proper case, immediate resort to the Courts cannot be denied for any reason whatever.

The things of which defendant Jetter most complains are the provisions of the directing statute that cooperative associations need not pay the uniform price to producers which is contained in Section 8 (c) (5) (f), the only limitation being that such a cooperative shall not sell its milk products to any handler for less than the fixed uniform price.

This section also provides for the blending of the net profits of all these sales in all markets and in all use classifications. These are two of the things which are most discriminatory.

Article 7, Section 1, provides that all handlers other than cooperative associations shall pay producers not less than the uniform price. It is by the construction and operation of this act that the cooperatives do not pay the uniform price, and may blend the price of
10362 milk sold outside of the State and in other classifications with fluid milk sold in the marketing area and thereby reduce the price paid by them to producers which is never, even for fluid milk, the price required to be paid by proprietary handlers.

The cooperatives also receive payments out of the Producers Settlement Fund that are denied to the proprietary handlers, sometimes amounting to as much as five cents per cwt.

The cooperative handlers may charge to the producers and deduct from the price paid for the milk, expenses of plant operation which run from 15 to 30 cents per cwt. of fluid milk. Proprietary handlers cannot make such deductions of amounts paid for expenses of operation themselves.

While all handlers are allowed 23 cents per cwt. plus transportation costs for milk received at each station equipped
10363 only for receiving and shipping milk and transporting the same to another plant where it is utilized for other than fluid milk purposes, only the large cooperatives and large proprietary dealers are equipped to receive this 23 cents charge.

Cooperatives which are also milk dealers or handlers, may and do pay their producers less than the uniform price and from their payments into the Producers Settlement Fund, if any, they receive payments back for services, which proprietary handlers cannot, and do not, receive.

In fact, there is very little that a proprietary handler, who does not sell any milk outside the marketing area, and who has no plant to which he can transfer surplus milk, can do to recoup his losses. He cannot reduce his price by "blending" a fictitious value on "unpriced" milk with that sold in the area. He has no unpriced milk. He has no manufacturing plant, and may possess neither capital or inclination to enter the manufacturing field already principally covered by Dairymen's League, Bordens, National, and some of the larger independents.

The discrimination between the small proprietary handlers and the Dairymen's League will be manifest from the following illustration of the comparative operation of the statute as applied in Order No. 27 as it affects the defendant, Jetter Dairy Company, and the

Dairymen's League. The figures include all the differentials in favor of the cooperatives.

The loss per quart is from 1 to 1½ cents per day for milk sold in the market area.

Jetter sells 40,000 quarts per day all in the marketing area, at a loss of $400.00 to $600.00 per day because required to pay the uniform price to producers.

The Dairymen's League sells about 1,640,000 quarts per day or 41 times as much as Jetter. Dairymen's League sells without loss, for what it does not gain from sales in New Jersey and other out-of-State markets, together with the service and other differentials, it may deduct from its producers because it is not required to pay the uniform price.

Jetter owes to Producers Settlement Fund for September and October (September payment has been made)	$30,000
Dairymen's League paid to Producers' Settlement Fund for September and October	110,000

or only about 3½ times as much as Jetter.

10364 Dairymen's League received from the Producers' Settlement Fund under Article VII, paragraph 5, in September $59,455.59, and in October $60,794.07, or a total of $120,239.66, which is about $10,000 more than it paid in.

In addition, it received from this fund under Article VII, section 6, in September $91,630 and in October $73,994, making a total of $165,524. Adding this to the aforesaid $120,239.00, it makes a grand total of $285,763.

This is about $175,000 more than the Dairymen's League paid into the Producers' Settlement Fund.

Jetter received nothing. Jetter loses at a $400.00 to $600.00 per day loss, on a 30-day month, $12,000 to $18,000. In a year that amounts to $144,000 to $216,000. One year's payments into the fund at $15,000 per month would be $180,000. In less than a year it is practically certain that all the assets of the Jetter Company would be taken by the operation of the order, and it would have no funds or assets to pay producers or to make further payments into the fund. In short, its entire property would be confiscated. This is by force of the statute as applied in the order.

As a matter of fact, the defendant Jetter Company could not last a year. It had on April 1, 1938 only $50,000 capital and $30,000 surplus or a total of $80,000. The taking of its capital at the rate of only $15,000 per month would exhaust its entire assets within 6 months.

Moreover, there is nothing to prevent the Dairymen's League and other large producers from further depressing the price of milk sold in the marketing area in order to capture the customers of competitors and thus forcing the Jetter Dairy Company and others in like situation, out of business at an even more rapid rate.

The Dairymen's League Cooperation, however, could go on indefinitely for the statute and order are greatly discriminatory in favor of cooperatives, especially large ones, which can take advantage of all the opportunities it presents.

The property of the Jetter Company and, of course, all other proprietary handlers and smaller cooperatives is thus taken by operation of statute and without the due process of law required by the Fifth Amendment.

This brings us to the consideration of the questions of law here involved, apart from the misrepresentations to producers in connection with the referendum.

10365 The two most important questions of law are these.

1. Does this statute as applied in the order, in its operation under the conditions here existing, violate the Fifth Amendment to the Federal Constitution prohibiting the taking of property without due process of law or the taking of private property for public use without just compensation?

2. Can the discriminations in favor of cooperatives be upheld under the circumstances here existing on the ground that producer cooperatives may legally receive the special preferential treatment provided in order 27?

It is held by high authority that even though a statute may be constitutional on its face, and may be valid when enacted or when given a particular application, it may be invalid under changed conditions or when given an application which results in arbitrary and prejudicial discrimination or when its operation results in the taking of property of one without compensation and transferring it to another.

Concordia Insurance Company v. Illinois, 299 U. S. 535, 545.

Borden Company v. Baldwin, 293 U. S. 194, 210. See also Arrway Corp. v. Day, 266 U. S. 71, 85.

Nebbia v. New York, 291 U. S. 502, 537.

Great Northern Ry. v. Washington, 300 U. S. 154.

The acts of Congress under the commerce clause are subject to the Fifth Amendment.

Currin v. Wallace, supra.

Railroad Retirement Act. v. Alton R. R., 295 U. S. 330, 347.

Monongahela Navigation Co. v. U. S., 148 U. S. 312, 336.

U. S. v. Chicago, Milwauke & St. Paul R. R. Co., 282 U. S. 311, 327.

Congress has not the power under the Commerce Clause, or otherwise, to take without compensation property of one and transfer it to another. And this is so, even though it be for a valid public purpose as is claimed here and as the statute intends.

Railroad Retirement Board v. Alton, 295 U. S. 330, 359.

Monongahela Nav. Co. v. U. S., 148 U. S. 312, 336.

Louisville Joint Stock Bank v. Radford, 295 U. S. 555, 580, 602.

There can be little doubt that the statute, as applied in the order by means of the Producers Settlement Fund, takes the money from one group without compensation and transfers it to another, 10366 however disguised that transferring and taking may be, by representing it to be necessary to stabilize milk production and to take care of surplus milk.

The Milk Producers Settlement Fund here bears a close resemblance to the pooling fund, to which, under the Railroad Retirement, the large carriers were required to contribute for the benefit of employees of the weaker roads.

That act was enacted under the commerce clause and was held to violate the Fifth Amendment because it took "the property or money of one and transferred (transferring) it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension the employees."

The money taken from one (Jetter) was in effect transferred to another (Dairymen's League and some other large cooperatives) for the benefit of the producers of such cooperatives and in effect for the benefit of those cooperatives themselves.

The Fifth Amendment is intended to protect the property and affairs of all citizens alike regardless of all other considerations, and forbids the taking of the property of one without compensation and transferring it to another.

All the public purposes declared to be the object of the Railroad Retirement Act were set aside as no consequence in face of the Fifth Amendment. So here, the welfare of the producers and cooperatives, sought to be served by the agricultural marketing agreement act must be set aside, because here, as in the Alton case the property of one by the force of the statute and order, is taken and transferred to another in violation of the Fifth Amendment.

This case has analogy to Thompson v. Consolidated Gas Utilities, 300 U. S. 551, even though the statute there involved was a state statute.

The validity of the extractions from one for the benefit of the other cannot be supported by the so-called pooling cases upholding workmen's compensation acts (Mountain Timber Company v. Washington, 243 U. S. 219. N. Y. Central Railroad v. White, 243 U. S. 188; nor by the statutes requiring banks to contribute to a common fund for insuring deposits (Noble State Bank v. Haskell, 219 U. S. 104; Abie State Bank v. Bryan, 282 U. S. 765.

These cases were cited in the Alton case and distinguished by Court and held without analogy.

In all those statutes there was a possible future benefit to 10367 be received by the one whose contribution was required. There is no possible benefit to be received here by the contributors.

The New England Divisions Case, 261 U. S. 184, and Dayton-Goose Creek Railway v. U. S., 263 U. S. 456, are equally without application here. There a fair return either by rate or on the investment was

rovided. Here no fair return is provided. The requirements of the tatute and order not only do not provide for a fair return or any re-urn on the investment but in fact take the entire investment in peri-odic exactions.

These cases were also distinguished in the Alton case:

Hegeman Farms Corporation v. Baldwin, 293 U. S. 163, upon hich some of the plaintiffs rely, has little application here.

There was no producers' settlement fund nor other pooling ar-angement for payments by one of the beneficiarys to another. The ecision was influenced there by the failure of any showing by the laintiff that his handicap in competition was not due to his own nefficiency.

There is no question of inefficiency, as has been shown.

It is said that the losses suffered by Jetter Dairy Company and thers are caused by the competitive conditions in the marketing area nd not by reason of the statute and order. It is the order under he statute which compels the proprietary handlers to make fixed pay-nents to producers and other payments into the milk producers set-lement fund and causes these large losses, while permitting coopera-ives to pay what they please to producers and giving such coopera-ives, especially large ones, other discriminatory preferences, both as o the amount paid into and withdrawn from the producers' settle-ent fund. These grossly discriminatory provisions permit in such competitive market, by means of the settlement, the taking of the roperty of some and transferring to others without compensation nd thereby eliminating them entirely from the competitive field.

This competitive condition was known when the statute was enacted nd the order was issued, for it had long existed and could not be ured by any and all the previous attempts at remedy. These defend-nts have no power or control over these competitive conditions. fficiency is not a factor.

This is not a case of "protecting a business against the hazards of ompetition" as plaintiff's counsel assert, citing Hegeman Farms Corp. vs. Baldwin, 293 U. S., Supra.

368 This is more like a case of statutory disarming of one set of competitors and sending into competitive battle with another t to whom the same statute supplies arms.

Neither the order nor the statute made any attempt to remedy the ompetitive conditions and the operation of the order must have been oreseen. In any event the statute as applied in the order brings the rbitrary discrimination and disaster hereinbefore shown.

Nebbia vs. New York, 291 U. S, 502, has little analogy. There the ew York Statute fixed minimum prices for the sale of milk at retail nd provided a penalty for violations. The case came before the ourt upon a conviction for selling under price.

The Court does, in its opinion, summarize the conclusions of the egislative Committee respecting the milk industry of New York. hese conclusions refer to the desirability of compelling an equal

sharing of the burden of the surplus milk by all producers and distributors. These statements, however, are those of the committee and not of the Court.

Public Service Commission vs. Great Northern Utility, 289 U. S. 130, is inapplicable. In that case there was, in the first instance, no allegation and no proof that the rates prescribed were confiscatory. Amendment to allege confiscation, but without proof, was held unavailing.

10369 There are no decisions of any appellate Court upholding such an order as this under provisions of this statute.

U. S. vs. David Buttrick Company, 91 Fed. (2nd) 66, C. C. A. 1, merely decided that the provisions of the agricultural adjustment act relating to milk were not covered by the decision in U. S. vs. Butler, 297 U. S. 1, which declared other provisions of that act void.

The district court had held the whole act void under the Butler case and the Circuit Court of Appeals reversed and sent the case back for trial. The case related to the statute before its amendment in 1937.

In Hood & Sons, et al., vs. U. S., 97 Fed. (2nd) 677, C. C. A. 1, the District Court granted a temporary mandatory injunction of the same kind sought here.

On appeal the C. C. A. modified the injunction and directed the payment into the registry of the Court of the moneys required under the temporary injunction to be paid to the market administrator. The C. C. A. held that the defenses were not frivolous and should be heard by the District Court before final decision.

In Whittenberg, et al., vs. U. S., 100 Fed. (2nd) 520, the Secretary of Agriculture brought suit against a handler of citrus fruits in Texas from violating the order there involved. There more than 50% of the handlers had signed the marketing agreement and the order was approved by two-thirds of the producers.

The Secretary made weekly regulations forbidding shippers to ship in interstate commerce and to Canada grape fruit below stated standards of *size* and *quality*.

The Court held the provisions of the act constitutional.

The Court relied chiefly on U. S. vs. Buttrick, 91 Fed. (2nd) 66, Supra, and Edwards vs. U. S., 91 Fed. (2nd) 767, later referred to and on the Currin case, 95 Fed. (2nd) 856 (Affirmed by the Supreme Court).

It will be noted that there was no equalization fund or producers settlement fund as here and no differentials or other discriminatory preferences.

The handler was not required to pay into any fund for transfer to others and the handler was on the same basis as all other handlers having inferior fruit.

Edwards vs. U. S. 91, Fed. (2nd) 767 (C. C. A. 9), contains no equalization scheme and no fund like the Producers Settlement Fund here into which one set of handlers are to pay into a fund to be

transferred to other handlers. The order complained of there merely prorated the shipment of fruit in interstate commerce. It has little analogy to the order and conditions here.

10370 Wallace vs. Hudson Duncan Company, 98 Fed. (2nd) C. C. A. 9,985, is not in strict analogy. The case related to unshelled walnuts.

In that case the order issued by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended, and held valid by the Court required that a packer (not a grower):

"either (1) must sell or hold all the walnuts it acquires in the state of acquisition, of (2) export from the State not more than a percentage of its intended shipments determined (percentage) by the Secretary for each crop year—upon consideration of the delivery of the remainder of such intended crop export to a control board.

"The Board may sell the walnuts it received to purchasers abroad or to shellers within the United States, at prices fixed by the Board, or may eliminate all or part of them from the market by donation or sale to charitable institutions in the United States, with provisions that such sales or donations shall not enter the U. S. as unshelled walnuts.

"The Board also has power to release to interstate shipment through the contributing packers all or portions of the surplus delivered to it, if in its opinion, the proper control of the interstate market warrants it. The proceeds of the distribution of the surplus and payments of credit value by the shippers are to be ratably apportioned and distributed to them by the Board.

"or (3) May export from the state all of its intended shipments upo consideration of a payment to the Board, not of what the Packer has sold them for, but for a certain 'credit value' fixed for all shippers by the Board, of the surplus walnuts which would otherwise have been delivered to the Board."

While that order has seeming similarity to the order here involved there are distinguishing differences.

1. There is no discrimination among packers as there is among handlers here where cooperatives are given a decidedly preferential position.

2. There are no prices fixed to be paid to producers as is done here.

3. There the object is to maintain the price of walnuts in the interstate markets, while here the sole object is to secure a price to producers before the milk passes into interstate commerce and no thought is given to prices in the interstate market which are subject to cut-throat competition largely by those given a preferential status in the order.

4. There the packers who deliver walnuts to the Control Board, the proceeds of the sale of which, if sold are distributed ratably to the same packers who delivered to the Board, while here the payments out of the producers settlement fund are not paid to handlers ratably

but on a plan involving preferential treatment based on whether or not the handlers are cooperative and whether they render services or not. Also here payments into the pool are subject to gross discrimination.

10871 5. There the walnuts might be kept or sold in intrastate commerce free from the order. Here milk cannot be kept, for it is highly perishable. Here, if sold in intrastate commerce in the marketing areas, it became subject to State Order No. 126, which provides for the same payment to the same producers settlement fund.

In the Hudson-Duncan case the Court recognized that such a regulation would be violative of the 5th amendment if unreasonable, arbitrary, or capricious, citing Nebbia vs. New York, 291 U. S. 502, 525, but held that the regulation was reasonable with one judge dissenting. It will be seen that the Hudson-Duncan case has little analogy to the case at bar.

In U. S. vs. Melvin Childs et al., D. C. Mass. (Jan. 18, 1939, not yet reported) mandatory injunction was granted to the Secretary requiring the defendants to pay into a milk price equalization fund. Whether or not there was other discriminatory provisions such as exist here is not disclosed. The discussion relates chiefly to whether all the defendants were engaged in interstate commerce. The opinion discloses that the judge writing the opinion believed there should be uniformity of decision in the District Court of that district. That decision is not controlling or persuasive here.

U. S. vs. Goldsmith Fruit Company, 19 Fed. Supp. 147, upheld the order of the Secretary under the Act before its amendment in 1937. That order had practically none of the provisions here and the case is not analogous.

It is also in direct conflict with Fosgate vs. Kirkland, 19 Fed. Supp. 152, decided one month later in the same district, in which later opinion the Judge said he could not follow the Goldsmith case.

There apparently are no further decisions under the act which have any analogy to the order and the facts here existing.

The defendants make some further contentions which may be briefly considered. It is urged that no provision of the statute authorizes Articles VII, Sections 5 and 6, of the order.

These relate to payments of 5¢ per cwt. to cooperatives and market services of 23 cents per cwt. and transportation charges, both to cooperatives and proprietary handlers.

The court does not find any sections of the act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced.

10872 It is also urged that Congress in the Act has neither fixed the price to be paid to producers nor prescribed a formula for fixing such price. This is not free from doubt.

If, without prescribing the price or a formula for determining the price, the statute authorizes the Secretary with the approval of two-thirds of the producers to fix a price without laying down standards

to be applied, then there seems no escape from the conclusion that the statute delegates to the Secretary and producers powers which are essentially legislative and such delegation of power is invalid whether the delegation is to the Secretary or the producers separately or to both together.

Carter vs. Carter Coal Company, 298 U. S. 310.

The case would then come within the decision of the Carter case rather than within Currin vs. Wallace, Supra.

Since the decision may be reached on other grounds, this question need not be decided.

Plaintiffs cite many statutes, both State and Federal, providing for certain preferential treatment to producers and cooperative associations of producers, certain cases in which the validity of some of them have been upheld. But none of these statutes carry any such arbitrary, discriminatory provisions as the applicable provisions of the Agricultural Marketing Agreement Act and order 27. None take from one and transfer to another without compensation. Some are tax cases where producers selling their own products are classified differently from dealers who are not producers and exempted from a tax imposed on such dealers. Some relate to classifications of dealers or other persons not many of which relate to cooperatives.

Warehouse Company vs. Tobacco Growers, 276 U. S. 71, is the case most relied upon. A Kentucky statute aiming to assist agricultural producers in the orderly marketing of their crops, authorized the incorporation of nonprofit associations, with membership confined to producers, to contract with their respective members for ten years to market the members' crops. It also provided that any warehouseman knowingly inducing such member to break his contract by receiving such members' tobacco for sale or auction should be liable for a penalty of $500 to be recovered in a civil suit by a cooperative. The Supreme Court upheld a judgment so recovered. The lack of analogy is clear.

10373 In Frost vs. Corporation Comm., 278 U. S. 515, the Discrimination in favor of cooperatives there involved was held to be unconstitutional.

Chicago Board of Trade vs. Olsen, 262 U. S. 1, has no analogy.

In Eisenberg Farms Inc. vs. Baldwin, 265 N. Y. 662, it was contended that the New York Milk Control Law was unconstitutional because it failed to require cooperative associations to return to their producers the prices fixed by the state milk control law. The Court of Appeals sustained the statute, but without opinion. The decision in the Eisenberg case was explained, however, by the Court of Appeals in Matter of Mayflower Farms, Inc. vs. Baldwin, 267 N. Y. 9, 12, as follows:

"In Matter of Eisenberg Farms, Inc. vs. Baldwin (265 N. Y. 662), this Court decided that the differential classes in favor of cooperative associations which permitted them to pay to producers less than the price fixed by the Commission for milk was Constitutional."

It may be said that the Court in 265 N. Y. 662, wrote no such opinion but did uphold the lower court so deciding.

The discrimination in favor of cooperatives in that statute is but a small matter compared to the comprehensive discriminatory scheme provided in the Marketing Act and Order 27, and can have little bearing here.

There is no need to prolong the discussion of statutes or decisions relating to cooperatives. There are no authoritative cases upholding any such discrimination in favor of cooperatives as here exists. None say that the 5th amendment permits one to be treated differently from another.

The defendant cooperatives are not quite in the same situation as the Jetter Dairy Company. It is quite true, as the Government contends, that they may not complain of any preferential treatment of cooperatives of which they may take advantage.

But there seems no good reason why they may not complain of discriminatory preferences of which only the large dealers, cooperative and proprietary handlers may avail themselves, such as the 23 cents per cwt. for transfer of milk from a nonmanufacturing to a manufacturing plant, the blending of prices for which unpriced milk may be sold in New Jersey and other nonmarketing area markets with prices of milk sold in the marketing area. They can avail themselves of none of these preferential provisions of statute and order.

The order is also discriminatory as against them. They pay money which would otherwise be distributed to their producers, to
10374 the Settlement Fund, in order that it may be paid out to the large cooperatives and large proprietary handlers. They are forbidden by law to sell milk in the area at less than the prices fixed by the order. They are also required to pay into the Producers Settlement Fund to provide preferential payments made to producers living in 18 counties, under the provisions of Article 6, Section 8. The producers in those counties, receive 20¢ per cwt. in addition to the locational differentials which return them a higher price for their milk because they are located nearer New York. By this means, moneys of the Rock Royal and the Schuyler Junction and Central New York Cooperatives, are taken to be given to other producers, for the most part, delivering to the three large proprietary and cooperative handlers, without compensation to these small defendants.

If they pay into the producers settlement fund on the order basis they, like also the smaller proprietary handlers, though in lesser degree, suffer confiscation of their property by the same taking from one and transferring to another.

There can be little doubt that under the situation existing when the order became effective, the large dealers doing 70% of the business in the marketing area enjoy discriminatory preferential treatment over most of the handlers doing the remaining 30% of the business.

There remains to be considered the separate contention of the defendant Central New York Cooperative. This defendant contends that it does not come within the terms of the order because as a cooperative marketing association it merely acts as an agent for the producers in marketing their milk; that their legal status is that of producers marketing their own milk, which, if true, removes them from the operation of the order.

Central New York Cooperative has paid uniform prices to its producers and has left after such payments and payments of all expenses a sum not exceeding half the amounts fixed by the administrator for payment into the Producer Settlement Fund for each month.

This cooperative is incorporated under the laws of the State, rents milk receiving plants, where, as it contends, it receives milk as their agent, from producers who are members and some others under contract with it and still as agent delivers the milk to other agents who are wholly owned subsidiary corporations, who sell to 0375 stores and retail distributors. The proceeds of the sale come back to the defendant cooperative, presumably less the expense of the selling agents and are paid to the producers less the expense of operating the receiving plants.

Such a claim that the Central New York Cooperative and its subsidiary corporations are merely agents for the producers is somewhat difficult to accept. This cooperative owns no farms or cows and directly produces no milk.

The Government contends that such a cooperative is a handler within the definition of handler and therefore liable for payment into the producers settlement fund. It is not free from doubt that such definition is entirely supported by the statute. Moreover, under a similar contract it has been held that such a relation is one of joint venture and not a sale.

Rhodes vs. Little Falls Dairy, 230 A. D. 571, Affirmed in 256 N. Y. 539.

It is, however, not necessary to decide this question, for even as a cooperative handler, Central New York Cooperative suffers the same discriminatory treatment as the other defendant cooperatives who by reason of the fact that they cannot avail themselves of all the opportunities for withdrawal from the Producers Settlement Fund that are enjoyed by the Dairymen's League and other large handlers selling in the New Jersey Market and receiving the other preferential differentials, find their property taken under the order without compensation and transferred to another.

The final conclusion is that the statute, as applied in the order, is unconstitutional as to all the defendants in its application to the situation and condition here existing and that the order was not approved in accordance with the provisions of the statute and should not be enforced.

Judgment may be entered dismissing the complaints as to all defendants, with one bill of costs against the Dairymen's League and Metropolitan Bargaining Agency. February 23, 1939.

10376 In United States District Court

[Title omitted.]

Petition for appeal

Filed March 21, 1939

The plaintiff in the above-styled cause, being aggrieved by the final order and decree entered on March 21, 1939, in the above-entitled cause, hereby appeals from said final order and decree to the Supreme Court of the United States and prays that its appeal may be allowed; and that a transcript of the record, proceedings and papers upon which said final order and decree was based and made, may be sent to the Supreme Court of the United States.

John S. L. Yost.
JOHN S. L. YOST,
Charles J. McCarthy.
CHARLES J. MCCARTHY,
Special Assistants to the Attorney General.

Ralph L. Emmons.
RALPH L. EMMONS,
United States Attorney.
Harold L. Schilz,
HAROLD L. SCHILZ,
Special Assistant to the Attorney General.
E. O. Mather.
E. O. MATHER,
Principal Attorney, Department of Agriculture.

10377 In United States District Court

[Title omitted.]

Order allowing appeal

Filed March 21, 1939

The plaintiff in the above-styled cause, having prayed for the allowance of an appeal therein to the Supreme Court of the United States from the final order and decree made and entered in the above-entitled cause by this Court on March 21, 1939, and having presented and filed its petition for appeal, assignment of errors, and its statement as to jurisdiction on appeal, and it appearing from said petition and the record in the above-entitled cause that the

United States is a party thereto and that the decision therein is against the constitutionality of an Act of Congress, the petition of plaintiff for an appeal is hereby granted and the appeal is allowed as prayed for.

Dated at Albany, New York, this 21 day of March, 1939.

FRANK COOPER,
United States District Judge.

10457 In United States District Court

[Title omitted.]

Plaintiff's assignment of errors

Filed March 21, 1939

The United States of America, plaintiff-appellant in the above-styled cause, files the following assignment of errors upon which it will rely in prosecution of its appeal from the final decree entered by the District Court in the above-styled cause on March 21, 1939:

1. The District Court erred in entering the final decree herein.

2. The District Court erred in failing and refusing to issue an injunction as prayed in the bills of complaint in the above-styled consolidated cause.

3. The District Court erred in failing to find the facts as requested in paragraphs numbered 8, 9, 15, 16, 23, 28, 29, 42 to 49, inclusive, 51, 52, and 56 of the proposed findings of fact submitted by plaintiff.

4. The District Court erred in failing and refusing to find without qualification, change, or omission the facts as stated in paragraphs numbered 12, 13, 14, 17, 18, 27, 30, 31, and 53 of the proposed findings of fact submitted by plaintiff.

5. The District Court erred in finding the facts to be as set forth in paragraphs numbered 17, 20 to 26 inclusive, 36 to 59 inclusive, 70 to 77 inclusive, 79 to 97 inclusive, 97a, 100, and 101 of its findings of fact.

10458 6. The District Court erred in making the conclusions of law stated in each and every paragraph of its conclusions of law with the exception of paragraph 30 thereof, as to which paragraph, plaintiff assigns as error, only the failure to adopt without qualification paragraph numbered 4 of plaintiff's proposed conclusions of law.

7. The District Court erred in failing to adopt as its conclusions of law, paragraphs numbered 1, 5, 7 to 10 inclusive, 14, and 15 of the proposed conclusions of law submitted by plaintiff.

8. The District Court erred in failing to adopt without qualification, paragraph numbered 4 of the proposed conclusions of law submitted by plaintiff.

9. The District Court erred in overruling and denying plaintiff's motion to strike from the amended answer of the defendant Jette Dairy Company, Inc., paragraphs twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, and thirty-fifth of said amended answer.

10. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Rock Royal Co-operative, Inc., the second of two consecutive paragraphs each numbered fourteenth and paragraphs fifteenth, sixteenth, and seventeenth of said answer.

11. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Schuyler Junction New York Milk Shed Cooperative Association, Inc., the second of two consecutive paragraphs each numbered fourteenth and paragraphs fifteenth, sixteenth, and seventeenth of said answer.

12. The District Court erred in receiving, over plaintiff's objections to the relevancy thereof, which objections appear in the narrative statement of evidence herein, evidence in support of the allegations contained in the paragraphs of the several answers designated in paragraphs 9, 10, and 11 of this assignment of errors as to which plaintiff's motion to strike was directed.

10459 13. The District Court erred in holding that the defendants have any legal standing to attack the validity of Order No. 27 in this proceeding without having first exhausted their administrative remedy pursuant to Section 8c (15) of the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246), the said Act of May 12, 1933, as re-enacted and amended being hereinafter referred to as "the Act."

14. The District Court erred in holding that the provisions of Section 8c (5) (B) (ii) of the Act are violative of, and inconsistent with requirements of the fifth amendment of the Constitution of the United States.

15. The District Court erred in holding that the operation of Section 8c (5) (B) (ii) of the Act results in a taking of the property of the defendants without due process of law.

16. The District Court erred in holding that the provisions of 8c (5) (B) (ii) of the Act are not within the grant of power conferred upon Congress by Article I, Sec. 8, clause 3 of the Constitution of the United States.

17. The District Court erred in holding that the provisions of Section 8c (5) (F) of the Act are violative of, and inconsistent with the requirements of the fifth amendment to the Constitution of the United States.

18. The District Court erred in receiving, over plaintiff's objection to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence purporting to show that

Eisenberg Farms, Inc., and other handlers signed a marketing agreement under coercion, resulting from the diversion of milk from the plants of the said Eisenberg Farms, Inc., and other handlers.

19. The District Court erred in holding that the signing of marketing agreements by handlers was induced or brought about by coercion exercised on the handlers.

10460 20. The District Court erred in admitting, over the objection of the plaintiff as to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence as to the alleged misrepresentations as to the terms of Order No. 27 by the Dairymen's League Co-operative Association, Inc., and the Metropolitan Co-operative Milk Producers Bargaining Agency, Inc.

21. The District Court erred in holding that there was misrepresentation as to the terms of Order No. 27 by the Secretary of Agriculture, the Dairymen's League Co-operative Association, Inc., and the Metropolitan Co-operative Milk Producers Bargaining Agency, Inc.

22. The District Court erred in holding that the producer vote in favor of Order No. 27 was obtained or influenced by misrepresentation as to the terms of said Order.

23. The District Court erred in holding that such alleged misrepresentation as to the terms of Order No. 27 rendered said Order invalid.

24. The District Court erred in admitting, over plaintiff's objection as to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence that milk was sold outside the marketing area by some handlers whose plants were also approved for the marketing area, and evidence purporting to show that such sales result in discrimination against the defendants.

25. The District Court erred in holding that the failure to fix minimum prices to be paid to producers for fluid milk and cream sold outside of the marketing area discriminates in favor of handlers who sell milk outside the marketing area and against defendants.

26. The District Court erred in holding that the alleged existence of such alleged discrimination results in a taking of defendants' property without due process of law and renders the Act unconstitutional and the Order invalid.

27. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discrimination.

28. The District Court erred in holding that the failure of the Act and of Order No. 27 to require cooperatives to pay the uniform
10461 price to producers results in discrimination in favor of cooperatives and against defendants.

29. The District Court erred in holding that the alleged existence of such alleged discrimination results in a taking of the defendants' property without due process of law and renders the Act unconstitutional, and the Order invalid.

30. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discrimination.

31. The District Court erred in holding that the provision of Section 8c (5) (F) of the Act which permits cooperatives to blend the sales of milk in all markets results in discrimination in favor of such cooperatives and against defendants.

32. The District Court erred in holding that the alleged existence of such alleged discrimination results in a taking of the defendants' property without due process of law and renders the Act unconstitutional and the Order invalid.

33. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discriminations.

34. The District Court erred in holding that the cooperative payments provided for in Article VII, Section 5 of Order No. 27, are not authorized by the Act.

35. The District Court erred in holding that the defendants have any legal standing to raise the question of whether such provisions are authorized by the Act.

36. The District Court erred in holding that the question of whether such provisions are authorized by the Act is raised by the defendants' pleadings.

37. The District Court erred in holding that the market service payments provided for in Article VII, Section 6 of Order No. 27, are not authorized by the Act.

38. The District Court erred in holding that the defendants have any legal standing to raise the question of whether such provisions are authorized by the Act.

10462 39. The District Court erred in holding that the question of whether such provisions are authorized by the act is raised by the defendants' pleadings.

40. The District Court erred in holding that the effect of the operation of Order No. 27 will be to confiscate the property of the defendants.

Wherefore plaintiff prays that the said final decree heretofore entered by this court may be reversed and for such other and further relief as to the Court may seem just and proper.

Ralph L. Emmons,
RALPH L. EMMONS,
United States Attorney.
John S. L. Yost,
JOHN S. L. YOST,
Charles J. McCarthy,
CHARLES J. MCCARTHY,
Special Assistants to the Attorney General.
E. O. Mather,
E. O. MATHER,
Principal Attorney, Department of Agriculture.
Attorneys for Plaintiff.

10466 In United States District Court

[Title omitted.]

Petition for appeal

Filed March 21, 1939

The intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets, being aggrieved by the final order and decree entered on March 21, 1939, in the above-entitled cause, hereby appeals from said final order and decree to the Supreme Court of the United States, and prays that its appeal may be allowed; and that a transcript of the record, proceedings and papers upon which said final order and decree was based and made, may be sent to the Supreme Court of the United States.

Dated: March 21, 1939.

MILO R. KNIFFEN,
Counsel, Department of Agriculture and Markets of the State of New York, and Attorney for intervening plaintiff, Holton V. Noyes, As Commissioner of Agriculture and Markets of the State of New York.

LOUIS S. WALLACH,
Assistant Counsel.

10467 In United States District Court

[Title omitted.]

Order allowing appeal

Filed March 21, 1939

The intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, having prayed for the allowance of an appeal therein to the Supreme Court of the United States from the final order and decree made and entered in the above-entitled cause by this Court on March 21, 1939, and having presented and filed its petition for appeal, and its assignment of errors, and the plaintiff, United States of America having filed a statement as to jurisdiction on appeal, and it appearing from said petition and the record on the above-entitled cause that the intervening plaintiff, Holton V. Noyes, as Commissioner of Department of Agriculture and Markets of the State of New York, is a party thereto, and that the decision therein is against the constitutionality of an Act of Congress, and the defendants have consented to waive the filing of a bond for security for costs on this appeal; the petition of the intervening plaintiff, Holton V. Noyes, as Commissioner of Agri-

culture and Markets of the State of New York, is hereby granted and the appeal is allowed as prayed for, and the filing of a bond as security for costs is hereby dispensed with.

Dated at Albany, New York, this 21st day of March, 1939.

FRANK COOPER,
United States District Judge.

10468 In United States District Court

[Title omitted.]

Petition for Appeal

Filed March 21, 1939

The intervening plaintiff, Dairymen's League Cooperative Association, Inc., being aggrieved by the final order and decree entered on March 21, 1939, in the above-entitled cause, hereby appeals from said final order and decree to the Supreme Court of the United States, and prays that its appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said final order and decree was based and made, may be sent to the Supreme Court of the United States.

Dated March 21*th*, 1939.

DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC.,
By SEWARD A. MILLER.

10469 In United States District Court

[Title omitted.]

Petition for appeal

Filed March 21, 1939

The intervening plaintiff, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., being aggrieved by the final order and decree entered on March 21, 1939, in the above-entitled cause, hereby appeals from said final order and decree to the Supreme Court of the United States, and prays that its appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said final order and decree was based and made, may be sent to the Supreme Court of the United States.

Dated March 21*th*, 1939.

METROPOLITAN COOPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC.,
By EDMUND F. COOKE.

170 In United States District Court

[Title omitted.]

Order allowing appeal

Filed March 21, 1939

The intervening plaintiff, Dairymen's League Cooperative Asso-tion, Inc., having prayed for allowance of an appeal therein to e Supreme Court of the United States from the final order and cree made and entered in the above-entitled cause by this Court March 21, 1939, and having presented and filed its petition for peal, and its assignment of errors, and the plaintiff, United ates of America having filed a statement as to jurisdiction on peal, and it appearing from said petition and the record in the ove-entitled cause that the intervening plaintiff, Dairymen's League operative Association, Inc., is a party thereto, and that the deci-n therein is against the constitutionality of an Act of Congress, l the defendants having consented to waive the filing of a bond security for costs on this appeal; the petition of the intervening intiff Dairymen's League Cooperative Association, Inc., is hereby nted and the appeal is allowed as prayed for, and the filing of ond as security for costs is hereby dispensed with.

Dated at Albany, New York, this 21st day of March 1939.

FRANK COOPER,
United States District Judge.

171 In United States District Court

Title omitted.]

Order Allowing Appeal

Filed March 21, 1939

The intervening plaintiff, Metropolitan Cooperative Milk Pro-ers Bargaining Agency, Inc., having prayed for the allowance of appeal therein to the Supreme Court of the United States from final order and decree made and entered in the above-entitled se by this Court on March 21, 1939, and having presented and l its petition for appeal, and its assignment of errors, and the intiff, United States of America, having filed a statement as to isdiction on appeal, and it appearing from said petition and record on the above-entitled cause that the intervening plaintiff, tropolitan Cooperative Milk Producers Bargaining Agency, Inc., party thereto, and that the decision therein is against the con-utionality of an Act of Congress, and the defendants having sented to waive the filing of a bond for security for costs on this

appeal; the petition of the intervening plaintiff, Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., is hereby granted and the appeal is allowed as prayed for, and the filing of a bond as security for costs is hereby dispensed with.

Dated at Albany, New York, this 21st day of March 1939.

FRANK COOPER,
United States District Judge.

10473 In United States District Court

[Title omitted.]

Waiver of bond

Filed March 21, 1939

It is hereby consented by the attorneys for the defendants in the above-entitled cause, that the filing of bonds on appeals as security for costs by the intervening plaintiffs, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Dairymen's League Co-operative Association, Inc., and Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., in their appeals herein to the United States Supreme Court, are hereby waived.

Dated: March 21, 1939.

WILLARD R. PRATT,
CHARLES W. JENKINS,
By W. R. PRATT,
Attorneys for Defendants, Rock Royal Co-operative Association, Inc., Jetter Dairy Company, Inc., Schuyler Junction New York Milk Shed Co-operative Association, Inc.

HASKELL & FOLEY,
By W. R. PRATT,
Attorneys for Central New York Co-operative Association, Inc.

10474 In United States District Court

[Title omitted.]

Assignment of errors of intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York

Filed March 21, 1939

Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, intervening plaintiff-appellant in the above-styled cause, files the following assignment of errors upon which it

will rely in prosecution of its appeal from the final decree entered by the District Court in the above-styled cause on March 21, 1939:

1. The District Court erred in entering the final decree herein.

2. The District Court erred in failing and refusing to issue an injunction as prayed in the bills of complaint in the above-styled consolidated cause.

3. The District Court erred in failing to find the facts as requested in paragraphs numbered 8, 9, 15, 16, 23, 28, 29, 42 to 49, inclusive, 51, 52, and 56 of the proposed findings of fact submitted by plaintiff.

4. The District Court erred in failing and refusing to find without qualification, change or omission the facts as stated in paragraphs numbered 12, 13, 14, 17, 18, 27, 30, 31, and 53 of the proposed findings of fact submitted by plaintiff.

5. The District Court erred in finding the facts to be as set forth in paragraphs numbered 17, 20 to 26, inclusive, 36 to 59, 10475 inclusive, 70 to 77 inclusive, 79 to 97 inclusive, 97a, 100 and 101 of the findings of fact.

6. The District Court erred in making the conclusions of law stated in each and every paragraph of its conclusions of law with the exception of paragraph 30 thereof, as to which paragraph the intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, assigns as error only the failure to adopt, without qualification, paragraph numbered 1 of plaintiff's proposed conclusions of law.

7. The District Court erred in failing to adopt as its conclusions of law paragraphs numbered 1, 5, 7 to 10 inclusive, 14, and 15 of the proposed conclusions of law submitted by plaintiff.

8. The District Court erred in failing to adopt without qualification paragraph numbered 4 of the proposed conclusions of law submitted by the plaintiff.

9. The District Court erred in overruling and denying the motion of the intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, to strike from the amended answer of the defendant Jetter Dairy Company, Inc., paragraphs twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, and thirty-fifth of said amended answer.

10. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Rock Royal Co-operative, Inc., the second of two consecutive paragraphs each numbered fourteenth and paragraphs fifteenth, sixteenth, and seventeenth of said answer.

11. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Schuyler Junction New York Milk Shed Cooperative Association, Inc., the second of two consecutive paragraphs each numbered fourteenth and paragraphs fifteenth, sixteenth, and seventeenth of said answer.

10476 12. The District Court erred in receiving evidence, over objections to the relevancy thereof which objection appears in the narrative statement of the evidence herein, evidence in support of the allegations contained in the paragraphs of the several answers designated in paragraphs 9, 10, and 11 of this assignment of errors as to which plaintiff's motion to strike was directed.

13. The District Court erred in holding that the defendants have any legal standing to attack the validity of Order No. 27 in this proceeding without having first exhausted their administrative remedy pursuant to Section 8c (15) of the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246), the said Act of May 12, 1933, as reenacted and amended being hereinafter referred to as "the Act."

14. The District Court erred in holding that the provisions of section 8c (5) (B) (ii) of the Act are violative of, and inconsistent with requirements of, the fifth amendment of the Constitution of the United States.

15. The District Court erred in holding that the operation of Section 8c (5) (B) (ii) of the Act results in a taking of the property of the defendants without due process of law.

16. The District Court erred in holding that the provisions of 8c (5) (B) (ii) of the Act are not within the grant of power conferred upon Congress by Article I, Section B, Clause 3 of the Constitution of the United States.

17. The District Court erred in holding that the provisions of Section 8c (5) (F) of the Act are violative of, and inconsistent with the requirements of, the fifth amendment to the Constitution of the United States.

18. The District Court erred in receiving, over objections to the relevancy thereof which objections appear in the narrative statement of the evidence herein; evidence purporting to show that Eisenberg Farms, Inc., and other handlers signed a marketing agree-
10477 ment under coercion resulting from the diversion of milk from the plant of the said Eisenberg Farms, Inc., and other handlers.

19. The District Court erred in holding that the signing of marketing agreements by handlers was induced or brought about by coercion exercised on the handlers.

20. The District Court erred in admitting, over objections as to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence as to alleged misrepresentations as to the terms of Order No. 27 by the Dairymen's League Co-operative Association, Inc. and the Metropolitan Co-operative Milk Producers Bargaining Agency, Inc.

21. The District Court erred in holding that there was misrepresentation as to the terms of Order No. 27 by the Secretary of Agriculture, the Dairymen's League Co-operative Association, Inc., and

the Metropolitan Co-operative Milk Producers Bargaining Agency, Inc.

22. The District Court erred in holding that the producer vote in favor of Order No. 27 was obtained or influenced by misrepresentation as to the terms of said Order.

23. The District Court erred in holding that such alleged misrepresentation as to the terms of Order No. 27 rendered said Order invalid.

24. The District Court erred in admitting, over objections as to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence that milk was sold outside the marketing area by some handlers whose plants were also approved for the marketing area and evidence purporting to show that such sales result in discrimination against the defendants.

25. The District Court erred in holding that the failure to fix minimum prices to be paid to producers of fluid milk and cream sold outside of the marketing area discriminates in favor of handlers who sell milk outside the marketing area and against defendants.

26. The District Court erred in holding that such alleged
10478 discrimination results in a taking of defendants' property without due process of law and renders the Act unconstitu-
tional and the Order invalid.

27. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discrimination.

28. The District Court erred in holding that the failure of the Act and of Order No. 27 to require cooperatives to pay the uniform price to producers results in discrimination in favor of cooperatives and against defendants.

29. The District Court erred in holding that the alleged existence of such alleged discrimination results in a taking of the defendants' property without due process of law and renders Act unconstitutional and the Order invalid.

30. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discrimination.

31. The District Court erred in holding that the provision of Section 8c (5) (F) of the Act which permits cooperatives to blend the sales of milk in all markets results in discrimination in favor of such cooperatives and against defendants.

32. The District Court erred in holding that the alleged existence of such alleged discrimination results in a taking of the defendants' property without due process of law and renders the Act unconstitutional and the Order invalid.

33. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discriminations.

34. The District Court erred in holding that the cooperative payments provided for in Article VII, Section 5 of Order No. 27 are not authorized by the Act.

35. The District Court erred in holding that the defendants have any legal standing to raise the question of whether such provisions are authorized by the Act.

36. The District Court erred in holding that the question of
10479 whether such provisions are authorized by the Act is raised by the defendants' pleadings.

37. The District Court erred in holding that the market service payments provided for in Article VII, Section 6 of Order No. 27 are not authorized by the Act.

38. The District Court erred in holding that the defendants have any legal standing to raise the question of whether such provisions are authorized by the Act.

39. The District Court erred in holding that the question of whether such provisions are authorized by the Act is raised by the defendants' pleadings.

40. The District Court erred in holding that the effect of the operation of Order No. 27 will be to confiscate the property of the defendants.

Wherefore plaintiff prays that the said Final decree heretofore entered by this Court may be reversed and for such other and further relief as to the Court may seem just and proper.

MILO R. KNIFFEN,
Counsel, Department of Agriculture and Markets of the State of New York and attorney for intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York.

LOUIS S. WALLACH,
Assistant Counsel.

10480 In United States District Court

[Title omitted.]

Assignment of errors of intervening plaintiff, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.

Filed March 21, 1939

Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., intervening plaintiff-appellant in the above-styled cause, files the following assignment of errors upon which it will rely in prosecution of its appeal from the final decree entered by the District Court in the above-styled cause on March 21, 1939:

1. The District Court erred in entering the final decree herein.

2. The District Court erred in failing and refusing to issue an injunction as prayed in the bills of complaint in the above-styled consolidated cause.

8. The District Court erred in failing to find the facts as requested in paragraphs numbered 8, 9, 15, 16, 23, 28, 29, 42 to 49 inclusive, 51, 52, and 56 of the proposed findings of fact submitted by plaintiff.

4. The District Court erred in failing and refusing to find without qualification, change, or omission the facts as stated in paragraphs numbered 12, 13, 14, 17, 18, 27, 30, 31, and 53 of the proposed findings of fact submitted by plaintiff.

5. The District Court erred in finding the facts to be as set forth in paragraphs numbered 17, 20 to 26 inclusive, 36 to 59 inclusive, 70 to 77 inclusive, 79 to 97 inclusive, 97a, 100, and 101 of the finding of fact.

6. The District Court erred in making the conclusion of law stated in each and every paragraph of its conclusions of law with the exception of paragraph 30 thereof, as to which paragraph the intervening plaintiff, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., assigns as error only the failure to adopt without qualification paragraph numbered 4 of plaintiff's proposed conclusions of law.

7. The District Court erred in failing to adopt as its conclusions of law paragraphs numbered 1, 5, 7 to 10 inclusive, 14, and 15 of the proposed conclusions of law submitted by plaintiff.

8. The District Court erred in failing to adopt without qualification paragraph numbered 4 of the proposed conclusions of law submitted by the plaintiff.

9. The District Court erred in overruling and denying the motion of the plaintiff, to strike from the amended answer of the defendant Getter Dairy Company, Inc., paragraphs 25, 26, 27, 28, 30, 31, 32, 33, 34, and 35 of said amended answer.

10. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Rock Royal Co-Operative, Inc., the second of two consecutive paragraphs each numbered 14 and paragraphs 15, 16, and 17 of said answer.

0482 11. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Schuyler Junction New York Milk Shed Cooperative Association, Inc., the second of two consecutive paragraphs each numbered 14 and paragraphs 15, 16, and 17 of said answer.

12. The District Court erred in receiving evidence, over objections to the relevancy thereof which objection appears in the narrative statement of the evidence herein, evidence in support of the allegations contained in the paragraphs of the several answers designated in paragraphs 9, 10, and 11 of this assignment of errors as to which plaintiff's motion to strike was directed.

13. The District Court erred in holding that the defendants have any legal standing to attack the validity of Order No. 27 in this proceeding without having first exhausted their administrative remedy pursuant to Section 80 (15) of the Act of May 12, 1933 (48

Stat. 31) as amended August 24, 1935 (49 Stat. 730) and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246), the said Act of May 12, 1933, as re-enacted and amended being hereinafter referred to as "the Act."

14. The District Court erred in holding that the provisions of Section 8c (5) (B) (ii) of the Act are violative of, and inconsistent with requirements of, the fifth amendment of the Constitution of the United States.

15. The District Court erred in holding that the operation of Section 8c (5) (B) (ii) of the Act results in a taking of the property of the defendants without due process of law.

16. The District Court erred in holding that the provisions of 8c (5) (B) (ii) of the Act are not within the grant of power conferred upon Congress by Article I, Section 8, Clause 3 of the Constitution of the United States.

10483 17. The District Court erred in holding that the provisions of Section 8c (5) (F) of the Act are violative of, and inconsistent with the requirements of, the fifth amendment to the Constitution of the United States.

18. The District Court erred in receiving, over objections to the relevancy thereof which objections appear in the narrative statement of the evidence herein, evidence purporting to show that Eisenberg Farms, Inc., and other handlers signed a marketing agreement under coercion resulting from the diversion of milk from the plant of the said Eisenberg Farms, Inc., and other handlers.

19. The District Court erred in holding that the signing of marketing agreements by handlers was induced or brought about by coercion exercised on the handlers.

20. The District Court erred in admitting, over objections as to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence as to alleged misrepresentations as to the terms of Order No. 27 by the Dairymen's League Cooperative Association, Inc., and the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc.

21. The District Court erred in holding that there was misrepresentation as to the terms of Order No. 27 by the Secretary of Agriture, the Dairymen's League Cooperative Association, Inc., and the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc.

22. The District Court erred in holding that the producer vote in favor of Order No. 27 was obtained or influenced by misrepresentation as to the terms of said Order.

23. The District Court erred in holding that such alleged misrepresentation as to the terms of Order No. 27 rendered said Order invalid.

10484 24. The District Court erred in admitting, over objections as to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence that milk was sold outside the marketing area by some handlers whose plants were also

pproved for the marketing area and evidence purporting to show at such sales result in discrimination against the defendants.

25. The District Court erred in holding that the failure to fix inimum prices to be paid to producers of fluid milk and cream old outside of the marketing area discriminates in favor of handlers ho sell milk outside the marketing area and against defendants.

26. The District Court erred in holding that such alleged discrimi-ation results in a taking of defendants' property without due process f law and renders the Act unconstitutional and the Order invalid.

27. The District Court erred in holding that the defendants have ny legal standing to complain of such alleged discrimination.

28. The District Court erred in holding that the failure of the ct and of Order No. 27 to require cooperatives to pay the uniform rice to producers results in discrimination in favor of cooperatives nd against defendants.

29. The District Court erred in holding that the alleged existence f such alleged discrimination results in a taking of the defendants' roperty without due process of law and renders Act unconstitu-onal and the Order invalid.

30. The District Court erred in holding that the defendants have ny legal standing to complain of such alleged discrimination.

31. The District Court erred in holding that the provision of Section 8c (3) (f) of the Act which permits cooperatives to 485 blend the sales of milk in all markets results in discrimination in favor of such cooperatives and against defendants.

32. The District Court erred in holding that the alleged existence f such alleged discrimination results in a taking of the defendants' roperty without due process of law and renders the Act unconsti-tional and the Order invalid.

33. The District Court erred in holding that the defendants have y legal standing to complain of such alleged discriminations.

34. The District Court erred in holding that the cooperative pay-ents provided for in Article VII, Section 5 of Order No. 27 are t authorized by the Act.

35. The District Court erred in holding that the defendants have y legal standing to raise the question of whether such provisions e authorized by the act.

36. The District Court erred in holding that the question of whether ch provisions are authorized by the Act is raised by the defendants' eadings.

37. The District Court erred in holding that the market service yments provided for in Article VII, Section 6, of Order No. 27 e not authorized by the Act.

38. The District Court erred in holding that the defendants have y legal standing to raise the question of whether such provisions e authorized by the Act.

39. The District Court erred in holding that the question of whether such provisions are authorized by the Act is raised by the defendants' pleadings.

40. The District Court erred in holding that the effect of the operation of Order No. 27 will be to confiscate the property of the defendants.

10486 Wherefore plaintiff prays that the said Final Decree heretofore entered by this Court may be reversed and for such other and further relief as to the Court may seem just and proper.

EDMUND F. COOKE,
Attorney for Intervening Plaintiff,
Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.

10487 In United States District Court

[Title omitted.]

Assignment of errors of intervening plaintiff, Dairymen's League Co-operative Association, Inc.

Filed March 21, 1939

Dairymen's League Co-operative Association, Inc., intervening plaintiff-appellant in the above-styled cause, files the following assignment of errors upon which it will rely in prosecution of its appeal from the final decree entered by the District Court in the above-styled cause on March 21, 1939:

1. The District Court erred in entering the final decree herein.

2. The District Court erred in failing and refusing to issue an injunction as prayed in the bills of complaint in the above-styled consolidated cause.

3. The District Court erred in failing to find the facts as requested in paragraphs numbered 8, 9, 15, 16, 23, 28, 29, 42 to 49, inclusive, 51, 52, and 56 of the proposed findings of fact submitted by plaintiff.

4. The District Court erred in failing and refusing to find without qualification, change or omission the facts as stated in para-
10488 graphs numbered 12, 13, 14, 17, 18, 27, 30, 31, and 53 of the proposed findings of fact submitted by plaintiff.

5. The District Court erred in finding the facts to be as set forth in paragraphs numbered 17, 20 to 26, inclusive, 36 to 59, inclusive, 70 to 77, inclusive, 79 to 97, inclusive, 97a, 100, and 101 of the finding of fact.

6. The District Court erred in making the conclusion of law stated in each and every paragraph of its conclusions of law, with the exception of paragraph 30 thereof, as to which paragraph the intervening plaintiff, Dairymen's League Cooperative Association, Inc., assigns as error only the failure to adopt without qualification paragraph numbered 4 of plaintiff's proposed conclusions of law.

7. The District Court erred in failing to adopt as its conclusions of law paragraphs numbered 1, 5, 7 to 10, inclusive, 14, and 15 of the proposed conclusions of law submitted by plaintiff.

8. The District Court erred in failing to adopt without qualification paragraph numbered 4 of the proposed conclusions of law submitted by the plaintiff.

9. The District Court erred in overruling and denying the motion of the plaintiff to strike from the amended answer of the defendant Better Dairy Company, Inc., paragraphs twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, and thirty-fifth of said amended answer.

10. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Rock Royal Co-Operative, Inc., the second of two consecutive paragraphs, each numbered fourteenth, and paragraphs fifteenth, sixteenth, and seventeenth of said answer.

10489 11. The District Court erred in overruling and denying plaintiff's motion to strike from the answer of the defendant Schuyler Junction New York Milk Shed Cooperative Association, Inc., the second of two consecutive paragraphs, each numbered fourteenth, and paragraphs fifteenth, sixteenth, and seventeenth of said answer.

12. The District Court erred in receiving evidence, over objections to the relevancy thereof, which objection appears in the narrative statement of the evidence herein, evidence in support of the allegations contained in the paragraphs of the several answers designated in paragraphs 9, 10, and 11 of this assignment of errors as to which plaintiff's motion to strike was directed.

13. The District Court erred in holding that the defendants have any legal standing to attack the validity of Order No. 27 in this proceeding without having first exhausted their administrative remedy pursuant to Section 8c (13) of the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as re-enacted and amended b the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246), the said Act of May 12, 1933, as re-enacted and amended, being hereinafter referred to as "the Act."

14. The District Court erred in holding that the provisions of Section 8c (5) (B) (ii) of the Act are violative of, and inconsistent with requirements of, the fifth amendment of the Constitution of the United States.

15. The District Court erred in holding that the operation of Section 8c (5) (B) (ii) of the Act results in a taking of the property of the defendants without due process of law.

16. The District Court erred in holding that the provisions of 8c (5) (B) (ii) of the Act are not within the grant of power conferred upon Congress by Article I, Section 8, Clause 3 of the Constitution of the United States.

10490 17. The District Court erred in holding that the provisions of Section 8c (5) (F) of the Act are violative of, and inconsistent with the requirements of, the fifth amendment to the Constitution of the United States.

18. The District Court erred in receiving, over objections to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence purporting to show that Eisenberg Farms, Inc. and other handlers signed a marketing agreement under coercion, resulting from the diversion of milk from the plant of the said Eisenberg Farms, Inc., and other handlers.

19. The District Court erred in holding that the signing of marketing agreements by handlers was induced or brought about by coercion exercised on the handlers.

20. The District Court erred in admitting, over objections as to the relevancy thereof, which objections appear in the narrative statements of the evidence herein, evidence as to alleged misrepresentations as to the terms of Order No. 27 by the Dairymen's League Co-operative Association, Inc., and the Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc.

21. The District Court erred in holding that there was misrepresentation as to the terms of Order No. 27 by the Secretary of Agriculture, the Dairymen's League Co-Operative Association, Inc., and the Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc.

22. The District Court erred in holding that the producer vote in favor of Order No. 27 was obtained or influenced by misrepresentation as to the terms of said Order.

23. The District Court erred in holding that such alleged misrepresentation as to the terms of Order No. 27 rendered said Order invalid.

10491 24. The District Court erred in admitting, over objections as to the relevancy thereof, which objections appear in the narrative statement of the evidence herein, evidence that milk was sold outside the marketing area by some handlers whose plants were also approved for the marketing area and evidence purporting to show that such sales result in discrimination against the defendants.

25. The District Court erred in holding that the failure to fix minimum prices to be paid to producers of fluid milk and cream sold outside of the marketing area discriminates in favor of handlers who sell milk outside the marketing area and against defendants.

26. The District Court erred in holding that such alleged discrimination results in a taking of defendants' property without due process of law and renders the Act unconstitutional and the Order invalid.

27. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discrimination.

28. The District Court erred in holding that the failure of the Act and of Order No. 27 to require cooperatives to pay the uniform

price to producers results in discrimination in favor of cooperatives and against defendants.

29. The District Court erred in holding that the alleged existence of such alleged discrimination results in a taking of the defendants' property without due process of law and renders Act unconstitutional and the Order invalid.

30. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discrimination.

31. The District Court erred in holding that the provision of Section 8c (5) (f) of the Act which permits cooperatives to blend
10492 the sales of milk in all markets results in discrimination in favor of such cooperatives and against defendants.

32. The District Court erred in holding that the alleged existence of such alleged discrimination results in a taking of the defendants' property without due process of law and renders the Act unconstitutional and the Order invalid.

33. The District Court erred in holding that the defendants have any legal standing to complain of such alleged discriminations.

34. The District Court erred in holding that the cooperative payments provided for in Article VII, Section 5 of Order No. 27 are not authorized by the Act.

35. The District Court erred in holding that the defendants have any legal standing to raise the question of whether such provisions are authorized by the Act.

36. The District Court erred in holding that the question of whether such provisions are authorized by the Act is raised by the defendants' pleadings.

37. The District Court erred in holding that the market service payments provided for in Article VII, Section 6 of Order No. 27 are not authorized by the Act.

38. The District Court erred in holding that the defendants have any legal standing to raise the question of whether such provisions are authorized by the Act.

39. The District Court erred in holding that the question of whether such provisions are authorized by the Act is raised by the defendants' pleadings.

40. The District Court erred in holding that the effect of the operation of Order No. 27 will be to confiscate the property of the defendants.

10493 Wherefore plaintiff prays that the said Fnal Decree heretofore entered by this Court may be reversed and for such other and further relief as to the Court may seem just and proper.

SEWARD A. MILLER,
Attorney for Intervening Plaintiff,
Dairymen's League Cooperative Association, Inc.

10496 In United States District Court

[Title omitted.]

Stipulation as to original exhibits

Filed March 21, 1939

It is hereby stipulated and agreed by and between counsel for the parties to the above-entitled cause, for the purpose of settling the record of the appeal therein to the Supreme Court of the United States that the exhibits listed in the attached schedule of exhibits, which were introduced at the trial before the District Court shall be transmitted in original form by the Clerk of this Court to the Clerk of the Supreme Court and shall there be retained as a part of the record in this cause and may be referred to by the Supreme Court and by counsel for appellants and appellees in their briefs and upon oral argument of this cause in the Supreme Court.

It is further stipulated and agreed that the original transcript of the oral testimony introduced at the trial of this cause, consisting of pages 1 to 2,732 inclusive, shall be transmitted in original form by the Clerk of this Court to the Clerk of Supreme Court, and shall there be retained as a part of the record in this cause and may be referred to by the Supreme Court and by counsel for appellants and appellees in their briefs and upon oral argument of this cause in the Supreme Court. A Condensed narrative statement of the oral testimony shall be included in the record on appeal and printed as a part thereof.

10497 United States of America, by Charles J. McCarthy, Special Assistant to the Attorney General; Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, by Milo R. Kniffen; Dairymen's League Co-operative Association, Inc., by Seward A. Miller, by L. W. Hornbeck; Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., by Edmund F. Cooke, by L. H. Hornbeck; Rock Royal Cooperative Association, Inc., Jetter Dairy Company, Inc., Schuyler Junction New York Milk Shed Cooperative Association, Inc., by Willard R. Pratt, Charles W. Jenkins, by W. R. Pratt; Central New York Cooperative Association, Inc., by Haskell & Foley, Leonard Acke, of Counsel.

Order

It is ordered that the foregoing stipulation be and the same is hereby approved, and that in preparing his certificate and transmitting the transcript of record to the Supreme Court of the United States, the Clerk is directed to proceed in accordance therewith.

Done at Albany, New York, this 21st day of March 1939.

FRANK COOPER,
District Judge.

10498 SCHEDULE OF EXHIBITS TO BE SENT UP IN ORIGINAL FORM PURSUANT TO STIPULATION DATED MARCH 21, 1939

Exhibit 1 to stipulation consisting of Federal Register dated August 9, 1938.

Exhibit 3 to stipulation consisting of transcript of testimony and exhibits constituting evidence before the Secretary of Agriculture in the promulgation of Order No. 27 bound in seven volumes.

Exhibit 7 to stipulation consisting of pamphlet schedule of polling places for producer referendum on Order No. 27—issued by the U. S. Department of Agriculture.

Exhibit 11 to stipulation consisting of Federal Register of August 27, 1938.

Exhibit 18 to stipulation consisting of a list entitled "Plants and Creameries of the New York Milk Shed and approved by the Department of Health of the City of New York as of August 1938."

Exhibit 18–A to stipulation consisting of a list entitled "Plants and Creameries of the New York Milk Shed and approved by Department of Health of the City of New York as of May 31, 1938."

Exhibit 19 to stipulation consisting of a list entitled "Milk and Cream Supplies approved for Newark dated April 1, 1938."

Exhibit 20 to stipulation consisting of a list of Milk Plants holding permits of Department of Health of the State of New Jersey, dated July 30, 1938.

Exhibition 23–J to stipulation consisting of text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, April 18, 1938.

Exhibit 23–K to stipulation consisting of text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, April 11, 1938.

Exhibit 23–L to stipulation consisting of text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, April 4, 1938.

Exhibit 23–M to stipulation consisting of text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 28, 1938.

Exhibit 23–N to stipulation consisting of text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 21, 1938.

Exhibit 21–O to stipulation consisting of text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 14, 1938.

Exhibit 21–P to stipulation consisting of text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 7, 1938.

Exhibit 27 to stipulation consisting of copies of The Dairy Farmer dated July 25, 1938, and Dairy Farmers' Union Special Bulletin dated August 15, 1938.

Exhibit 29 to stipulation consisting of copy of report to Market Administrator of Jetter Dairy Co., for month of September.

Exhibit 30 to stipulation consisting of copy of report to Market Administrator of Jetter Dairy Co., for month of October.

10499 Exhibit 31 to stipulation consisting of copy of report to Market Administrator of Jetter Dairy Co., for month of November.

Exhibit 32 to stipulation consisting of report to Market Administrator of Rock Royal Cooperative, Inc., for month of September.

Exhibit 33 to stipulation consisting of report to Market Administrator of Rock Royal Cooperative, Inc., for month of October.

Exhibit 34 to stipulation consisting of report to Market Administrator of Rock Royal Cooperative, Inc., for month of November.

Exhibit 35 to stipulation consisting of report to Market Administrator of Schuyler Junction New York Milk Shed Cooperative Association, Inc., for month of September.

Exhibit 36 to stipulation consisting of report to Market Administrator of Schuyler Junction New York Milk Shed Cooperative Association, Inc., for month of October.

Exhibit 37 to stipulation consisting of report to Market Administrator of Schuyler Junction New York Milk Shed Cooperative Association, Inc., for month of November.

Exhibit 38 to stipulation consisting of report to Market Administrator of Central New York Cooperative Association, Inc., for month of September.

Exhibit 39 to stipulation consisting of report to Market Administrator of Central New York Cooperative Association, Inc., for month of October.

Exhibit 40 to stipulation consisting of report to Market Administrator of Central New York Cooperative Association, Inc., for month of October.

Exhibit 42 to stipulation consisting of agreement between Hegton Milk Corporation of Brooklyn as landlord and Central New York Cooperative Association, Inc., of Cortland, N. Y., as tenants.

Defendants Exhibit 4 consisting of a Photostat of a certificate of Incorporation of Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc.

Defendants Exhibit 9 consisting of a Pamphlet "The Federal-State Program for the New York Milk Market"—issued October 1938.

Defendants Exhibit 10 consisting of a Photostat of check of Jetter Dairy Company to Market Administrator dated October 18, 1938.

Defendants Exhibit 14–A consisting of a carbon copy of letter dated November 19, 1938, from Walter T. Kohn to Willard R. Pratt.

Defendants Exhibit 14–B consisting of a letter dated December 2, 1938, from W. R. Pratt to Walter T. Kohn.

Defendants Exhibit 14–C consisting of a carbon copy of letter dated December 3, 1938, to Willard R. Pratt from Secretary to Walter T. Kohn.

Defendants Exhibit 14–D consisting of a carbon copy of letter dated December 5, 1938, to Willard R. Pratt from Walter T. Kohn.

Defendants Exhibit 19 consisting of a photostat of summary Report to Market Administrator for month of September of Dellwood Dairy Co., Inc.

Defendants Exhibit 19–A consisting of photostats of schedules of receipts and utilization of milk at Kyserike, N. Y., plant for the month of September 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc.

Defendants Exhibit 19–B consisting of Photostats of schedules of receipts and utilization of milk at Fort Edward plant for the month of September 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc.

Defendants Exhibit 20 consisting of a photostat of summary Report to Market administrator for month of October of Dellwood Dairy Co., Inc.

10500 Defendants Exhibit 20–A consisting of photostats of schedules of receipts and utilization of milk at Kyserike, N. Y. plant for the month of October 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc.

Defendants Exhibit 20–B consisting of photostats of schedules of receipts and utilization of milk at Fort Edward plant for the month of October 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc.

Defendants Exhibit 21 consisting of a photostat of summary Report to Market Administrator for month of November of Dellwood Dairy Co., Inc.

Defendants Exhibit 21–A consisting of photostats of schedules of receipts and utilization of milk at Kyserike, N. Y. plant for the month of November 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc.

Defendants Exhibit 21–B consisting of photostats of schedules of receipts and utilization of milk at Fort Edward, N. Y. plant for the month of November 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc.

Defendants Exhibit 23 consisting of a photostat of summary report to the market Administrator for month of October of Slate Hill Milk and Cream Co.

Defendants Exhibit 23–A consisting of photostats of schedules of receipts and utilization of milk at Slate Hill plant for the month of October, 1938, submitted to the Market Administrator by Slate Hill Milk and Cream Co.

Defendants Exhibit 24 consisting of photostat of summary report to the Market Administrator for month of November of Slate Hill Milk and Cream Co.

Defendants Exhibit 24–A consisting of photostats of schedules of receipts and utilization of milk at Slate Hill for the month of

November 1938, submitted to the Market Administrator by Sla Hill Milk and Cream Co.

Defendants Exhibit 25 consisting of a photostat of summary repo to Market Administrator for month of September of Middleto Milk and Cream Co.

Defendants Exhibit 25–A consisting of photostats of schedules receipts and utilization of milk at Slate Hill plant for the month September 1938, submitted to the Market Administrator by Middl town Milk and Cream Co.

Defendants Exhibit 26 consisting of a photostat of summary repo to Market Administrators for month of October of the Middleto Milk and Cream Co.

Defendants Exhibit 26–A consisting of photostats of schedules receipts and utilization of milk at Slate Hill plant for the month October 1938, submitted to the Market Administrator by Middl town Milk and Cream Co.

Defendants Exhibit 27 consisting of a photostat of summary re port to Market Administrator for month of November of Middl town Milk and Cream Co.

Defendants Exhibit 28 consisting of a photostat of Market Servi claims made to Market Administrator by Dellwood Dairy Co., Inc for month of October.

Defendants Exhibit 29 consisting of photostat of Market Servi claim to Market Administrator made by Middletown Milk and Crea Co., Inc., for month of September 1938.

Defendants Exhibit 30 consisting of photostat of Market Servi claim to Market Administrator made by Middletown Milk and Crea Co., Inc., for month of October 1938.

Defendants Exhibit 55 consisting of a "List of Country Mil Plants in the Region of the New York Milk Shed" issued by Corne University, January 1938.

Defendants Exhibit 56 consisting of a report of Commissioner o Agriculture and Markets regarding Audit of Milk Dealers and Co operative Associations-Legislative Document (1938 No. 100)

10501 Defendants Exhibit 62 consisting of pamphlets containing State Milk Control Law Appendix A, Chapter 8, revise statutes of New Jersey (1937).

Defendants Exhibit 63 consisting of official order, mimeographe copy, No. B–6, issued July 2, 1934, by the New Jersey Milk Contro Board.

Defendants Exhibit 63–A consisting of official order, mimeographe copy, No. C–4, issued November 21, 1935, by the New Jersey Mil Control Board.

Defendants Exhibit 63–B consisting of official order, mimeo graphed copy, No. E–1, issued July 22, 1937, by the New Jersey Mil Control Board.

Defendants Exhibit 63–C consisting of official order, mimeo graphed copy, No. E–2, issued July 22, 1937, by the New Jersey Mil Control Board.

Defendants Exhibit 63–D consisting of official order, mimeographed copy, No. E–3, issued July 23, 1937, by the New Jersey Milk Control Board.

Defendants Exhibit 63–E consisting of official order, mimeographed copy, No. E–4, issued September 25, 1937, by the New Jersey Milk Control Board.

Defendants Exhibit 63–F consisting of official order, mimeographed copy, No. E–8, issued December 7, 1937, by the New Jersey Milk Control Board.

Defendants Exhibit 63–G consisting of official order, mimeographed copy, No. E–9, issued December 12, 1937, by the New Jersey Milk Control Board.

Defendants Exhibit 63–H consisting of official order, mimeographed copy, No. E–13, issued March 21, 1938, by the New Jersey Milk Control Board.

Defendants Exhibit 63–I consisting of official order, mimeographed copy, No. E–14, issued April 28, 1938, by the New Jersey Milk Control Board.

Defendants Exhibit 63–J consisting of official order, mimeographed copy, No. E–15, issued April 28, 1938, by the New Jersey Milk Control Board.

Defendants Exhibit 63–K consisting of official order, mimeographed copy, No. 38–1, issued August 8, 1938, by the New Jersey Milk Control Board.

Defendants Exhibit 63–L consisting of official order, mimeographed copy, No. 38–2, issued August 8, 1938, by the New Jersey Milk Control Board.

Defendants Exhibit 63–M consisting of official order, mimeographed copy, No. 38–3, issued August 8, 1938, by the New Jersey Milk Control Board.

Defendants Exhibit 70 consisting of copy of Market Service Claim to the Market Administrator of Queensboro Farm Products, Inc.

Defendants Exhibit 71 consisting of copy of schedule of daily receipts at Canastota from other Queensboro Plant for September 1938.

Defendants Exhibit 71–A consisting of schedule of daily milk receipts at Canastota from outside sources for September 1938.

Defendants Exhibit 71–B consisting of schedule of milk receipts at Canastota from other Queensboro Plant for October 1938.

Defendants Exhibit 71–C consisting of schedule of daily milk receipts at Canastota from outside sources for October 1938.

Defendants Exhibit 71–D consisting of schedule of milk receipts at Canastota from outside sources for November 1938.

Defendants Exhibit 71–E consisting of schedule of daily milk receipts at Canastota from other Queensboro Plant for November 1938.

Defendants Exhibit 80 consisting of copies of announcements of the Market Administrator with respect to assignment of plants or handlers to freight differential zones.

10502 Defendants Exhibit 81 consisting of photostats of the application for license to the Commissioner of Agriculture and Markets of the State of New York by the Jetter Dairy Co., Inc.

Defendants Exhibit 84 consisting of photostats for application for license to the Commissioner of Agriculture and Markets of the State of New York by Triboro Milk and Cream Co., Inc.

10503 In United States District Court

[Title omitted.]

Stipulation as to contents of transcript of record on appeal

Filed March 21, 1939

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following and no other papers and exhibits, to wit:

1. Complaint in the action entitled United States of America, Plaintiff, v. Rock Royal Co-operative, Inc., et al., Defendants.

2. Complaint in the action entitled United States of America, Plaintiff, v. Jetter Dairy Company, Inc., Defendant.

3. Motion of Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, to intervene in the case of United States of America, Plaintiff, v. Rock Royal Co-operative, Inc., et al., Defendants.

4. Complaint of the intervening plaintiff, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, in the case of United States of America, Plaintiff, v. Rock Royal Co-operative, Inc., et al., Defendants.

10504 5. Complaint of Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, v. Jetter Dairy Company, Inc.

6. Order consolidating the cases of United States of America v. Rock Royal Co-operative, Inc., et al. and United States of America v. Jetter Dairy Company, Inc.

7. Order permitting Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, to intervene.

8. Answer of the defendant Rock Royal Co-operative, Inc.

9. Answer of the defendant Schuyler Junction New York Milk Shed Cooperative Association, Inc.

10. Answer of the defendant Central New York Cooperative Association, Inc.

11. Motion to strike portions of the answers of the defendants Jetter Dairy Company, Inc., Rock Royal Co-operative, Inc., and

Schuyler Junction New York Milk Shed Co-operative Association, Inc.

12. Amended answer of defendant Jetter Dairy Company, Inc.
13. Plaintiff's motion to strike portions of the amended answer of the defendant Jetter Dairy Company, Inc.
14. Order of the court denying plaintiff's motion to strike.
15. Opinion of the Court denying plaintiff's motions to strike.
16. Amendments to the amended answer of the defendant Jetter Dairy Company, Inc.
17. Amended complaint of the Dairymen's League Co-operative Association, Inc.
18. Complaint of Metropolitan Co-operative Milk Producers Bargaining Agency, Inc.
19. Findings of fact and conclusions of law, and order directing judgment.
20. Plaintiff's proposed findings of fact.
21. Record references to plaintiff's proposed findings of fact.
22. Plaintiff's proposed conclusions of law.
23. Proposed findings of fact and conclusions of law submitted by the defendants Jetter Dairy Company, Inc., Rock Royal Cooperative, Inc., and Schuyler Junction New York Milk Shed Cooperative, Inc.
24. Plaintiff's objections to the proposed findings of fact and conclusions of law submitted by the defendants Jetter Dairy Company, Inc., Rock Royal Cooperative, Inc., and Schuyler Junction New York Milk Shed Cooperative Association, Inc.
25. Record references to proposed findings of fact and conclusions of law submitted by the defendants Jetter Dairy Company, Inc., Rock Royal Cooperative, Inc., and Schuyler Junction New York Milk Shed Cooperative Association, Inc.
26. Transcript of the oral testimony introduced at the trial, together with the condensed statement in narrative form of all the testimony introduced at the trial, which is filed herewith.
27. All of the exhibits introduced at the trial, including all exhibits to the "Stipulation of Facts and Evidence."
28. The final decree herein, filed March 21, 1939.
29. Opinion of the Court.
30. The petition for appeal.
31. The order allowing the appeal.
32. The jurisdictional statement required by Rule 12 of the Revised Rules of the United States Supreme Court.
33. Plaintiff's assignment of errors.
34. The statement required by paragraph 2 of Rule 12 of the Revised Rules of the United States Supreme Court, together with acceptance of service thereof and waiver of right to file opposing jurisdictional statement and waiver of issuance and service of citation.

35. Petition for appeal of the intervening plaintiff, Holton V. Noyes.

36. Orders permitting appeal of the intervening plaintiff, Holton V. Noyes.

37. Petition for appeal of the intervening plaintiffs, Dairymen's League and Bargaining Agency.

38. Orders allowing appeal of the intervening plaintiffs, Dairymen's League and Bargaining Agency.

39. Waiver of issuance and service of citation on appeals of intervening plaintiffs.

40. Waiver of bond on appeals of intervening plaintiffs.

41. Assignments of error of intervening plaintiff, Holton V. Noyes.

42. Assignments of error of intervening plaintiffs Dairymen's League and Bargaining Agency.

43. Jurisdictional statement filed by intervening plaintiffs.

44. Stipulation and order authorizing the transmitting of certain exhibits to the Clerk of the Supreme Court in original form.

45. This stipulation as to the contents of the transcript of record.

46. The certificate of the Clerk of this court to the transcript.

It is further stipulated and agreed that the plaintiffs, Dairymen's League Cooperative Association, Inc., and Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., submitted proposed Findings of Fact and Conclusions of Law identical with those submitted by plaintiff, and that the Court refused to pass upon such proposed Findings of Fact and Conclusions of Law on the ground that it had already passed upon the same in passing upon those submitted by plaintiff.

10507 It is further stipulated and agreed that the foregoing transcript of record contains all the pleadings, exhibits, and other papers listed in this stipulation and that all of the copies of pleadings, exhibits, and other papers contained in the aforesaid transcript are true, correct and complete copies of the same and the foregoing transcript may be certified without further comparison by the Clerk of this Court as the record on appeal in this cause.

United States of America, by Charles J. McCarthy, Special Assistant to Attorney General; Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, by Milo R. Kniffen, Attorney; Dairymen's League Cooperative Association, Inc., by Seward A. Miller, by L. W. Hornbeck; Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., By Edward F. Cooke, by L. W. Hornbeck; Rock Royal Cooperative Association, Inc., Jetter Dairy Company, Inc., Schuyler Junction New York Milk Shed Cooperative Association, Inc., by Willard R. Pratt, Attorney and Counsel; Central New York Cooperative Association, Inc., By Haskell & Foley, Leonard Acker, of Counsel.

10508 In the District Court of the United States

[Clerk's certificate to foregoing transcript omitted in printing.]

10509 In Supreme Court of the United States

Case No. 771

Statement of points to be relied on and designation of the parts of the record to be printed

Filed March 27, 1939

Comes now the appellant in the above-styled cause and adopts its assignment of errors as its statement of points to be relied on, and states that the entire record in this cause, as filed in this Court, is necessary for the consideration of the foregoing points, and that the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court, excepting those parts specified in the attached "Stipulation re printing record," filed herewith.

ROBERT H. JACKSON,
Solicitor General of the United States.

10510 In Supreme Court of the United States

Stipulation re printing record

It is hereby stipulated by and between the parties hereto through their respective attorneys, as follows:

I

The original transcript of the oral testimony introduced at the trial, contained in volumes 2, 3, and 4 of the Transcript of Record (R. 593–3325, inclusive), and the exhibits listed in the attached schedule of exhibits, which exhibits are contained in volumes 6 to 14 of the Transcript of Record (R. 3972–10332, inclusive), all of which were transmitted by the Clerk of the court below to the Clerk of this Court, pursuant to stipulations of the parties and order of the District Court, entered March 21, 1939 (R. 10496), shall not be printed by the Clerk of this Court, but shall be retained as a part of the Record in this cause and may be referred to by the Court and by counsel for the parties in their briefs and arguments in this cause.

II

Only the portions marked in red of the following exhibits shall be printed:

Exhibits Nos. 23 to 23–H to the stipulation, inclusive, being copies of the Milk Producers' Market News (R. 3461–3580).

10511 Exhibits Nos. 24 to 24–J to the stipulation, inclusive, being copies of the Dairymen's League News (R. 3581–3772).

Exhibits Nos. 25 and 25–A to the stipulation, being copies of the Sheffield Producer (R. 3773–3774).

III

Only so much of Exhibit "A" to the complaint in the action entitled "United States of America v. Rock Royal Co-operative, Inc., et al." as includes a copy of proposed Order No. 27, to wit: Column 3 of page 1945; pages 1946–1950, inclusive, and the first part of column 1 of page 1951 thereof (R. 18–24) shall be printed. Exhibits "A" and "B" to the complaint in the action entitled "United States of America v. Jetter Dairy Company" are identical with Exhibits "A" and "B" to the complaint in the action entitled "United States of America v. Rock Royal Co-operative, Inc., et al.," and have not been included in the Transcript.

IV

Except as above specified, all of the Transcript of Record transmitted by the Clerk of the District Court to the Clerk of this Court shall be printed.

Dated March 24, 1939.

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, By Robert H. Jackson, ROBERT H. JACKSON, *Solicitor General;* HOLTON V. NOYES, *as Commissioner of Agriculture and Markets of the State of New York, Intervening Plaintiff-Appellant*, By Milo R. Kniffen, by J. J. W., MILO R. KNIFFEN, *General Counsel;* DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
10512 *Intervening Plaintiff-Appellant*, By Seward A. Miller, SEWARD A. MILLER, *Attorney;* METROPOLITAN CO-OPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., *Intervening Plaintiff-Appellants;* By Edmund F. Cooke, EDMUND F. COOKE, Attorney; ROCK ROYAL CO-OPERATIVE, INC., *Defendant-Appellee*, By Charles W. Jenkins by J. J. W., CHARLES W. JENKINS, *Attorney;* JETTER DAIRY COMPANY, INC., SCHUYLER JUNCTION NEW YORK MILK SHED CO-OPERATIVE, INC., *Defendants-Appellees*, By Willard R. Pratt, by J. J. W., WILLARD R. PRATT, *Attorney;* CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC., *Defendant-Appellee*, By Haskell & Foley, Leonard Acke, *of Counsel*, HASKELL & FOLEY, *Attorneys*.

10513 *Schedule of exhibits which are not to be printed*

	Page
Exhibit No. 1 to stipulation—Federal Register dated August 9, 1938	R. 3972
Exhibit No. 3 to stipulation—Transcript of testimony and exhibits constituting evidence before the Secretary of Agriculture in the promulgation of Order No. 27, bound in seven volumes	R. 3989
Exhibit No. 7 to stipulation—Pamphlet, "schedule of polling places for producer referendum on Order No. 27"—issued by the U. S. Department of Agriculture	R. 9821
Exhibit No. 11 to stipulation—Federal Register of August 27, 1938	R. 9340
Exhibit No. 18 to stipulation—A list entitled "Plants and Creameries of the New York Milk Shed and approved by the Department of Health of the City of New York as of August 1938"	R. 9345
Exhibit No. 18a to stipulation—A list entitled "Plants and Creameries of the New York Milk Shed and approved by Department of Health of the City of New York as of May 31, 1938"	R. 9357
Exhibit No. 19 to stipulation—A list entitled "Milk and Cream Supplies approved for Newark, dated April 1, 1938"	R. 9376
Exhibit No. 20 to stipulation—A list of Milk Plants holding permits of Department of Health of the State of New Jersey, dated July 30, 1938	R. 9380
Exhibit No. 23-J to stipulation—Text of Radio Broadcast made by Edmund R. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, April 18, 1938	R. 9394
Exhibit No. 23K to stipulation—Text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, April 11, 1938	R. 9397
Exhibit No. 23L to stipulation—Text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, April 4, 1938	R. 9400
10514 Exhibit No. 23M to stipulation—Text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 28, 1938	R. 9402
Exhibit No. 23N to stipulation—Text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 21, 1938	R. 9405
Exhibit No. 21-O to stipulation—Text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 14, 1938	R. 9408
Exhibit No. 21P to stipulation—Text of Radio Broadcast made by Edmund F. Cooke for the Metropolitan Cooperative Milk Producers Bargaining Agency, March 7, 1938	R. 9411
Exhibit No. 27 to stipulation—Copies of The Dairy Farmer, dated July 25, 1938, and Dairy Farmers' Union Special Bulletin, dated August 15, 1938	R. 9415
Exhibit No. 29 to stipulation—Copy of report to Market Administrator of Jetter Dairy Co., for month of September	R. 9423
Exhibit No. 30 to stipulation—Copy of report to Market Administrator of Jetter Dairy Co., for month of October	R. 9437
Exhibit No. 31 to stipulation—Copy of report to Market Administrator of Jetter Dairy Co., for month of November	R. 9451
Exhibit No. 32 to stipulation—Report to Market Administrator of Rock Royal Co-operative, Inc., for month of September	R. 9461
Exhibit No. 33 to stipulation—Report to Market Administrator of Rock Royal Co-operative, Inc., for month of October	R. 9467
Exhibit No. 34 to stipulation—Report to Market Administrator of Rock-Royal Co-operative, Inc., for month of November	R. 9473
Exhibit No. 35 to stipulation—Report to Market Administrator of Schuyler Junction, New York Milk Shed Cooperative Association Inc., for month of September	R. 9477
Exhibit No. 36 to stipulation—Report to Market Administrator of Schuyler Junction, New York Milk Shed Cooperative Association, Inc., for month of October	R. 9482

Page

10515 Exhibit No. 37 to stipulation—Report to Market Administrator of Schuyler Junction New York Milk Shed Cooperative Association Inc., for month of November ..... R. [illegible]

Exhibit No. 38 to stipulation—Report to Market Administrator of Central New York Cooperative Association, Inc., for month of September ..... R. [illegible]

Exhibit No. 39 to stipulation—Report to Market Administrator of Central New York Cooperative Association, Inc., for month of October ..... R. [illegible]

Exhibit No. 40 to stipulation—Report to Market Administrator of Central New York Cooperative Association, Inc., for month of November ..... R. [illegible]

Exhibit No. 42 to stipulation—Agreement between Hegton Milk Corporation of Brooklyn as landlord and Central New York Cooperative Association, Inc., of Cortland, N. Y., as tenants ..... R. [illegible]

Defendants' Exhibit No. 4—A photostat of a certificate of Incorporation of Metropolitan cooperative Milk Producers' Bargaining Agency, Inc. ..... R. [illegible]

Defendants' Exhibit No. 9—A Pamphlet "The Federal-State Program for the New York Milk Market"—issued October 1938 ..... R. [illegible]

Defendants' Exhibit No. 10—A Photostat of check of Jetter Dairy Company to Market Administrator dated October 18, 1938 ..... R. [illegible]

Defendants' Exhibit No. 14-A—A carbon copy of letter dated November 19, 1938, from Walter T. Kohn to Willard R. Pratt ..... R. [illegible]

Defendants' Exhibit No. 14-B—A letter dated December 2, 1938, from W. R. Pratt to Walter T. Kohn ..... R. [illegible]

Defendants' Exhibit No. 14-C—Carbon copy of letter dated December 3, 1938, to Willard R. Pratt from Secretary to Walter T. Kohn ..... R. [illegible]

10516 Defendants' Exhibit No. 14-D—A carbon copy of letter dated December 5, 1938, to Willard R. Pratt from Walter T. Kohn ..... R. [illegible]

Defendants' Exhibit No. 19—A photostat of summary Report to Market Administrator for month of September of Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 19-A—Photostats of schedules of receipts and utilization of milk at Kyserike, N. Y. plant for the month of September 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 19-B—Photostats of schedules of receipts and utilization of milk at Fort Edward plant for the month of September 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 20—A photostat of summary Report to Market Administrator for month of October of Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 20-A—Photostats of schedules of receipts and utilization of milk at Kyserike, N. Y. plant for the month of October 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 20-B—Photostats of schedules of receipts and utilization of milk at Fort Edward plant for the month of October 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 21—A photostat of summary Report to Market Administrator for month of November of Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 21-A—Photostats of schedules of receipts and utilization of milk at Kyserike, N. Y. plant for the month of November 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 21-B—Photostats of schedules of receipts and utilization of milk at Fort Edward, N. Y. plant for the month of November 1938, submitted to the Market Administrator by Dellwood Dairy Co., Inc. ..... R. [illegible]

Defendants' Exhibit No. 23—A photostat of summary report to the Market Administrator for month of October of Slate Hill Milk and Cream Co. ..... R. [illegible]

10517 Defendants' Exhibit No. 23A—Photostats of schedules of receipts and utilization of milk at Slate Hill plant for the month of October 1938, submitted to the Market Administrator by Slate Hill Milk and Cream Co. ..... R. [illegible]

	Page
ndants' Exhibit No. 24—Photostat of of summary report to the arket Administrator for month of November of Slate Hill Milk and eam Co.	R. 9618
ndants' Exhibit No. 24A—Photostats of schedules of receipts and ilisation of milk at Slate Hill for the month of November 1938, bmitted to the Market Administrator by Slate Hill Milk and eam Co.	R. 9619
ndants' Exhibit No. 25—A photostat of summary report to Market dministrator for month of September of Middletown Milk and eam Co.	R. 9621
ndants' Exhibit No. 25A—Photostats of schedules of receipts and ilisation of milk at Slate Hill Plant for the month of September 38, submitted to the Market Administrator by Middletown Milk d Cream Co.	R. 9622
ndants' Exhibit No. 26—A photostat of summary report to Mar- t Administrators for month of October of the Middletown Milk and eam Co.	R. 9626
ndants' Exhibit No. 26A—Photostats of schedules of receipts and ilisation of milk at Slate Hill plant for the month of October 1938, bmitted to the Market Administrator by Middletown Milk and eam Co.	R. 9627
ndants' Exhibit No. 27—A photostat of summary report to Market dministrator for month of November of Middletown Milk and eam Co.	R. 9631
ndants' Exhibit No. 28—A photostat of Market Service claims made Market Administrator by Dellwood Dairy Co., Inc., for month October	R. 9633
ndants' Exhibit No. 29—Photostat of Market Service claim to arket Administrator made by Middletown Milk and Cream Co., Inc., for month of September 1938	R. 9635
18 Defendants' Exhibit No. 30—Photostat of Market Service claim to Market Administrator made by Middletown Milk and Cream , Inc., for month of October 1938	R. 9637
ndants' Exhibit No. 55— A "List of Country Milk Plants in the egion of the New York Milk Shed" issued by Cornell University, anuary 1938	R. 9639
ndants' Exhibit No. 62—Pamphlets containing State Milk Control aw Appendix A, Chapter 8, revised statutes of New Jersey (1937)	R. 9671
ndants' Exhibit No. 63—Official order, mimeographed copy No. B-6, ued July 2, 1934, by the New Jersey Milk Control Board	R. 9681
ndants' Exhibit No. 63A—Official order, mimeographed copy, No. -4, issued November 21, 1935, by the New Jersey Milk Control Board	R. 9683
ndants' Exhibit No. 63B—Official order, mimeographed copy, No. -1, issued July 22, 1937, by the New Jersey Milk Control Board	R. 9685
ndants' Exhibit No. 63C—Official order, mimeographed copy, No. -2, issued July 22, 1937, by the New Jersey Milk Control Board	R. 9691
ndants' Exhibit No. 63D—Official order, mimeographed copy, No. -3, issued July 28, 1937, by the New Jersey Milk Control Board	R. 9696
ndants' Exhibit No. 63E—Official order, mimeographed copy, No. -4, issued September 25, 1937, by the New Jersey Milk Control oard	R. 9700
ndants' Exhibit No. 63F—Official order, mimeographed copy, No. -8, issued December 7, 1937, by the New Jersey Milk Control Board	R. 9702
ndants' Exhibit No. 63G—Official order, mimeographed copy, No. -9, issued December 12, 1937, by the New Jersey Milk Control Board	R. 9703
ndants' Exhibit No. 63H—Official order, mimeographed copy, No. -13, issued March 21, 1938, by the New Jersey Milk Control Board	R. 9705
19 Defendants' Exhibit No. 63 I—Official order, mimeographed copy, No. E-14, issued April 28, 1938, by the New Jersey Milk Control oard	R. 9707
ndants' Exhibit No. 63 J—Official order, mimeographed copy, No. -15, issued April 28, 1938, by the New Jersey Milk Control Board	R. 9708
ndants' Exhibit No. 63 K—Official order, mimeographed copy, No. 8-1, issued August 8, 1938, by the New Jersey Milk Control Board	R. 9709

Page

Defendants' Exhibit No. 63 L—Official order, mimeographed copy, No. 88-2, issued August 8, 1938, by the New Jersey Milk Control Board... R. 9710
Defendants' Exhibit No. 63 M—Official order, mimeographed copy, No. 88-3, issued August 8, 1938, by the New Jersey Milk Control Board... R. 9711
Defendants' Exhibit No. 70—Copy of Market Service Claim to the Market Administrator of Queensboro Farm Products, Inc..... R. 9713
Defendants' Exhibit No. 71—Copy of schedule of daily receipts at Canastota from other Queensboro Plant for September 1938..... R. 9715
Defendants' Exhibit No. 71A—Schedule of daily milk receipts at Canastota from outside sources for September 1938..... R. 9716
Defendants' Exhibit No. 71B—Schedule of milk receipts at Canastota from other Queensboro plant for October 1938..... R. 9717
Defendants' Exhibit No. 71C—Schedule of daily milk receipts at Canastota from outside sources for October 1938..... R. 9718
Defendants' Exhibit No. 71D—Schedule of milk receipts at Canastota from outside sources for November 1938..... R. 9719
Defendants' Exhibit No. 71E—Schedule of daily milk receipts at Canastota from other Queensboro Plant for November 1938..... R. 9720
Defendants' Exhibit No. 80—Copies of announcements of the Market Administrator with respect to assignment of plants or handlers to Freight differential zones..... R. 9721
10520 Defendants' Exhibit No. 83—Photostats of the application for license to the Commissioner of Agriculture and Markets of the State of New York by the Jetter Dairy Co., Inc..... R. 9733
Defendants' Exhibit No. 84—Photostats for application of license to the Commissioner of Agriculture and Markets of the State of New York by Triboro Milk and Cream Co., Inc..... R. 9737
Defendants' Exhibit No. 56—A report of Commissioner of Agriculture and Markets regarding Audit of Milk Dealers and Cooperative Association-Legislative Document. (1938 no. 100)..... R. 9741

[File endorsement omitted.]

10521 In Supreme Court of the United States

No. 826. No. 827. No. 528

Statement of points to be relied on and designation of the parts of the record to be printed

Filed March 31, 1939

Come now the appellants in the above-styled causes and adopt their respective assignments of errors as their respective statements of points to be relied on; and appellants adopt the "Stipulation Re Printing Record" and the designation by appellant in the case of United States of America, appellant v. Rock Royal Co-Operative, Inc., et al., appellees (No. 771) of the parts of the record to be printed and appellants state that only the record in said cause No. 771 is necessary for the consideration of the foregoing points.

Holton V. Noyes as Commissioner of Agriculture and Markets of the State of New York, appellant in No. —, by Milo R. Kniffen, Counsel, by C. J. M.; Dairymen's League Cooperative Association, Inc., appellant in No. —, by Seward A. Miller, by C. J. M., Attorney; Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., appellant in No. —, by Edmund F. Cooke, by C. J. M., attorney.

[Endorsement on cover:] File Nos. 43256, 43311, 43312, 43313. New York, D. C. U. S. Term No. 771. The United States of America, Appellant vs. Rock Royal Co-Operative, Inc., et al. Term No. 826. Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Appellant vs. Rock Royal Co-Operative, Inc., et al. Term No. 827. Dairymen's League Cooperative Association, Inc., Appellant vs. Rock Royal Co-Operative, Inc., et al. Term No. 828. (Enter John E. Larson.) Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., Appellant vs. Rock Royal Co-Operative, Inc., et al. Filed March 23, 1939, March 30, 1939, March 30, 1939, March 30, 1939. Term No. 771 O. T. 1938, No. 826 O. T. 1938, 827 O. T. 1938, 828 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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FILED
MAR 23 1939
CHARLES ELMORE CROPLEY
CLERK

No. 771

In the Supreme Court of the United States

October Term, 1939

The United States of America, appellant

vs.

Rock Royal Co-Operative, Inc., et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Northern District of New York

Civil Action No. 32. Consolidated Cause

UNITED STATES OF AMERICA, PLAINTIFF, HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., INTERVENING PLAINTIFFS

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL., DEFENDANTS

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, the United States of America, plaintiff-appellant in the above-entitled cause, presents the following statement in connection with its petition for the allowance of an appeal to the Supreme Court of the United States from the decree entered herein on March 21, 1939:

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 2 of the Act of August 24, 1937,

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Public No. 352, 75th Congress, 50 Stat. 751, 28 U. S. C., Section 349a, which reads as follows:

> In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section

shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

(b) There is involved in this case the validity f certain provisions of the Act of Congress approved May 12, 1933, Public, No. 10, 73d Congress, 8 Stat. 31, 7 U. S. C. A., Chap. 26, as amended y the Act of Congress approved August 24, 1935, Public, No. 320, 74th Congress, 49 Stat. 750, and s reenacted and amended by the Act of Congress approved June 3, 1937, known as the Agricultural Marketing Agreement Act of 1937, Public, No. 137, 75th Congress, 50 Stat. 246, a compilation of the pertinent provisions of the aforesaid Act of Congress approved May 12, 1933, as mended by the aforesaid Act of Congress, approved August 24, 1935, and as reenacted and mended by the aforesaid Act of Congress approved June 3, 1937, is appended hereto as Exibit A.

(c) The final decree of the United States District Court for the Northern District of New York, review of which is sought by the appeal herein, as signed March 21, 1939, and entered March 21, 939, and the application for appeal is presented ntemporaneously with the presentation of this atement, to wit: on the 21st day of March 1939.

(d) The nature of the case and the rulings of e Court are such as to bring this case within the risdictional provisions relied on because the

United States is a party to this case and the decision of the District Court is against the constitutionality of an Act of Congress, namely, the Act of Congress approved May 12, 1933, as amended by the Act of Congress approved August 24, 1935, and as reenacted and amended by the Act of Congress approved June 3, 1937, a compilation of the pertinent provisions of which is appended hereto as Exhibit A. The District Court held that the provisions of Section 8c (5) (B) (ii) of said Act (Exhibit A, p. 4) which authorize the Secretary of Agriculture to issue an order "providing for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered," and the provisions of Section 8c (5) (F) of said Act (Exhibit A, p. 5) which provides that no order shall "prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the 'Capper-Volstead Act,' engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers," are violative of the Fifth Amendment to the Constitution of the United

States, and that the provisions of Section 8c (5) (B) (ii) of said act are unauthorized by the Constitution or by the Commerce Clause thereof.

The following case is believed by plaintiff to sustain the jurisdiction of the Supreme Court:

United States v. *Bekins*, 304 U. S. 27.

(e) There is appended hereto as "Exhibit B" a copy of the opinion delivered by the District Court upon the rendering of the final decree sought to be reviewed. There is appended hereto as "Exhibit C" a copy of the opinion delivered by the District Court overruling plaintiff's motion to strike certain designated paragraphs in the answers of the defendants Schuyler Junction New York Milk Shed Cooperative Association, Inc., Rock Royal Co-operative, Inc., and certain designated paragraphs in the amended answer of the defendant, Jetter Dairy Company, Inc.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General of the United States.

RALPH L. EMMONS,
United States Attorney.

JOHN S. L. YOST,
CHARLES J. MCCARTHY,
Special Assistants to the Attorney General,

E. O. MATHER,
Principal Attorney,
Department of Agriculture.

EXHIBIT A 7

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION

OF

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

OTATED COMPILATION OF AGRICULTURAL MARKETING GREEMENT ACT OF 1937 REENACTING, AMENDING AND UPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS MENDED [1]

AN ACT

eenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

e it enacted by the Senate and House of Representatives of United States of America in Congress assembled, that the owing provisions of the Agricultural Adjustment Act, as nded, not having been intended for the control of the pro-tion of agricultural commodities, and having been intended e effective irrespective of the validity of any other provision hat act are expressly affirmed and validated, and are reen-d without change except as provided in section 2:

) Section 1 (relating to the declaration of emergency);

DECLARATION

is hereby declared that the disruption of the orderly exchange ommodities in interstate commerce impairs the purchasing power armers and destroys the value of agricultural assets which sup-the national credit structure and that these conditions affect sactions in agricultural commodities with a national public rest, and burden and obstruct the normal channels of interstate merce.[2]

b) Section 2 (relating to declaration of policy);

DECLARATION OF POLICY

EC. 2. It is hereby declared to be the policy of Congress—

1) Through the exercise of the powers conferred upon the Secre-of Agriculture under this title, to establish and maintain such *erly marketing conditions for agricultural commodities in inter-e commerce as will establish* [3] prices to farmers at a level that give agricultural commodities a purchasing power with respect

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or annotations to the Agricultural Adjustment Act, as amended; for provisions of that ot reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; for other acts of Congress relating both to the Agricultural Adjustment Act, as ded, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Com-ion of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the of the First Session of the 74th Congress, August 26, 1935"; Superintendent of uments, Washington, D. C.

is amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

it the present acute economic emergency being in part the consequence of a severe and asing disparity between the prices of agricultural and other commodities, which dis-y has largely destroyed the purchasing power of farmers for industrial products, has n down the orderly exchange of commodities, and has seriously impaired the agricul-assets supporting the national credit structure, it is hereby declared that these con-ns in the basic industry of agriculture have affected transactions in agricultural odities with a national public interest, have burdened and obstructed the normal nts of commerce in such commodities, and render imperative the immediate enactment le I of this Act."

he italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing ment Act of 1937, in lieu of the words: "balance between the production and con-tion of agricultural commodities, and such marketing conditions therefor, as will ablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating[1] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

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[1] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[5] of milk during a representative period of time.

[5] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs
) and (B) of this subsection (5), providing a method for making
justments in payments, as among handlers (including producers
o are also handlers), to the end that the total sums paid by each
ndler shall equal the value of the milk purchased by him at the
ices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers
om any producer who did not regularly sell milk during a period
30 days next preceding the effective date of such order for con-
mption in the area covered thereby, payments to such producer, for
e period beginning with the first regular delivery by such pro-
cer and continuing until the end of two full calendar months fol-
wing the first day of the next succeeding calendar month, shall be
ade at the price for the lowest use classification specified in such
der, subject to the adjustments specified in paragraph (B) of this
bsection (5).

(E) Providing (i) except as to producers for whom such services
e being rendered by a cooperative marketing association, qualified
provided in paragraph (F) of this subsection (5), for market
formation to producers and for the verification of weights, sam-
ng, and testing of milk purchased from producers, and for making
propriate deductions therefore from payments to producers, and
) for assurance of, and security for, the payment by handlers for
lk purchased.

(F) Nothing contained in this subsection (5) is intended or shall
construed to prevent a cooperative marketing association qualified
der the provisions of the Act of Congress of February 18, 1922, as
ended, known as the "Capper-Volstead Act", engaged in making
llective sales or marketing of milk or its products for the producers
ereof, from blending the net proceeds of all its sales in all markets
all use classifications, and making distribution thereof to its pro-
cers in accordance with the contract between the association and
producers: *Provided*, That it shall not sell milk or its products to
y handler for use or consumption in any market at prices less than
e prices fixed pursuant to paragraph (A) of this subsection (5) for
ch milk.

(G) No marketing agreement or order applicable to milk and its
oducts in any marketing area shall prohibit or in any manner limit,
the case of the products of milk, the marketing in that area of any
lk or product thereof produced in any production area in the
ited States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not in-
ding apples and not including fruits, other than olives, for can-
g) and their products, tobacco and its products, vegetables (not
luding vegetables, other than asparagus, for canning) and their
oducts, soybeans and their products, and naval stores as included
the Naval Stores Act and standards established thereunder (in-
ding refined or partially refined oleoresin), orders issued pursuant
his section shall contain one or more of the following terms and
ditions, and (except as provided in subsection (7)) no others:
A) Limiting, or providing methods for the limitation of, the total
ntity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [6] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [7] such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

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[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.

[7] The italicized words were substituted, by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds at any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk and its products in the marketing area to which the contemplated mar-

keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, making adjustments in such prices.[8]

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[9]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

[8] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

[9] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2) [10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

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[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within*

the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[14] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provisions of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[14] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words

der such conditions and in sufficient quantities as to render or tend render ineffective or materially interfere with any program or eration undertaken, or to reduce substantially the amount of any oduct processed in the United States from any commodity subject and with respect to which any program is in operation, under this le, or the Soil Conservation and Domestic Allotment Act, as ended, he shall cause an immediate investigation to be made by the nited States Tariff Commission, which shall give precedence to vestigations under this section to determine such facts. Such in- stigation shall be made after due notice and opportunity for hearing interested parties and shall be conducted subject to such regulations the President shall specify.

(b) If, on the basis of such investigation and report to him of find- gs and recommendations made in connection therewith, the Presi- ent finds the existence of such facts, he shall by proclamation impose ch limitations on the total quantities of any article or articles hich may be imported as he finds and declares shown by such vestigation to be necessary to prescribe in order that the entry f such article or articles will not render or tend to render ineffec- ve or materially interfere with any program or operation under- aken, or will not reduce substantially the amount of any product rocessed in the United States from any commodity subject to and ith respect to which any program is in operation, under this title or he Soil Conservation and Domestic Allotment Act, as amended: rovided, That no limitation shall be imposed on the total quantity f any article which may be imported from any country which reduces uch permissible total quantity to less than 50 per centum of the aver- ge annual quantity of such article which was imported from such ountry during the period from July 1, 1928, to June 30, 1933, both ates inclusive.

(c) No import restriction proclaimed by the President under this ection nor any revocation, suspension, or modification thereof shall ecome effective until fifteen days after the date of such proclama- ion, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section hall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds hat the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President when- ever he finds that changed circumstances require such modification o carry out the purposes of this section.[15]

Sec. 2. The following provisions, reenacted in section 1 of this ct, are amended as follows: [16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or mployee of the Department of Agriculture as may be designated

[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of e Agricultural Adjustment Act, as amended, by inserting after the words "this title", herever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, s amended,"; and by deleting the words "an adjustment", wherever they appeared, and serting in lieu thereof the word "any".

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement ct of 1937, are incorporated in the preceding text and in footnotes 2 to 9 inclusive and to 14 inclusive, supra.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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EXHIBIT B

United States District Court, Northern District of New York

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, INTERVENING PLAINTIFF

vs.

ROCK ROYAL CO-OPERATIVE INC., ET AL.

John S. Yost, Charles J. McCarthy, Special Assistants to the Attorney General.

Harold R. Schilz, Special Assistant to the Attorney General.

E. O. Mather, Senior Attorney, Department of Agriculture.

Ralph L. Emmons, United States Attorney.

Milo R. Kniffen, Counsel, Department of Agriculture and Markets of the State of New York. Louis S. Wallach, Assistant Counsel.

Seward A. Miller, 11 West 42nd Street, New York, N. Y.; Edward Schoeneck, State Tower Building, Syracuse, N. Y.; Paul J. McCauley, 70 Pine Street, New York, N. Y.; Attorneys for Plaintiff, Dairymen's League Co-operative.

Edmund F. Cooke, Richard Cooke, Attorneys for Plaintiff, Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., Onondaga Hotel, Syracuse, N. Y., and Buffalo, N. Y.

Willard R. Pratt, Utica, N. Y.; Charles W. Jenkins, Deposit, N. Y.; Haskell & Foley, Cortland, N. Y.; Attorneys for Defendants.

Samuel Rubinton, of Counsel for Rock Royal Co-Operative, Inc., 32 Court Street, Brooklyn, N. Y.

Leonard Acker, of Counsel for Central New York Co-operative, 32 Court Street, Brooklyn, N. Y.

COOPER, J.

This suit was brought by the Secretary of Agriculture in the name of the United States, for a mandatory injunction to compel the defendants to comply with the provisions of order No. 27 issued by the Secretary on August 5th, 1938, effective September 1, 1938.

The order was issued by the Secretary to make effective the provisions of the Agricultural Marketing Agreement act as amended in 1937.

The order is concerned only with milk produced by producers approved by the City of New York for sale in interstate commerce in the Metropolitan Milk Marketing Area, consisting of the counties in New York City and the Counties of Nassau, Suffolk, and Westchester.

Order 27, among other things provides for the payment, by non-cooperative dealers, called proprietary handlers, who buy milk from the producers, of a minimum price to the producers.

It also provides for the payment by all handlers, proprietary or cooperative, under varying conditions, of certain moneys into a milk pool or equalization fund, called Producers Settlement Fund, and also for withdrawals from that fund, chiefly by cooperatives.

This suit is brought to compel payment by the defendant into this Producers Settlement Fund of the following sums in compliance with the terms of order No. 27.

	September	October	November
Jetter Dairy Co	Paid	$14,616.05	$9,039.77
Rock Royal	$3,616.56	3,038.24	1,508.74
Schuyler Junction	1,603.00	1,337.40	757.64
Central New York	20,115.56	19,581.60	11,069.13

Similar amounts are claimed to be due for each succeeding month.

The State of New York has a statute called the Rogers-Allen Law similar to the Federal Act to cover milk produced by like approved producers for sale in intrastate commerce in the Metropolitan milk marketing area and under authority thereof the Commission of Agriculture, Farms and Markets of New York State issued his order No. 126.

The two orders are complementary and are administered by the same administrator appointed by each sovereignty.

The State Commissioner intervened as party plaintiff with the consent of the original plaintiff as did the Dairymen's League Co-operative Association, Inc., and also the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. But the latter two were allowed to intervene only to help the original plaintiff to defend against acts charged against them by the defendants relating to the referendum, and other things more fully referred to hereinafter.

Three of the four defendants are incorporated cooperative associations and the fourth, the Jetter Dairy Company is a proprietary handler.

It is not questioned here as the Court understands it, but that the milk of all four defendants reaches the Metropolitan marketing area through the channels of interstate commerce and that they are subject to Federal Order 27 if the Federal Statute and order 27 are valid and are not subject to State Order No. 126.

So the decision here is based on the Federal Order 27 and little attention will be given to State Order No. 126.

Order No. 27 is lengthy and somewhat complicated. That order is attached to and made a part of this memorandum. Parts of it will be referred to herein.

The Secretary contends that Order 27 was appropriate and necessary to effectuate the provisions of the Statute and asks that the defendants be compelled to comply with it by paying the aforesaid sums.

The defendants assert, on various grounds to be more particularly referred to later herein that the order is invalid, that its approval in the referendum of producers was procured by misrepresentation of its terms, that its terms, operation, and effect, and the statute under which it was issued, are so discriminatory that it will confiscate the defendants property, if enforced, and both statute and order are unconstitutional in operation and effect.

The statute involved in the present case under which the Secretary of Agriculture purported to

issue Marketing Order No. 27 is the Agricultural Marketing Agreement Act of 1937 (Act of June 3, 1937, Public No. 137, 75th Congress).

That act reenacts and amends some of the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended by the Act of August 24, 1935 (49 Stat. 750).

The purpose of the act is set forth in the "declaration of policy" contained in section 2 of the Act. That purpose is to establish prices to farmers at a level which will give agricultural commodities a purchasing power, in relation to articles that farmers buy, equivalent to the purchasing power possessed by such commodities in the so-called "base period."

The attainment of the farmers purchasing power at such level is to be had by creating and maintaining orderly marketing conditions for agricultural commodities in interstate commerce through the exercise by the Secretary of Agriculture of the powers conferred by the Act.

The goal sought through the act is to regain for the farmers the favorable financial conditions which they enjoyed without any economic or marketing control during the base period which was about 25 years ago and before the world war.

The regulation of marketing conditions in agricultural commodities in interstate commerce through the machinery provided in the Act is merely a means of reaching and thereafter maintaining the goal sought. The act is in no sense an emergency measure but is to continue until the Secretary determines that the exercise of the powers therein conferred is no longer necessary or, possibly, is ineffective to obtain the desired object.

The means provided for attaining this object is the issuance of the Secretary of Agriculture of orders applicable to persons engaged in the handling in Interstate Commerce of certain agricultural commodities. Milk is one of the specified commodities (Section 8 (c) (2)).

Orders are to be issued when the Secretary has reason to believe that the issuance of the order will tend to effectuate the declared policy of the act with respect to the particular commodity involved when he so finds upon evidence introduced at a hearing of which he has given due notice (Section 8–C (3) (4)). Such an order may be issued with respect to the commodity if the handlers of not less than 50% of the volume of such commodity produced or marketed out of the particular area defined in the order, shall sign a marketing agreement which regulates the handling of the commodity in the manner provided in the order (Section 8–C (8)).

Should 50% of such handlers refuse to sign such an agreement an order may nevertheless be issued if the Secretary determines that their failure so to sign the marketing agreement tends to prevent effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of the producers (Section 8 (c) (9)).

Whether an order is issued in connection with a marketing agreement under Section 8–C (8) or without such agreement under Section 8 (c) (9), the order must be approved by two-thirds of the producers of such commodity or the producers of two-thirds of the volume thereof, who during a representative period to be determined by the Secretary, were engaged in the production of such com-

modity for sale in the marketing area to which the order applied (Section 8–C (8 and 9)).

In order to determine that approval, the Secretary may conduct a referendum of producers, and if two-thirds of those represented in the referendum approve, that is sufficient. (Section 8 (c) 19.)

In conducting such referendum the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide, engaged in marketing the commodity or product thereof, covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such cooperative association of producers 8 (c) (12).

A number of terms and conditions are set forth in the act, one or more of which must be contained in all orders.

These terms and conditions include provisions prohibiting unfair methods of competition and unfair trade practices and, except in the case of fluid milk or cream to be sold for consumption in fluid form, provision for sale of commodities only to be at prices fixed by the handlers and also a provision for the selection of the agency to administer the order.

Besides these general terms common to all orders, the Statute states particular terms or conditions to be included in orders relating to milk and its products. Section 8 (c) 5.

None of these terms and conditions need be included in the order but the order must contain at least one of them.

The first term provides for classifying milk in accordance with the form or the purpose for which it is used, fixing a minimum price for each such used classification, which all handlers shall pay for milk purchased from producers or associations of producers, and a time when payment shall be made (Section 8 (c) (5) (a)). The prices so fixed are to be uniform for each classification of milk, subject, however, to certain differentials. The classification of milk is to be determined not by the character of the milk sold by the farmer or the handler, but by the form in which or the purpose for which the handler uses it. The farmers all sell milk in fluid form, varying no doubt as to the grade and quality but still fluid milk. The handler may resell or use such milk in different forms for different purposes. Some he may sell as fluid milk, some he may convert into butter or cream, and some he may manufacture into ice cream or other manufactured milk products. Its subsequent use determines the class into which falls the milk he buys from the farmer and the price he has to pay.

The second term or condition is designed to secure for each farmer a uniform price for all the milk he sells regardless of the classification in which it falls. Section 8c (5) b.

This equalization provision may take one of two forms. It may provide for the payment of uniform prices, either (1) to all producers selling to the same handler, or (2) to all producers selling to all handlers, irrespective of the uses made of the milk by the particular handler to whom it is delivered. In either case the uniform prices are subject to certain adjustments for market differ-

entials, grade and quality of the milk, and point of delivery of the milk. These two alternative provisions may be designated as "dealer equalization" and "market equalization." The first alternative, that of "dealer equalization," secures to the producers selling to one dealer a uniform price for the milk they deliver to him. If different rates have been fixed for different classifications of milk, the dealer may not attribute all the milk of one class he buys to a particular farmer or group of farmers, and all the milk of another class to other farmers. He must allocate among all his farmers equally all classifications of milk he purchases. The second alternative, that of "market equalization," secures to all farmers in the market covered by the order a uniform price for all milk delivered. It is immaterial that the particular handler to whom a farmer sells, buys milk of only one classification. Each farmer in the market is to be paid a price based on his pro rata share of all classifications of milk purchased by all dealers in the production area. The principle of allocation is extended from allocation among all producers of each dealer to allocation among all producers selling to all dealers. In both cases, however, the uniform prices may be subject to certain adjustments.

It will be seen that the first term providing for payment by the handler on the basis of the use to which he puts the milk purchased, and the second term, providing for receipt by the farmer of a uniform price regardless of the use to which the particular milk he sells is put, appear to be inconsistent and to leave open a gap between the amount the handler must pay and the amount the farmer

is to receive. This gap will not appear if the provision for uniform receipts by farmers is that of "dealer equalization." The handler will pay to all his farmers as a group a total amount based on his total purchases of milk of all classifications. That total amount will be allocated among all his farmers. But if the provision for uniform receipts is that of "market equalization" the gap is clear. The handler is to pay only on the basis of his own use and the farmer is to receive on the basis of the use of the entire market. The handler may, therefore, have to pay more or less than his farmers are to receive.

This gap is bridged by the third term that may be included in a milk order (Section 8c (5) (C)), providing a method for making adjustments in payments as among handlers, to the end that the total sums paid by each handler shall equal the "value" of the milk purchased by him at the rates fixed in accordance with the first term. By virtue of this provision in any order, handlers, who, on the basis of their own use, should pay more than the amount their farmers are entitled to receive, may be required to pay the excess to other handlers who, on the basis of their own use, should pay less than their farmers are entitled to receive. The first term, therefore, fixes the "value" that the handler "owes" for his milk. That "value" may be greater or less than the "price" he has to pay his farmers, fixed in accordance with the second term. If greater, he pays the excess to other handlers. If less, he pays the required "price" to his farmers and collects the difference from other handlers whose "value" was greater than the "price."

The fourth term (Section 8c (5) (D)) provides hat producers who were not regularly selling milk luring a thirty-day period prior to the effective late of the order shall be paid at the rate for the owest use classification for a period of two cal-ndar months.

The fifth term (Section 8 (c) (5) (E)) is a pro-ision for rendering market information and for rification of weights, sampling, and testing of nilk sold by producers, for whom such services are ot rendered by a cooperative marketing associa-ion qualified under the "Capper-Volstead Act." Appropriate deductions to cover these services are o be made from payments to producers.

The sixth term (Section 8 (c) (5) (F)) provides hat cooperative marketing associations, qualified nder the "Capper-Volstead Act may blend the pro-eeds of all sales in all markets in all use classifica-ions and distribute to producers in accordance vith the contract between the association and its roducers, thus in effect exempting such associa-ions from the "market equalization" provisions hich may be imposed upon competing handlers. he last term (Section 8 (c) (5) (G)) provides hat no milk order shall prohibit or limit the mar-eting in the area covered by the order of milk roduced in any production area in the United tates.

Orders, once effective, may be terminated or sus-ended by the Secretary, whenever he finds that the der obstructs or does not tend to effectuate the de-ared purposes of the Act (Section 8 (c) (16) (A)), d must be terminated when termination is fa-ored by a majority of producers engaged in pro-

duction of the commodity for sale in the marketing area during a representative period, provided such majority have produced more than 50 percent of the volume of the commodity (Section 8 (c) (16) (B)).

Violation of an order renders the handler subject to a fine (Section 8 (c) (14)). Jurisdiction is vested in the district courts to enforce, and to restrain violation of, any order, regulation, or agreement made pursuant to the Act (Section 8 (a) (6)).

A handler subject to an order may seek administrative relief by petition to the Secretary stating that an order or obligation imposed thereby is not in accordance with law and praying that it be modified or he be exempted from it. (Section 8 (c) (15) (A)). The ruling of the Secretary, after hearing on the petition, is subject to review in equity in the District Courts. Any proceeding brought under (Section 8 (a) (15)) to enforce the provisions of an order abate whenever a final decree is entered in proceedings to review the ruling of the Secretary on the petition (Section 8 (c) (15) (B)).

Order No. 27 in Article III classified milk in 9 classifications, viz Classes I, II–A, II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B.

Class I may be called fluid milk.

Class II–A is cream with certain exceptions.

The remaining classes relate to various products made from fluid milk.

Article IV fixes the minimum prices for milk in the various classes with variations for certain months.

Articles V relates to reports of handlers.

Article VI relates to the determination of uniform prices by formulas therein contained.

Article 7 relates to payment to producers.

Article 7, Section 1, exempts cooperatives from paying the uniform price to their producers.

Article VII, Section 6 provides for certain service payments to all handlers who come within the provisions thereof.

Article VII, Section 7, provides for payment to the Producers Settlement Fund.

Article VII, Section 8, provides for payments out of the Producers Settlement Fund.

All of the defendants are handlers as defined in the order. None of them have facilities for the manufacture of milk products and none of them are engaged in marketing milk outside the marketing area.

The order established prices to be paid for milk according to its utilization. The price of milk for fluid consumption known as Class I is fixed arbitrarily, depending upon the market price of butter. The price of Class II–A milk (cream for fluid consumption) is likewise fixed arbitrarily. The price for fluid milk has been $2.45 per cwt. since September 1, 1938.

Prices for milk manufactured into various milk products, are the assumed values thereof, based on market prices of the products into which the milk is manufactured which products are sold in country-wide competition. The prices for milk used in the manufacture of milk products is determined monthly by the Administrator by the use of formulae therefor contained in the order.

All handlers purchasing milk from producers are required to report to the Administrator monthly, a statement of the amounts of milk purchased by

such handler, and the utilization thereof (Article V, Section 2).

Based on the reports of all handlers, the Administrator computes the total value of the milk of such handler, based on the prices provided in the order (Article VI, Section 7). The result of such computation is the "net pool obligation."

Upon these same reports, the Administrator computes a "uniform" price which is the average price payable to producers for milk for each month, subject to certain differentials in part referred to hereinafter (Article VI, Section 2). Such involves also subtracting certain special payments to handlers under Article VI, Sections 5 and 6.

Each handler, which is not a cooperative association of producers on or before the 25th of each month, is required to pay to each producer the "uniform price" for all milk delivered by producers during the preceding month and which was sold in the marketing area (Article VII, Section 1).

Cooperative associations which are handlers are not required to make payment for such milk delivered to them by producers at the "uniform price" or at any fixed or stated price.

All handlers are required to pay into the Producers Settlement Fund on or before the 18th day of each month the difference between $2.45 per cwt. and the uniform price for all Class I milk (fluid milk) Article VII, Section 8.

Handlers selling milk outside the marketing area are under no requirement to pay the producers the uniform price for such milk nor to pay into the Producers Settlement Fund the difference between the uniform price and the actual market

value of such milk. Such handlers are permitted to "blend" prices paid or purported to have been paid for such milk sold in the outside market, with the uniform price announced by the Administrator for milk sold in the marketing area, thereby reducing the actual price paid to producers by such handlers for milk sold by them in the marketing area in competition with the defendant and others in like situation whose milk is sold entirely in the marketing area. This permits handlers selling in the outside market by blending milk so sold with milk sold in the marketing area to pay the producers at less than the order price and less than the actual value, if the price figured by the handlers for sales in outside markets (called "unpriced milk") is lower than the actual market value.

Cooperatives are not only exempted from paying the uniform price or any fixed portion thereof to producers but are permitted to blend prices of milk received in the production area and sold in the outside marketing area.

Other discriminations in favor of cooperatives and large dealers are briefly referred to hereinafter.

The laudable purpose of the statute to procure for farmers prices for their milk commensurate with their purchasing power at specified periods of better balance of purchasing power is not criticized or condemned. Nor is there any denial that the production or sale of milk presents peculiar problems due in part to excess supply at certain times and almost scarcity at others.

The challenge is to the means set up in the statute and order for dealing with the conditions. These means constitute, defendants claim, such gross discrimination as to drive defendants out of business and confiscate their property by the arbitrary discrimination therein provided and without any lack of efficiency on the part of the defendants.

The defendants contend that the order was put forward by the Metropolitan Co-Operative Milk Bargaining Agency in connection with the Dairymen's League, that it was designed for and has the effect of, in connection with the destructive marketing conditions in the Metropolitan area, driving out of business competitors not enjoying special price and other favorable arrangements with cooperatives; that the vote in the referendum of producers was brought about by misrepresentation as to the terms and effect of the order both on the part of agents of the Secretary of Agriculture and the State Commissioner, as well as by the Bargaining Agency and the Dairymen's League; that the referendum was thereby unfair and that the Dairymen's League alone cast two-thirds of the favorable votes cast.

Consideration will be given first to the legislation and the activities of the Bargaining Agency and the Dairymen's League in connection with the legislation and the preparation, promulgating and adoption of the order and the Referendum preceding its issuance by the Secretary.

The Rogers-Allen law was enacted first in 1937 by the Legislature of the State of New York as Chapter 383 of the Laws of 1937. Its provisions, so far as they relate to milk are similar to the

provisions of the Agricultural Marketing agreement as amended in 1937.

The amendments to the Federal Agricultural Marketing Agreement Act became effective on June 3, 1937. One of the amendments was the insertion in the act of Section 8 (c) 19, providing for a Producers' Referendum to determine whether or not an order is approved by two-thirds of the producers.

The intervening plaintiff, the Dairymen's League, in cooperation with the New York State Conference Board of Farm Organizations of which it is the sole member representing milk producers, actively sponsored and supported the enactment of the Rogers-Allen Law.

After the enactment of the Rogers-Allen Law and almost immediately after the amendment of the Agricultural Marketing Agreement Act, viz, on or about the 7th of June 1937, the Dairymen's League in conjunction with representatives of other cooperative organizations of the State, organized and incorporated the Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., under the Cooperative Corporations Law of the State of New York. This Metropolitan Bargaining Agency consisted entirely of cooperative associations. Among its directors were several representatives of the Dairymen's League and Sheffield Producers Cooperative Assn., Inc., another large cooperative. While these two cooperatives never had a majority of the Board of Directors of the Bargaining Agency, it is clear that they exercised an important if not the dominating influence over the activities of the Bargaining Agency.

After the Incorporation of the Bargaining Agency in 1937, it set about inducing producers selling milk to proprietary handlers to form cooperatives for the purpose of joining the bargaining agency.

Many were so formed, including all three cooperatives of the producers delivering milk to the Defendant, Jettef Dairy Company, though only one joined the Bargaining Agency. In some instances the Bargaining Agency advanced the fee for filing certificates of incorporation.

By June of 1938 there were 193 cooperative associations, most of which were members of the bargaining agency. The membership of these cooperatives included a very large percentage of all the producers. Many of these producers delivered milk to proprietary handlers and many to cooperative handlers.

In July 1937, Mr. E. Harmon, then connected with the Dairy Section of the Federal Department of Agriculture and later Federal and State Administrator of orders 27 and 126, addressed a meeting of the Bargaining Agency relative to Federal Aid in a marketing program and spent three days monthly commencing with November 1937, at least some portion of which was spent in conference with the representatives of the bargaining agency and others about the marketing program.

About November 1st, 1937, the Bargaining Agency appointed a lawyer's committee to draft a form of marketing agreement in order to regulate the sale of milk in New York City.

The original draft of such agreement and order was presented to the committee by Mr. Allen D.

Miller, one of the attorneys for the Dairymen's League.

Early in 1938, the Bargaining Agency presented to the Secretary of Agriculture of the United States and to the Commissioner of Agriculture and Markets of the State of New York, respectively, petitions for the issuance of Federal and State orders under the Agricultural and Marketing Agreement Act as amended in 1937 and of the State Rogers-Allen Law, and presented therewith proposed marketing agreement and proposed order regulating the handling of milk in the New York Metropolitan marketing area.

On April 29, 1938, the Secretary of Agriculture and the State Commissioner of Agriculture gave notice of hearings to be held on the proposed order and marketing agreement commencing May 16, 1938 at Albany and continuing at Malone on May 19th, Syracuse on May 18th, Elmira on May 19th, New York City on May 20th, 24th, 25th and 26th, and again at Albany June 3rd, 4th and 7th. Hearings were held at these places on these dates. The State Commissioner of Agriculture gave notice of like hearings on the like proposed state order. The hearings were conducted jointly by the Secretary of Agriculture and the State Commissioner of Agriculture through jointly appointed representatives.

Commencing in April 1938, radio addresses were made by representatives of the Bargaining Agency urging the adoption of the agreement and order. The Dairymen's League News and the Bargaining Agency publications, which were widely distributed among the milk-producing farmers, urged the adoption of the proposed agreement and order.

The Secretary of Agriculture caused to be printed and sent out to producers and others the proposed order and agreement and also certain pamphlets.

The pamphlets purported to explain the meaning and intent of the agreement and order, the latter of which is complicated and not easily intelligible to the man of ordinary education.

The pamphlet "Explanation of the Federal State Marketing Plan" explaining Order 27 states:

> The hearings on the marketing agreement program were called at the request of the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., which claims a membership of cooperative associations representing over 40,000 producers.

Under the heading "Principal Provisions" appears this:

> 3. The establishment of minimum prices which handlers are required to pay producers of each class of milk.

Under "Producers to decide" appears this:

> The definition (handlers) specifically includes any cooperative association that operates plants or any cooperative association which causes milk to be delivered to plants of handlers and collects payment for such milk.

These Provisions would undoubtedly lead the farmer-producer who received the pamphlet to believe that the uniform price would be paid to all producers by all handlers, proprietary or cooperative.

True, at a later point the pamphlet also says under:

UNIFORM POOL PRICES FOR PRODUCERS

> The order requires handlers to pay a uniform pool or blended price, calculated by the market administrator, to all producers delivering milk in any month unless the handler has received milk and sold it as Class I milk outside the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. (It does not say, on that portion of the milk sold in the marketing area.) For the remainder of each producer's milk the handler may pay such prices as he sees fit * * *.

But this is so involved and technical and appears on the last page of the pamphlet and would hardly be likely to lead the farmer to doubt that all producers would receive the minimum uniform price fixed by the administration.

On or about August 5th, 1938, the Secretary of Agriculture tentatively approved the proposed order and a marketing agreement and sent it out to all handlers who would be subject to the provisions of the order, but the requisite 50% of the handlers failed to sign the marketing agreement.

The failure of 50% of the handlers to sign the marketing agreement required the approval of the order by two-thirds of the producers.

In August 1938 there were 54,111 producers whose dairies had been approved for Grade B Milk and 6,109 for Grade A Milk, or a total of 60,220 producers. They were located in New York, Pennsylvania, New Jersey, Massachusetts, Connecticut, and Vermont.

About 420 Country milk receiving stations for Grade B Milk and 86 for Grade A Milk or a total of 506 had been approved within this territory.

Of these the Dairymen's League operated 109 stations receiving milk from 11,391 producers. In addition thereto Bordens operated 65 approved milk receiving stations receiving milk from 8,404 producers, all of which producers are members of the Dairymen's League. Bordens pays the Dairymen's League for milk received at these plants and the League pays the producers. The total number of producers included in the Dairymen's League Membership is upwards of 19,500. Dairymen's League does 34% of the milk business in the Metropolitan area.

Sheffield Farms Inc. and Sheffield Farms Condensed Milk Company operate 87 approved milk receiving stations receiving milk from 10,334 producers. The greater part of these producers deliver milk to Sheffield Farms Inc. and are organized as a cooperative association known as Sheffield Producers Co-operative Association.

The Department of Agriculture of the United States in August 1938 issued a printed pamphlet under the Seal of the Department. In that pamphlet appears this:

> The Order (27) requires handlers to pay the uniform pool or blanket price, calculated by the market Administrator, to *all* producers delivering milk during any month unless the handler has received milk and sold it as Class I Milk outside the marketing area * * *.
>
> Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to

> *all producers at uniform rate* except for the transportation and other differentials.

The last above paragraph quoted from the Government pamphlet is identical, word for word, with a paragraph contained in the Dairymen's League News of August 16, 1938, on Page 5.

These statements were incorrect. There is nothing in the order requiring payment of a uniform price to *all* producers or that the uniform price or any stated price or any price determinable under the order be paid to producers of the cooperative associations even for milk sold in the marketing area.

About this time a pamphlet issued by the Bargaining Agency was entitled "Mr. Dairyman—Save This Booklet." "The Plan," it explains, "may save your farm." On Page 1, under the heading "Principles Upon Which the Order Is Based," appears this:

> The fundamental requirements of the industry which the order seeks to establish are five in number, viz:
>
> "1. An *equal* purchase price to be paid by *all* dealers for milk for the same use.
>
> "2. An *equal* share to each producer of the benefits of the fluid market."

These are not accurate statements, for the Dairymen's League and other cooperatives are not required to pay a price equal to that paid by proprietary dealers.

Had this order been prepared by and for the Dairymen's League and other large cooperatives, it could hardly have been more favorable to them.

The Dairymen's League and Metropolitan Bargaining Agency publications were sent broadcast

to producers urging them to vote for the order and assuring that they would receive a higher price than they had before received, and radio addresses to like effect were made.

Following this and on August 19, 1938, and for several days thereafter, the Secretary conducted a referendum. The State Commissioner of Agriculture conducted a referendum on State Order 126 at the same times and places.

The referendum was held at the times and places set forth in a schedule of polling places issued by the Secretary prior to the referendum; 308 polling places were designated, of which 233 were in New York, 35 in Pennsylvania, and 16 in New Jersey.

Prior to the referendum there was sent to each known eligible producer a copy of the proposed order as issued by him on August 5th, the schedule of polling places and a pamphlet prepared by him entitled "Questions and Answers on the Federal and State Milk Program for New York," and another pamphlet also prepared by him entitled "New York Milk, Explanation of Federal State Marketing Plan, contained in Order 27."

About 70,000 copies of these documents were sent through Federal and State Agencies to such producers.

The Metropolitan Bargaining Agency, whose largest and most influential member was the Dairymen's League, spent $108,637.91 to promote the adoption of this order covering salaries, publicity, printing, radio, etc., of which $12,385.00 was for radio addresses, $7,979.00, which $12,385.00 was spent during the period between June 1 and September 1, during which time took place the last of the hearings and all the efforts to obtain signa-

tures to the agreement by 50% of the handlers and to procure two-thirds of the producers to vote favorably on the Referendum.

Prior to the referendum a list of cooperative associations entitled to vote for their members was compiled. There were about 22 cooperatives found entitled to vote for their members. A letter was sent to each declaring the requirements for voting for their members. The 22 cooperatives cast 24,903 votes, of which 24,580 were in favor of the order and 323 were against it.

On the referendum held August 19th for several days, 45,664 votes were cast out of a total of 60,220 producers qualified to vote, but 7,017 of the 45,664 were rejected as invalid, leaving 38,627 valid votes. Of these 38,627, 33,663 votes or 87.1% were in favor of the issuance of the order. Of this 33,663 favorable votes, 22,297 or slightly more than two-thirds were cast by the Dairymen's League, Inc., alone as a corporation for its members and other producers delivering milk to it. It had only about 19,500 members.

Of the 7,017 votes rejected as invalid, 5,110 votes were in favor and 1,437 against the order, making a total of 6,547. These were rejected because either the voters were members of cooperatives which had voted for their members or because they were not qualified to vote. 470 voters of 7,017 rejected failed to mark their ballots for or against the order.

Had it not been for these misrepresentations the order might not have had the approval of two-thirds of 38,627 votes counted as valid. 12,876 negative votes would have defeated the order.

No one knows how these producers not voted by the cooperative associations would have voted had they but been correctly informed of the terms and effect of the order, nor how many of the 14,576 voters who did not vote at all nor the 7,017 whose votes were declared invalid would have voted had there been no misrepresentation of the terms and effect of the order.

The statute (Section 8 (c) (12)) is mandatory that the—

> Secretary shall consider the approval or disapproval by any cooperative association * * * as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such cooperative association of producers.

That this applies to approval upon a referendum is made clear by Section 8 (c) (19).

So great was the power and voting strength of the Dairymen's League that no order which it opposed could be approved, for it controlled more than one-third of the entire number of producers entitled to vote.

This, urge the defendants, may explain why the order contains so many provisions claimed to be discriminatory in favor of large cooperatives and against proprietary handlers and small cooperatives.

Nor is it affected by the fact that some of the provisions in the order were the same as in previous but generally futile attempts by state action to beneficially regulate the milk industry.

This is not to be taken as suggesting that the Dairymen's League would not approve an order that was beneficial to the milk industry, but it

must be an order which the Dairymen's League believes will be beneficial.

The Secretary has no right to exclude from voting any cooperative "engaged in marketing the commodity or product thereof, or in advancing the interests of the producers of such commodity." Section 8 (c) (12). Yet the Secretary found only 22 of 193 cooperatives who were entitled to and desired to vote for its members.

The defendant, Schuyler Junction, N. Y., Milk Shed Co-operative made no application to the Secretary for qualification to vote for its members and did not apply for a cooperative ballot and when it attempted through its President to vote in the Referendum for its members the President was told that he could not do so. Upon his insistence that his ballot be taken, it was taken, but the President was told that it would not be counted. This was probably error. The statute fixes the qualifications for cooperatives and no application is necessary. The burden seems to be on the Secretary to ascertain whether a cooperative meets the requirements of the statute and he may not make any additional qualifications such as applying for the right to vote or for a ballot.

The statute says the Secretary "shall" regard the approval or disapproval of a cooperative which complies with the statutory requirements. There seems no reason to doubt that Schuyler Junction Co-operative was entitled to vote and its vote should have been received and counted.

It seems that letters under date of July 8, 1938 (Exhibit 14 to Stip.), purporting to be authorized and directed by the Federal Secretary and State Commissioner of Agriculture, were sent to these

193 cooperatives or so many of them as were then known to exist. The letters said:

> It is expected that simultaneous referenda will be conducted by the Secretary and Commissioner to ascertain if and when such order is perfected for the New York Market.

Certain information and requirements were sought from and presented to these cooperatives, at least some of which was not necessary to determine their right to vote.

In any event they were required to furnish the required information, determine their intention to vote for their members and have such information in the hands of the representatives of the Secretary at Washington and the Commissioner at Albany not later than July 16, 1938. The cooperatives were in the same letter notified:

> In the event the requested information is not submitted, or the Secretary determines that such association is not qualified, the member-producer will be given an opportunity to vote individually and any vote submitted by such cooperative will be disregarded.

Here we have the cooperatives required to give information and determine within eight days, less time out for transportation of mail from Washington and to country districts and back to Washington, whether they favored an order not yet definitely known and whether they wished to vote as a cooperative for or against such order.

Assume four days for transportation (two days each way) that leaves four days for the collection of the information, calling meetings of directors and determination whether the cooperative would

vote for its members on an unknown order and in a Referendum not yet called and not held within a month thereafter. It is not surprising that only 54 out of the 193 cooperatives replied within this limited time and that only 22 had time to determine and so inform the Secretary and the Commissioner that they would vote for their members.

It is reasonably clear that the producers were led to believe that equal uniform prices for all producers would be received under order No. 27.

We hav then a favorable vote obtained or influenced by misinformation as to the terms and effects of the order.

We have also the Dairymen's League alone casting in favor of the order two-thirds of all the votes cast in favor of the order.

Should the conscience of the Court be satisfied that the order should be enforeed when it was adopted on such a referendum and under the circumstances here shown? Manifestly not unless the Secretary's finding is binding on the Court despite the fact that some of the misinformation was contained in departmental literature sent to producer voters.

It is said that the Secretary cannot be held responsible for the acts of the Bargaining Agency and the Dairymen's League. There can be little doubt of the cooperation between Federal and State Agents with the cooperatives to bring about a favorable vote for the order in the Referendum. Of this, the Secretary himself was probably unaware and relied on his subordinates. Indicative of cooperation is the misleading statement in the Department's published statement of August 1938,

taken verbatim from the Dairymen's League News of August 16, 1938.

After the order became effective on Sept. 1, 1938, strenuous efforts were apparently made to persuade or coerce proprietary handlers to sign the marketing agreement, every handler signing the agreement estopped himself from any legal attack on the order after signing and for a period of 31 to 59 days after he should withdraw from the marketing agreement.

Specific instances of diversion of withholding of milk from dealers until they signed the marketing agreement appear in the record and some of them were the result of official pressure, but not directly by the market administrator.

Effort was made to persuade at least one producer to withhold milk from the defendant Jetter Dairy Company. Publications by the Bargaining Agency and the Dairymen's League, letters by officers thereof, frankly suggest pressure, if not more, to persuade the handlers to sign the marketing agreement.

In the Dairymen's League News of Sept. 26, 1938, on the front page appeared an article headed:

PRODUCERS READY TO DIVERT MILK FROM NON-COMPLYING DEALERS

League gets thanks from Bargaining Agency for its offer of marketing facilities.

VOLUNTEER ENFORCEMENT AGENTS—100 STRONG WORKING THE ROADS LAST WEEK

This action followed a meeting of delegates of the Metropolitan Co-operative Milk Producers Bargaining Agency in Syracuse Sept. 10th. The delegates voted to have 100

farmers go out as volunteer enforcement agents to "crack down" on delegates who have not signed the marketing agreement.

* * * The Dairymen's League Plants are open * * * and others too, said Mr. ——— (A State official). Call me up. I'll tell you where to put your milk. You won't have to divert very long before these dealers will be ready to sign up.

In the Bargaining Agency's "Milk Producers Market News" for October 1938 appeared this:

Please bear in mind that our able Secretary who is in charge of the "Minute Men" is doing a fine job and these men are on the watch at all times for disturbances, chiseling, and other items that are not for the best interests of your producers.

Other statements of suggested coercion and force are frequent.

On September 21, 1938, an officer of the Bargaining Agency issued a letter which was circulated among the producers, including those of the Jetter Dairy Company.

Among other things the letter said:

* * * almost every dealer in the Metropolitan Market has signed the agreement. In some instances it has been necessary to exert producer pressure and the willingness of producer to cooperate in withholding or offering to withhold their milk until their dealer signed, has been encouraging and gratifying.

From Sept. 1, 1938, to December 1, 1938, the Bargaining Agency has spent $31,348.98.

It is not an unreasonable inference under the evidence of persuasion, pressure, and coercion, that no small part was spent in obtaining the signatures by handlers to the marketing agreement to prevent litigation which the agency asserted had impaired the effectiveness of the order in the Boston Marketing area.

The record shows clear evidence that the Dairymen's League and the Bargaining Agency, aided by some officials not Federal, brought about the signing of the marketing agreement by nearly all the handlers.

Efforts were made to persuade the producers of the cooperatives delivering to the defendant Jetter Dairy Company and others who had not signed the marketing agreement to transfer their milk to other handlers, by representations that the producers delivering to Jetter and others might not be paid for their milk.

It is urged that these post-referendum happenings are not relevant either as to the referendum or as to the terms, conditions, or validity of the order or of the statute. The question is not free from doubt. But they seem to this Court to fit into and illustrate the design to prepare, present, and secure the approval of this order, first by the public authorities and then by the producers in the referendum on this order, apparently so greatly desired by the Dairymen's League, the Bargaining Agency and the large cooperatives and large handlers, and also to aid in understanding the operation and effect of the order.

Without doubt, the Secretary of Agriculture hoped and believed order No. 27 and its comple-

mentary State order No. 126 would remedy the chaotic milk situation in the Metropolitan Area, which had been a vexatious and seemingly unending problem to legislative bodies and executive authority. Undoubtedly the State Commissioner of Agriculture had like hope and belief.

It may be assumed that the Bargaining Agency and Dairymen's League Cooperatives believe that these orders would solve the milk problem when they prepared and put forward their proposed order or orders. The results, however, have not justified such expectations.

The results of the operation of the order would not ordinarily be a matter of judicial concern, but if such results have the effect of taking the property of one set of handlers without compensation and giving such property to another set of handlers, amounting to what the defendants call confiscation, it bears upon the validity and constitutionality of the order and the statute.

It is agreed here that handlers must receive not less than 9¾ cents per quart for milk in glass bottles sold to stores and other retail dealers in order to pay for full butter-fat content and all other charges and make full payment under the order to producers.

This price is based upon efficient operation and makes no allowance for inefficiency.

About September 1st, the price to retail distributors was advanced to 9¾ cents per quart. Within two weeks cut throat competition under the order reduced this price to a level of from 8 to 9 cents per quart and milk was being sold generally at that price to dealers and store trade in the metropolitan

area. This is about the same price that prevailed before the order became effective.

Some time prior to September 1st, 1938, the Jetter Dairy Company had been selling to one Weintraub thirty cases of milk daily and the price of the milk on that date was 9¾ cents per quart. On September 4th, 1938, the Dairymen's League solicited said account and by selling milk at 9 cents per quart acquired 10 cases of said trade. Gold Medal Farms Inc. by the same price cutting on the same date also acquired 10 cases of the trade of the said Weintraub. In order to retain the balance of 10 cases of such trade the defendant Jetter Dairy Company was compelled to reduce its price to 9 cents per quart on September 5th, 1938.

The Sheffield Farms Company offered one Herman Lavender milk at 9¾ cents per quart on all milk purchased and in addition thereto delivered 13 quarts per case instead of 12 quarts, the extra quart of milk further reducing the price ¾th cents per quart, making a net cost to Lavender of 8¼ cents per quart.

The Sheffield Company, a subsidiary of National Dairy Products Corporation, also sold milk to one Rose Paley. This Company gave her 35 cases of free milk to induce her to buy Breakstone milk, the latter being also a subsidiary of National Dairy, and its milk being sold by the Sheffield Company.

The Dairymen's League also gave the same Rose Paley 35 cases of free milk to procure her using the Dairymen's League Milk.

The Sheffield Company delivered milk to Mrs. Paley at 9¾ cents per quart and collected that

amount and rebated to her in cash at the rate of ¾ cent per quart. The Dairymen's League billed milk to her at nine cents per quart.

The Grant View Dairy Company, which had been selling Mrs. Paley milk refused to give her any free milk and she discontinued buying from it and obtained all her milk from Sheffield's and the Dairymen's League, who made the aforesaid concessions.

The practices above referred to were general throughout the marketing area and therefore the price of milk to grocers and other retail distributors was lowered to a price varying from 8 to 9 cents per quart. Producers who sell directly to the grocers and retail distributors are not subject to the order, selling their own milk and do not have to pay the producers a uniform price nor do they have to pay into any producers settlement fund.

One of these, the Balsam Dairy Company, a producer dealer, owning a large number of cows and free from the order, selling milk in Brooklyn, sold milk to Israel Hoch in September and October in Brooklyn at 8½ cents per quart and presumably since.

From September 1st, 1938, to January 1, 1939, the defendant Jetter Dairy Company lost 240 cases of daily sales of milk to competitors by reason of these concessions. The Jetter Dairy Company handles a minimum of 40,000 quarts per day. The result—a loss of 1 cent to 1½ cents per quart has been from $400.00 to $600.00 per day.

The average quantities of fluid milk sold by the Dairymen's League, including milk distributed directly by the Dairymen's League and milk sold by the Dairymen's League to Distributors during the months of September, October, and November 1938, was approximately 26,000 forty-quart cans or a total of 1,640,000 quarts daily, constituting about 34% of the fluid milk in the marketing area.

If the Dairymen's League had to pay the same uniform price to producers as does the Jetter Dairy Company and other independent proprietary handlers, on the same basis of sale at 1 to 1½ cents below the cost price of 9¾ cents per quart, the Dairymen's League would lose from $10,400.00 to $15,600.00 per day. But the Dairymen's League does not pay the uniform price to these producers, and is not required by the statute or the order to do so. It may deduct such losses from its price paid to producers. Besides that, it may recoup itself in other ways by service charges and milk sales out of the district.

The amount paid to producers by the Dairymen's League for Class I Milk, at the base for 3.5% butterfat content in the 200-mile zone in cash and certificates of indebtedness to be taken as cash are as follows:

September 1.75%.
October 1.81%.
November 2.01%.

While the uniform price fixed by the administration on the same basis of 3.5% milk for the 200-mile zone was as follows:

September 1.87%.
October 1.91%.
November 2.10%.

It will be seen that the uniform price which the proprietary handlers paid to the producer was greater than that paid by the Dairymen's League to the producers as follows: September 12 cents, October 10 cents, November 9 cents per cwt.

Another source of great discrimination in favor of the large milk operators who can sell in the outside market is contained in the provision that the handler may blend the price of milk sold in the outside market with the milk in the Metropolitan area.

The Dairymen's League sold large quantities of milk, called unpriced milk in New Jersey, averaging more than 10,000,000 pounds per month.

The producers' price of milk in New Jersey is fixed by the State Board at $2.76 per cwt. It is not established in the evidence that the Dairymen's League received that price for its milk produced in the New York Production area and sold in New Jersey.

While the Dairymen's League offered the defendants almost all the things they desired about their prices and quantities, etc., the prices at which the Dairymen's League sold in New Jersey was not disclosed and the Court did not require its disclosure.

The New Jersey State Board fixes the resale price of milk sold to stores at 12 cents per quart, in rural districts and 13 cents per quart in the three heavily populated districts.

This compares with prices of 8 to 9 cents per quart received for such milk wholesale in the Metropolitan area.

It is a reasonable inference that its milk was sold at about the fixed price in New Jersey or at

very little less than that price, if such price was not obtainable.

The records of the Dairymen's League show that they sold about 20% of their entire sales in New Jersey.

If they sold at the base price of $2.76 per cwt. in New Jersey, the difference between the amount which the Dairymen's League received from this New Jersey Milk and the price it paid to the producers for September is $1.01 per cwt. ($2.76—$1.75). For October the difference was 95¢ per cwt. ($2.76—$1.81). For November the price was 75¢ per cwt. ($2.76—$2.01).

The price which the Dairymen's League paid to its producers for this large quantity of milk (10,208,500 lbs.), amounted for the September milk to $178,648.00. This is on the basis of about $1.75 per cwt. Assuming a sale price of $2.76 per cwt., this leaves about $103,195.00 profit on this milk sold in New Jersey in September from which must be deducted transportation charges and certain other expenses but which could not be measurably greater than on milk sold in the marketing area.

This sale was in the fixed price market in New Jersey whereas the sales in the Metropolitan area were in the competitive market with no prices fixed and where the milk sold at from 1 to 1½ cents per quart less than it cost for production and delivery.

Strenuous objection was made by the defendants against disclosing prices which the group of handlers, of which Aarun J. Rubenfeld is the head, received in the New Jersey market, where most of his direct sales of fluid milk was made and where 99½ percent of all the milk from the State Hill plant was sold as fluid milk.

It hardly admits of doubt that higher prices were received in the New Jersey market were fixed selling and resale prices have long been maintained than in the Metropolitan market area where unbridled competition exists.

It is quite true, as urged, that the defendants might have applied to the Secretary of Agriculture for a modification of Order No. 27 in some or all of the respects in which they are aggrieved thereby.

But it is not to be supposed that there could be quick action upon such an application for modification of the order and in the meantime great detriment might result to the handlers.

The handler must comply with the order during such time as it takes for the Secretary to entertain, hear, and decide the application for modification of the order and for such further time as it takes for a Court to decide whether modification should have been granted.

The statute also provides:

See also *U. S.* vs. *Melvin Child Andrews* (D. C. Mass., January 18, 1939, not yet reported) where any substantial amount of money is involved administrative relief is of little value.

But the order could not be amended in the two most important particulars, viz, cooperatives are exempt from payment of the uniform price to producers and the order is required to permit cooperatives to blend prices received in outside markets with prices received in the marketing area. Adjustment through a scheme such as the Producers' Settlement Fund is also provided by the statute so administrative relief would be futile.

Furthermore it is the Government and not the handler which brings this suit. Also, the power

does not lie with Congress to require one whose property is being taken in violation of the 5th amendment to pursue some prescribed administrative remedy during which time his property continues to be taken before he can apply to the Courts for protection and relief.

In a proper case, immediate resort to the Courts cannot be denied for any reason whatever.

The things of which defendant Jetter most complains are the provisions of the directing statute that cooperative associations need not pay the uniform price to producers which is contained in Section 8 (c) (5) (f), the only limitation being that such a cooperative shall not sell its milk products to any handler for less than the fixed uniform price.

This section also provides for the blending of the net profits of all these sales in all markets and in all use classifications. These are two of the things which are most discriminatory.

Article 7, Section 1, provides that all handlers other than cooperative associations shall pay producers not less than the uniform price. It is by the construction and operation of this act that the cooperatives do not pay the uniform price, and may blend the price of milk sold outside of the State and in other classifications with fluid milk sold in the marketing area and thereby reduce the price paid by them to producers which is never, even for fluid milk, the price required to be paid by proprietary handlers.

The cooperatives also receive payments out of the Producers Settlement Fund that are denied to the proprietary handlers, sometimes amounting to as much as five cents per cwt.

The cooperative handlers may charge to the producers and deduct from the price paid for the milk, expenses of plant operation which run from 15 to 20 cents per cwt. of fluid milk. Proprietary handlers cannot make such deductions of amounts paid for expenses of operation themselves.

While all handlers are allowed 23 cents per cwt. plus transportation costs for milk received at each station equipped only for receiving and shipping milk and transporting the same to another plant where it is utilized for other than fluid milk purposes, only the large cooperatives and large proprietary dealers are equipped to received this 23 cents charge.

Cooperatives which are also milk dealers or handlers, may and do pay their producers less than the uniform price and from their payments into the Producers Settlement Fund, if any, they receive payments back for services, which proprietary handlers cannot, and do not, receive.

In fact, there is very little that a proprietary handler, who does not sell any milk outside the marketing area, and who has no plant to which he can transfer surplus milk, can do to recoup his losses. He cannot reduce his price by "blending" a fictitious value on "unpriced" milk with that sold in the area. He has no unpriced milk. He has no manufacturing plant, and may possess neither capital or inclination to enter the manufacturing field already principally covered by Dairymen's League, Bordens, National, and some of the larger independents.

The discrimination between the small proprietary handlers and the Dairymen's League will be

manifest from the following illustration of the comparative operation of the statute as applied in Order No. 27 as it affects the defendant, Jetter Dairy Company, and the Dairymen's League. The figures include all the differentials in favor of the cooperatives.

The loss per quart is from 1 to 1½ cents per day for milk sold in the market area.

Jetter sells 40,000 quarts per day, all in the marketing area, at a loss of $400.00 to $600.00 per day because required to pay the uniform price to producers.

The Dairymen's League sells about 1,640,000 quarts per day, or 41 times as much as Jetter. Dairymen's League sells without loss, for what it does not gain from sales in New Jersey and other out-of-State markets, together with the service and other differentials, it may deduct from its producers because it is not required to pay the uniform price.

> Jetter owes to Producers Settlement Fund for September and October, $30,000. (September payment has been made.)
>
> Dairymen's League paid to Producers Settlement Fund for September and October, $110,000.

or only about 3½ times as much as Jetter.

Dairymen's League received from the Producers Settlement Fund under Article VII, paragraph 5, in September $59,455.59, and in October $60,794.07, or a total of $120,239.66, which is about $10,000 more than it paid in.

In addition, it received from this fund under Article VII, section 6, in September $91,630 and in October $73,994, making a total of $165,524.

Adding this to the aforesaid $120,239.00, it makes a grand total of $285,763.

This is about $175,000 more than the Dairymen's League paid into the Producers Settlement Fund. Jetter received nothing. Jetter loses at a $400.00 to $600.00 per day loss, on a 30-day month, $12,000 to $18,000. In a year that amounts to $144,000 to $216,000. One year's payments into the fund at $15,000 per month would be $180,000. In less than a year it is practically certain that all the assets of the Jetter Company would be taken by the operation of the order, and it would have no funds or assets to pay producers or to make further payments into the fund. In short, its entire property would be confiscated. This is by force of the statute as applied in the order.

As a matter of fact, the defendant Jetter Company could not last a year. It had on April 1, 1938, only $50,000 capital and $30,000 surplus, or a total of $80,000. The taking of its capital at the rate of only $15,000 per month would exhaust its entire assets within 6 months.

Moreover, there is nothing to prevent the Dairymen's League and other large producers from further depressing the price of milk sold in the marketing area in order to capture the customers of competitors and thus forcing the Jetter Dairy Company and others in like situation out of business at an even more rapid rate.

The Dairymen's League Cooperative, however, could go on indefinitely for the statute and order are greatly discriminatory in favor of cooperatives, especially large ones, which can take advantage of all the opportunities it presents.

The property of the Jetter Company, and, of course, all other proprietary handlers and smaller cooperatives is thus taken by operation of statute and without the due process of law required by the Fifth Amendment.

This brings us to the consideration of the questions of law here involved, apart from the misrepresentations to producers in connection with the referendum.

The two most important questions of law are these:

1. Does this statute as applied in the order, in its operation under the conditions here existing, violate the Fifth Amendment to the Federal Constitution prohibiting the taking of property without due process of law?

2. Can the discriminations in favor of cooperatives be upheld under the circumstances here existing on the ground that producer cooperatives may legally receive the special preferential treatment provided in order 27?

It is held by high authority that even though a statute may be constitutional on its face, and may be valid when enacted or when given a particular application, it may be invalid under changed conditions or when given an application which results in arbitrary and prejudicial discrimination or when its operation results in the taking of property of one without compensation and transferring it to another.

Concordia Insurance Company v. *Illinois*, 299 U. S. 535, 545.

Borden Company v. *Baldwin*, 293 U. S. 194, 210. See also *Arrway Corp.* v. *Day*, 266 U. S. 71, 85.

Nebbia v. *New York*, 291 U. S. 502, 537.
Great Northern Ry. v. *Washington*, 300 U. S. 154.

The acts of Congress under the commerce clause are subject to the Fifth Amendment.

Currin v. *Wallace, supra.*
Railroad Retirement Act v. *Alton R. R.* 295 U. S. 330, 347.
Monongahela Navigation Co. v. *U. S.* 148 U. S. 312, 336.
U. S. v. *Chicago, Milwaukee & St. Paul R. R. Co.*, 282 U. S. 311, 327.

Congress has not the power under the Commerce Clause, or otherwise, to take without compensation property of one and transfer it to another. And this is so, even though it be for a valid public purpose as is claimed here and as the statute intends.

Railroad Retirement Board v. *Alton*, 295 U. S. 330, 359.
Monongahela Nav. Co. v. *U. S.*, 148 U. S. 312, 336.
Louisville Joint Stock Bank v. *Radford*, 295 U. S. 555, 580, 602.

There can be little doubt that the statute, as applied in the order by means of the Producers Settlement Fund, takes the money from one group without compensation and transfers it to another, however disguised that transferring and taking may be, by representing it to be necessary to stabilize milk production and to take care of surplus milk.

The Milk Producers Settlement Fund here bears a close resemblance to the pooling fund, to which, under the Railroad Retirement, the large

carriers were required to contribute for the benefit of employees of the weaker roads.

That act was enacted under the commerce clause and was held to violate the Fifth Amendment because it took "the property or money of one and transferred (transferring) it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension the employees."

The money taken from one (Jetter) was in effect transferred to another (Dairymen's League and some other large cooperatives) for the benefit of the producers of such cooperatives and in effect for the benefit of those cooperatives themselves.

The Fifth Amendment is intended to protect the property and affairs of all citizens alike, regardless of all other considerations, and forbids the taking of the property of one without compensation and transferring it to another.

All the public purposes declared to be the object of the Railroad Retirement Act were set aside as no consequence in face of the Fifth Amendment. So here, the welfare of the producers and cooperatives, sought to be served by the agricultural marketing agreement act must be set aside, because here, as in the Alton case the property of one by the force of the statute and order, is taken and transferred to another in violation of the Fifth Amendment.

This case has analogy to *Thompson* v. *Consolidated Gas Utilities*, 300 U. S. 551, even though the statute there involved was a state statute.

The validity of the extractions from one for the benefit of the other cannot be supported by the so-called "pooling" cases upholding workmen's com-

pensation acts (*Mountain Timber Company* v. *Washington*, 243 U. S. 219; *N. Y. Central Railroad* v. *White*, 243 U. S. 188; nor by the statutes requiring banks to contribute to a common fund for insuring deposits (*Noble State Bank* v. *Haskell*, 219 U. S. 104; *Abie State Bank* v. *Bryan*, 282 U. S. 765).

These cases were cited in the Alton case and distinguished by Court and held without analogy.

In all those statutes there was a possible future benefit to be received by the one whose contribution was required. There is no possible benefit to be received here by the contributors.

The *New England Divisions Case*, 261 U. S. 184, and *Dayton-Goose Creek Railway* v. *U. S.*, 263 U. S. 456, are equally without application here. There a fair return either by rate or on the investment was provided. Here no fair return is provided. The requirements of the statute and order not only do not provide for a fair return or any return on the investment but in fact take the entire investment in periodic exactions.

These cases were also distinguished in the Alton case:

> *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163, upon which some of the plaintiffs rely, has little application here.

There was no producers' settlement fund or other pooling arrangement for payments by one of the beneficiaries to another. The decision was influenced there by the failure of any showing by the plaintiff that his handicap in competition was not due to his own inefficiency.

There is no question of inefficiency, as has been shown.

It is said that the losses suffered by Jetter Dairy Company and others are caused by the competitive conditions in the marketing area and not by reason of the statute and order. It is the order under the statute which compels the proprietary handlers to make fixed payments to producers and other payments into the milk producers settlement fund and causes these large losses, while permitting cooperatives to pay what they please to producers and giving such cooperatives, especially large ones, other discriminatory preferences, both as to the amount paid into and withdrawn from the producers settlement fund. These grossly discriminatory provisions permit in such a competitive market by means of the settlement, the taking of the property of some and transferring to others without compensation and thereby eliminating them entirely from the competitive field.

This competitive condition was known when the statute was enacted and the order was issued, for it had long existed and could not be cured by any and all the previous attempts at remedy. These defendants have no power or control over these competitive conditions. Efficiency is not a factor.

This is not a case of "protecting a business against the hazards of competition" as plaintiff's counsel assert, citing *Hegeman Farms Corp.* vs. *Baldwin,* 293 U. S. *Supra.*

This is more like a case of statutory disarming of one set of competitors and sending into competitive battle with another set to whom the same statute supplies arms.

Neither the order nor the statute made any attempt to remedy the competitive conditions and the operation of the order must have been foreseen.

In any event the statute as applied in the order brings the arbitrary discrimination and disaster hereinbefore shown.

Nebbia vs. *New York*, 291 U. S. 502, has little analogy. There the New York Statute fixed minimum prices for the sale of milk at retail and provided a penalty for violations. The case came before the court upon a conviction for selling under price.

The Court does in its opinion summarize the conclusions of the Legislative Committee respecting the milk industry of New York. These conclusions refer to the desirability of compelling an equal sharing of the burden of the surplus milk by all producers and distributors. These statements, however, are those of the committee and not of the Court.

Public Service Commission vs. *Great Northern Utility*, 289 U. S. 130, is inapplicable. In that case there was in the first instance no allegation and no proof that the rates prescribed were confiscatory. Amendment to allege confiscation but without proof, was held unavailing.

There are no decisions of any appellate Court upholding such an order as this under provisions of this statute.

U. S. vs. *David Buttrick Company*, 91 Fed. (2nd) 66, C. C. A. 1, merely decided that the provisions of the agricultural adjustment act relating to milk were not covered by the decision in *U. S.* vs. *Butler*, 297 U. S. 1, which declared other provisions of that act void.

The district court had held the whole act void under the Butler case and the Circuit Court of Ap-

peals reversed and sent the case back for trial. The case related to the statute before its amendment in 1937.

In *Hood & Sons, et al.* vs. *U. S.*, 97 Fed. (2nd) 677, C. C. A. 1, the District Court granted a temporary mandatory injunction of the same kind sought here.

On appeal the C. C. A. modified the injunction and directed the payment into the registry of the Court of the moneys required under the temporary injunction to be paid to the market administrator. The C. C. A. held that the defenses were not frivolous and should be heard by the District Court before final decision.

In *Whittenberg, et al.* vs. *U. S.*, 100 Fed. (2nd) 520, the Secretary of Agriculture brought suit against a handler of citrus fruits in Texas from violating the order there involved. There more than 50% of the handlers had signed the marketing agreement and the order was approved by two-thirds of the producers.

The Secretary made weekly regulations forbidding shippers to ship in interstate commerce and to Canada grape fruit below stated standards of *size* and *quality*.

The Court held the provisions of the act constitutional.

The Court relied chiefly on *U. S.* vs. *Buttrick*, 91 Fed. (2nd) 66, *Supra*, and *Edwards* vs. *U. S.*, 91 Fed. (2nd) 767, later referred to and on the *Currin case*, 93 Fed. (2nd) 856 (Affirmed by the Supreme Court).

It will be noted that there was no equalization fund or producers settlement fund as here and no differentials or other discriminatory preferences.

The handler was not required to pay into any fund for transfer to others and the handler was on the same basis as all other handlers having inferior fruit.

Edwards vs. *U. S.*, 91 Fed. (2nd) 767 C. C. A. 9, contains no equalization scheme and no fund like the Producers Settlement Fund here into which one set of handlers are to pay into a fund to be transferred to other handlers. The order complained of there merely prorated the shipment of fruit in interstate commerce. It has little analogy to the order and conditions here.

Wallace vs. *Hudson Duncan Company*, 98 Fed. (2nd) C. C. A. 9,985, is not in strict analogy. The case related to unshelled walnuts.

In that case the order issued by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended, and held valid by the Court required that a packer (not a grower):

> either (1) must sell or hold all the walnuts it acquires in the state of acquisition, or (2) export from the State not more than a percentage of its intended shipments determined (percentage) by the Secretary for each crop year—upon consideration of the delivery of the remainder of such intended crop export to a control board.
>
> The Board may sell the walnuts it received to purchasers abroad or to shellers within the United States, at prices fixed by the Board, or may elimmate all or part of them from the market by donation or sale to charitable institutions in the United States, with provisions that such sales or donations shall not enter the U. S. as unshelled walnuts.
>
> The Board also has power to release to interstate shipment through the contribut-

ing packers all or portions of the surplus delivered to it, if in its opinion, the proper control of the interstate market warrants it. The proceeds of the distribution of the surplus and payments of credit value by the shippers are to be ratably apportioned and distributed to them by the Board.

or (3) May export from the state all of its intended shipments upon consideration of a payment to the Board, not of what the Packer has sold them for, but for a certain "credit value" fixed for all shippers by the Board, of the surplus walnuts which would otherwise have been delivered to the Board.

While that order has seeming similarity to the order here involved there are distinguishing differences.

1. There is no discrimination among packers as there is among handlers here where cooperatives are given a decidedly preferential position.

2. There are no prices fixed to be paid to producers as is done here.

3. There the object is to maintain the price of walnuts in the interstate markets, while here the sole object is to secure a price to producers before the milk passes into interstate commerce and no thought is given to prices in the interstate market which are subject to cut-throat competition largely by those given a preferential status in the order.

4. There the packers who deliver walnuts to the Control Board, the proceeds of the sale of which, if sold are distributed ratably to the same packers who delivered to the Board, while here the payments out of the producers' settlement fund are not paid to handlers ratably, but on a plan involving preferential treatment based on whether or not the

handlers are cooperatives and whether they render services or not. Also here payments into the pool are subject to gross discrimination.

5. There the walnuts might be kept or sold in intrastate commerce free from the order. Here milk cannot be kept for it is highly perishable. Here, if sold in intrastate commerce in the marketing areas, it became subject to State Order No. 126 which provides for the same payment to the same producers' settlement fund.

In the *Hudson-Duncan* case the Court recognized that such a regulation would be violative of the 5th amendment if unreasonable, arbitrary, or capricious, citing *Nebbia* vs. *New York,* 291 U. S. 502, 525, but held that the regulation was reasonable with one judge dissenting. It will be seen that the *Hudson-Duncan* case has little analogy to the case at bar.

In *U. S.* vs. *Melvin Childs et al.,* D. C. Mass. (Jan. 18, 1939, not yet reported) mandatory injunction was granted to the Secretary requiring the defendants to pay into a milk-price equalization fund. Whether or not there was other discriminatory provisions such as exist here is not disclosed. The discussion relates chiefly to whether all the defendants were engaged in interstate commerce. The opinion discloses that the judge writing the opinion believed there should be uniformity of decision in the District Court of that district. That decision is not controlling or persuasive here.

U. S. vs. *Goldsmith Fruit Company,* 19 Fed. Supp. 147, upheld the order of the Secretary under the Act before its amendment in 1937. That order had practically none of the provisions here and the case is not analogous.

It is also in direct conflict with *Fosgate* vs. *Kirkland,* 19 Fed. Supp. 152, decided one month later in the same district, in which later opinion the Judge said he could not follow the Goldsmith case.

There apparently are no further decisions under the act which have any analogy to the order and the facts here existing.

The defendants make some further contentions which may be briefly considered. It is urged that no provision of the statute authorizes Articles VII, Sections 5 and 6 of the order.

These relate to payments of 5¢ per cwt. to cooperatives and market services of 23 cents per cwt. and transportation charges, both to cooperatives and proprietary handlers.

The court does not find any sections of the act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced.

It is also urged that Congress in the Act has neither fixed the price to be paid to producers nor prescribed a formula for fixing such price. This is not free from doubt.

If, without prescribing the price or a formula for determining the price, the statute authorizes the Secretary with the approval of two-thirds of the producers to fix a price without laying down standards to be applied, then there seems no escape from the conclusion that the statute delegates to the Secretary and producers powers which are essentially legislative and such delegation of power is invalid whether the delegation is to the Secretary or the producers separately or to both together.

Carter vs. *Carter Coal Company*, 298 U. S. 310,

The case would then come within the decision of the Carter case rather than within *Currin* vs. *Wallace, Supra.*

Since the decision may be reached on other grounds, this question need not be decided.

Plaintiffs cite many statutes, both State and Federal, providing for certain preferential treatment to producers and cooperative associations of producers, certain cases in which the validity of some of them have been upheld. But none of these statutes carry any such arbitrary, discriminatory provisions as the applicable provisions of the Agricultural Marketing Agreement Act and order 27. None take from one and transfer to another without compensation. Some are tax cases where producers selling their own products are classified differently from dealers who are not producers and exempted from a tax imposed on such dealers. Some relate to classifications of dealers or other persons not many of which relate to cooperatives.

Warehouse Company vs. *Tobacco Growers*, 276 U. S. 71 is the case most relied upon. A Kentucky statute aiming to assist agricultural producers in the orderly marketing of their crops, authorized the incorporation of nonprofit associations with membership confined to producers, to contract with their respective members for ten years to market the members' crops. It also provided that any warehouseman knowingly inducing such member to break his contract by receiving such members tobacco for sale or auction should be liable for a penalty of $500 to be recovered in a civil suit by

a cooperative. The Supreme Court upheld a judgment so recovered. The lack of analogy is clear.

In *Frost* vs. *Corporation Comm.*, 278 U. S. 515, the discrimination in favor of cooperatives there involved was held to be unconstitutional.

Chicago Board of Trade vs. *Olsen*, 262 U. S. 1, has no analogy.

In *Eisenberg Farms, Inc.* vs. *Baldwin*, 265 N. Y. 662, it was contended that the New York Milk Control Law was unconstitutional because it failed to require cooperative associations to return to their producers the prices fixed by the state milk control law. The Court of Appeals sustained the statute, but without opinion. The decision in the Eisenberg case was explained, however, by the Court of Appeals in Matter of *Mayflower Farms, Inc.* vs. *Baldwin*, 267 N. Y. 9, 12, as follows:

> In Matter of *Eisenberg Farms, Inc.* vs. *Baldwin* (265 N. Y. 662), this Court decided that the differential clauses in favor of cooperative associations which permitted them to pay to producers less than the price fixed by the Commission for milk was Constitutional.

It may be said that the Court in 265 N. Y. 662 wrote no such opinion but did uphold the lower court so deciding.

The discrimination in favor of cooperatives in that statute is but a small matter compared to the comprehensive discriminatory scheme provided in the Marketing Act and Order 27, and can have little bearing here.

There is no need to prolong the discussion of statutes or decisions relating to cooperatives. There are no authoritative cases upholding any

such discrimination in favor of cooperatives as here exists. None say that the 5th amendment permits one to be treated differently from another. The defendant cooperatives are not quite in the same situation as the Jetter Dairy Company. It is quite true, as the Government contends, that they may not complain of any preferential treatment of cooperatives of which they may take advantage.

> But there seems no good reason why they may not complain of discriminatory preferences of which only the large dealers, cooperative and proprietary handlers, may avail themselves, such as the 23 cents per cwt. for transfer of milk from a nonmanufacturing to a manufacturing plant, the blending of prices for which unpriced milk may be sold in New Jersey and other nonmarketing area markets with prices of milk sold in the marketing area. They can avail themselves of none of these preferential provisions of statute and order.

The order is also discriminatory as against them. They pay money which would otherwise be distributed to their producers to the Settlement Fund, in order that it may be paid out to the large cooperatives and large proprietary handlers. They are forbidden by law to sell milk in the area at less than the prices fixed by the order. They are also required to pay into the Producers' Settlement Fund to provide preferential payments made to producers living in 18 counties, under the provisions of Article 6, Section 8. The producers in those counties receive 20¢ per cwt. in addition to the locational differentials which return them a higher price for their milk because they are located nearer

New York. By this means, moneys of the Rock Royal and the Schuyler Junction and Central New York Cooperatives are taken to be given to other producers, for the most part, delivering to the three large proprietary and cooperative handlers, without compensation to these small defendants.

If they pay into the producers' settlement fund on the order basis they like also the smaller proprietary handlers, though in lesser degree, suffer confiscation of their property by the same taking from one and transferring to another.

There can be little doubt that under the situation existing when the order became effective, the large dealers doing 70% of the business in the marketing area enjoy discriminatory preferential treatment over most of the handlers doing the remaining 30% of the business.

There remains to be considered the separate contention of the defendant Central New York Cooperative. This defendant contends that it does not come within the terms of the order because as a cooperative marketing association it merely acts as an agent for the producers in marketing their milk; that their legal status is that of producers marketing their own milk, which, if true, removes them from the operation of the order.

Central New York Cooperative has paid uniform prices to its producers and has left after such payments and payments of all expenses a sum not exceeding half the amounts fixed by the administrator for payment into the Producer Settlement Fund for each month.

This cooperative is incorporated under the laws of the State, rents milk receiving plants, where, as it contends, it receives milk as their agent, from

producers who are members and some others under contract with it and still as agent delivers the milk to other agents who are wholly owned subsidiary corporations, who sell to stores and retail distributors. The proceeds of the sale come back to the defendant cooperative, presumably less the expense of the selling agents and are paid to the producers less the expense of operating the receiving plants.

Such a claim that the Central New York Cooperative and its subsidiary corporations are merely agents for the producers is somewhat difficult to accept. This cooperative owns no farms or cows and directly produces no milk.

The Government contends that such a cooperative is a handler within the definition of handler and therefore liable for payment into the producers settlement fund. It is not free from doubt that such a definition is entirely supported by the statute. Moreover, under a similar contract it has been held that such a relation is one of joint venture and not a sale.

Rhodes vs. *Little Falls Dairy,* 230 A. D. 571, Affirmed in 256 N. Y. 559.

It is, however, not necessary to decide this question, for even as a cooperative handler, Central New York Cooperative suffers the same discriminatory treatment as the other defendant cooperatives who by reason of the fact that they cannot avail themselves of all the opportunities for withdrawal from the Producers Settlement Fund that are enjoyed by the Dairymen's League and other large handlers selling in the New Jersey Market and receiving the other preferential differentials,

find their property taken under the order without compensation and transferred to another.

The final conclusion is that the statute, as applied in the order, is unconstitutional as to all the defendants in its application to the situation and conditions here existing and that the order was not approved in accordance with the provisions of the statute and should not be enforced.

Judgment may be entered dismissing the complaints as to all defendants, with one bill of costs against the Dairymen's League and Metropolitan Bargaining Agency. February 23, 1939.

EXHIBIT C

United States District Court, Northern District of New York

UNITED STATES OF AMERICA, PLAINTIFF, AND HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, INTERVENING PLAINTIFF

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

John S. L. Yost, Charles J. McCarthy, Special Assistants to the Attorney General.

Ralph L. Emmons, United States Attorney.

Harold L. Schilz, Special Assistant to the Attorney General.

E. O. Mather, Senior Attorney, Dept. of Agriculture.

Milo R. Kniffen, Counsel, Department of Agriculture and Markets of the State of New York.

Robert G. Blabey, Assistant Counsel.

Willard R. Pratt, Utica, N. Y.; Charles W. Jenkins, Deposit, N. Y.; Haskell & Foley, Cortland, N. Y.; Attorneys for Defendants.

COOPER, J.: This is a motion by the plaintiff to strike from the answer of the defendant Jetter Dairy Company, Inc., and of other defendants, certain paragraphs relating chiefly to affirmative defenses.

The grounds of the motion are that said paragraphs:

(a) Fail to state a legal defense to plaintiff's claim, and

(b) Contain only allegations which are redundant, immaterial, impertinent, and scandalous.

The intervening plaintiff makes a like motion on the same grounds to strike out the same paragraphs.

The Jetter Dairy Company, Inc., is a New York State Corporation engaged in the business of buying fluid milk from producers and selling it to consumers through a jointly owned subsidiary corporation.

On August 5th, 1938, the Secretary of Agriculture of the United States, hereinafter called the Secretary, issued Order No. 27, effective Sept. 1, 1938, under the provisions of the Agricultural Marketing Agreement Act as amended in 1937. This order was to be carried out under the direction of a market administrator appointed by the Secretary.

Among other things Order 27 provided that the method for the fixing of prices monthly for prices to be paid to the producers and for the establishment of a so-called Milk Pool to which these handlers (meaning those who buy from the producers and sell to distributors or sell directly to consumers) should pay or from which they should receive certain sums fixed by the Market Administrator, depending upon the use to which the milk received from the producers was put under the various classified uses specified in Order No. 27.

The Market Administrator determined upon the basis of the reports made by the defendant Jetter Dairy Company and other defendants that certain payments were due from the Jetter Dairy Company and the other three defendants.

This action is brought by the Government to compel payment of such moneys by injunction.

A like order was issued by the State Commissioner of Agriculture hereinafter called the Commissioner under State Statutes intended to bring about joint milk control, and price fixing in cooperation with the Secretary.

The same person appointed Federal Administrator was appointed State Administrator to make more effective the joint Federal and State Control of the production and distribution of milk.

The State Commissioners' complaint seeks to compel like action if the milk is sold in intrastate and not interstate commerce, the Federal Act applying only to milk sold in interstate commerce or directly affecting interstate commerce.

It is conceded that the milk of the Jetter Dairy Company is sold in Interstate Commerce because it passes through New Jersey in going from farm to market. For present purposes it will be assumed that the milk of all defendants is sold in interstate commerce.

When it is sought to obtain the order of a Court of Equity requiring citizens to obey an order of an administrative or executive department of the Government, the conscience of the Court must be satisfied that the order should be issued. As sometimes stated, the order is in the sound discretion of the Court.

If it were otherwise, resort to a court would not be necessary.

Morrison v. *Work,* 266 U. S. 481.

Virginia Railway Co. v. *System Fed.,* 84 Fed (2nd) 641.

McNulty v. *National Mediation Board,* 18 Fed Sup. 494.

The motion is to strike out the balance of the answer from paragraphs 25 to 35 inclusive. Paragraph 25 of the defendants amended answer alleges the incorporation of the Metropolitan Incorporated Milk Products Bargaining Agency with the Dairymen's League, Sheffield Incorporated and others.

It further alleges that agents of the Metropolitan Agency procured the formation of an incorporated association among milk producers delivering milk to independent nonincorporated handlers and that such corporations so formed were neither dealers, handlers nor bona fide corporations within the Federal Law.

Paragraph 26 alleges that the Metropolitan Bargaining Agency formed a scheme to procure competitive advantages for several large incorporated dealers over the independents, proprietary dealers such as the defendant Jetter Company and others and to establish a monopoly under the Metropolitan Bargaining Agency.

Paragraph 27 constituting the first affirmative defense alleges the joint referendum by Federal and State agencies upon proposed Federal Order 27 proposed by the Metropolitan Bargaining Agency and State order 126 and alleges misstatement contained in the public notice issued by the Secretary and misrepresentations by printed statements of the Metropolitan Cooperative Bargaining Agency and by the Dairymen's League (alleged to handle 40% of all milk received in the Metropolitan Marketing Area) and that these misstatements and misrepresentations were a fraud upon the producers and induced them to believe that the terms of the orders were other than they actually were.

There are certain further allegations of speeches, letters, or radio talks.

It is impracticable to refer to each of the remaining paragraphs of the answer, but it may be said that paragraphs 27 to 35 inclusive set forth defenses of these kinds, viz:

1. Order 27 is invalid because it failed to comply with the Federal Statute under which it was issued; viz, the Agricultural Marketing Agreement Act of 1937.

The grounds are chiefly these:

The handlers having failed to approve the proposed order No. 27 the Act required a finding by the Secretary that two-thirds of the Producers favor the Order and permits a referendum of producers to determine such approval.

That the secretary directed the referendum to be conducted and such vote as was had in favor of the order was induced by misunderstanding or misrepresentations as to the terms and effect of order 27 and that the referendum, therefore, did not give true expression of approval by the producers and the Secretary's finding, therefore, based on the Referendum for the promulgation of the order was without any actual or substantial support.

The defendant's argument appears to be that the secretary having elected to ascertain the approval of the producers by the Referendum, cannot reply upon hearings or any other means of ascertaining the approval of the producers. That the order is not such as it was represented to be and has various discriminatory, confiscatory, and other unconstitutional provisions and effects referred to hereinafter and that a Court of Equity cannot in good conscience find that the order was promul-

gated in accordance with the statute nor that it should be enforced.

Defendant's cite, to support their contention, among others:

Butler vs. *U. S.*, 78 Fed. (2nd) 1, Affirmed, 297 U. S. 1.

Scheter vs. *U. S.*, 285 U. S. 495.

Di Giovanni vs. *Camden F. I. Company*, 296 U. S. 64, 73.

and certain railroad cases holding that in the absence of a finding of essential facts the order cannot be sustained.

Plaintiff urges that defendants nowhere allege that the result of the referendum would have been different had no such representations been made.

Assuming that there is no such specific allegation, the unmistakable and necessary inference to be drawn from defendant's affirmative allegations is to that effect.

The pleading on such a motion as this must be given every fair intendment that may be drawn therefrom.

Plaintiff urges that the affirmative defenses are not a simple, concise and direct pleading but are prelux, redundant, scandalous and state no defense and constitute no defense.

Plaintiffs cite the N. Y. Civil Practice Act 8 (e) and the Federal Practice act and cases such as

Cantanzaritti vs. *Bedrin* (Nor. Dist. Pa.), Not yet Reported.

Polk vs. *Mutual Reserve Fund*, 128 Fed. 524, and many cases relating to invulnerability from attack of legislative bodies and public officers.

This Court agrees that the motive behind the Legislation cannot be attacked for if the Courts

could inquire into such subject, there would be danger of invasion by the Judicial branch upon the legislative branch of three branch constitutional form of Government.

The same is true in large measure of the Acts of Administrative Offices but here the statute is the guide and apart from motive, acts not in compliance with the statute are not vaild or enforceable.

The plaintiff also urges upon the basis of a number of Supreme Court citations, including:

Johnson vs. *Drew,* 171 U. S. 93.
Williamsport vs. *U. S.,* 277 U. S. 551.
Douglas vs. *Noble,* 261 U. S. 165.
Red (c) Oil Company vs. *Board of Agriculture,* 224 U. S. 380.

that in a wide variety of situations discretionary administrative determinations of fact are conclusive, and that this order was such an administrative determination.

The statutes and the situations in those cases are not in close analogy.

The statutes here provided that the Secretary might avail himself of a Referendum to determine whether or not two-thirds of the producers approved the proposed order. Having done so that referendum should be held to be the basis of his action and if it was not in fact a referendum upon the proposed order the validity of the order may be affected thereby. Compliance with the statute is necessary to the validity of the order.

Fosgate Company vs. *Kirkland,* 19 Fed. (Supp.) 152, 160.

The defendant's allegations that the order was issued upon a referendum where the producers who

voted were misled as to its terms and effect cannot be said to have no legal status as a defense where if the allegations are true there was no other evidence before the Secretary justifying the promulgation of the order.

That there may be and perhaps is other support for the order which may be shown on the trial should not prevent the defendants from being given their day in Court.

The evidence the defendants may introduce upon the trial, however, must be documentary evidence and will not include any oral statements, radio speeches (unless the text thereof cannot be shown in writing by undisputable proof), nor letters to individuals but only letters shown to have been sent generally to producers or large numbers thereof.

The alleged publications, radio speeches, etc., of the Metropolitan Marketing Agency, Dairymen's League, etc., will be competent evidence if shown to have a large circulation among producers, or to have been delivered over well-known radio stations with the text preserved in writing.

It is quite true that the Secretary is not responsible for the Acts of the nongovernmental organizations, but the proposed order was admittedly suggested by the Metropolitan Bargaining Agency, of which the Dairymen's League and others are members and had representation upon its board. It is not so important that the Secretary did not send out such publications as it is whether he had knowledge and whether or not the Referendum vote was induced thereby.

In this connection the fact that the Dairymen's League, through its officers and not through its

members, could and did vote for approximately 20,000 producer members is not without significance.

The Secretary is not burdened to any extent with defending the acts of these nongovernmental agencies, for only evidence as to which there can be little or no dispute will be received and these agencies can be made parties hereto if they desire to present any evidence they desire, but only with the consent of the plaintiff.

2. The remaining defenses allege the invalidity of the order on constitutional grounds and on the grounds of discrimination, which results or may result, in driving all but the large cooperatives from the milk business.

The grounds are chiefly these:

(a) The order exempts Cooperative handlers from paying producers the uniform price required to be paid by noncooperative handlers and permits cooperative handlers to pay into the equalization fund a lesser base amount than noncooperative handlers.

(b) The order fixes low prices to three large groups of handlers for milk in the lower brackets (sold for other than fluid milk consumption) and is in effect a rebate which can be and is applied in reducing the price by these groups for fluid milk; which preferred handlers sell 70% of the milk sold in the marketing area; that the order permits three large groups to pay lower prices for fluid milk by permitting them to "blend" the price paid for milk sold in the marketing area, with the lower price paid for milk sold outside the marketing area, which latter price is not fixed in the order,

all of which results in a competitive advantage to these groups.

(c) That unfair freight differentials are fixed in the order not based on actual freight costs, which is discriminatory.

(d) That no sale price to consumers or to distributors being fixed in the order the foregoing discrimination above set forth and otherwise, permits the large dealers, or some of them, to reduce the price to those selling to consumers to a point below the costs of fluid milk to defendants and others in like situation to a point below the cost with the most efficient operation and that the order procured, it is alleged, by the large dealers particularly Dairymen's league, was designed by them to so permit the underselling of defendants and others in like situation at a price below cost for the purpose of driving them out of business and creating a monopoly in such large dealers, and the payments into the milk pool sought to be enforced by the complaint results in a confiscation of their property to the point of total confiscation.

(e) There are certain other allegations of illegal and unlawful delegation of power to a majority or two-thirds, which permits the majority or the two-thirds to regulate the business of the minority for the benefit of the majority or two-thirds in violation of fundamental law.

The power to fix in the order the price to be paid to producers is not challenged, nor the fixed price itself.

The numerous authorities cited on this point need not be considered.

The contention is that the same price is not fixed for all but discrimination is practiced in the vari-

ous ways above referred to, some of which appear on the face of the order and others of which can only be shown by proof.

Involved in this discrimination is the exactions of the milk pool which result in alleged discrimination in favor of certain large producers and against these defendants and others like them.

That a price fixing or price control when by reason of discrimination or otherwise it becomes an arbitrary discriminatory regulation having a demonstrably irrelevence to the legislative, is unconstitutional and an unwarranted interference with individual liberty is declared in *Nebbia* vs. *New York*, 291 U. S. 502, 539.

Plaintiff argues that the milk pool is only a stabilization fund by which the burden of the surplus may be shared by all producers and distributors citing *Nebbia* vs. *New York, Supra,* and various other cases.

But the defendants allege the milk pool as operated under and by the terms of the order is arbitrary and discriminatory and goes to the length of exacting from them, in connection with the price cutting by the big handlers and distributors especially cooperatives, and despite their effective operation, practically their entire capital assets in a series of periodic exactions.

Discrimination in favor of a cooperative association of farmers and laborers is not invalid but valid and approved, urges the plaintiff, citing:

Matter of Mayflower Farms vs. *Baldwin*, 267 N. Y. 912.

Liberty Warehouse Company vs. *Burley T. G. Coop. M. Assn.*, 276 U. S. 71, and other cases.

Some discrimination in favor of Farmer Cooperatives, when confined within reasonable limits, is undoubtedly valid, but, argues the defendants, a giant cooperative, controlling 40% of the milk supplied to the Metropolitan area and which uses its preferential treatment to combine with a few others to destroy competition and control the market is not the cooperative intended by the Statute, and in any event gets so much preference, under the whole scheme as to unlawfully take all of defendant's property if it would attempt to comply with the order.

Defendants, to support their contention that the exactions for the milk pool under the order and in effect by reason of discrimination and otherwise is to take defendants' property and give the same to other competitors, cite:

> *Thompson* vs. *Cons. Gas Company,* 300 U. S. 53.
>
> *Railroad Retirement Board* vs. *Alton R. R.,* 295 U. S. 330.
>
> *Louisville Joint Stock Land Bank* vs. *Radford,* 295 U. S. 555, and others.

These cases have no analogy of fact and are not under the Commerce clause except the *Alton* case.

The question under discussion is one that could best be decided upon the evidence when presented and upon facts to be found therefrom.

> *Borden Company* vs. *Baldwin,* 293 U. S. 194, 210, 213.

Moreover, a statute valid when enacted may become invalid by a change in the conditions to which it applies.

> *Adkins* vs. *Childs Hospital,* 294 U. S. 405, 415.

The defendants allege in substance that the tute delegates power to two-thirds of the pro-cers to make the order binding on the remaining ird and that such delegation is unlawful.

Defendants assert that the statute here is like at in *Carter* vs. *Carter Coal Company*, 298 U. S. 8, 310 where such delegation as was there in-lved was held in violation of the 5th amendment.

Plaintiff asserts that there is no such delegation power in the statute here involved as in the tute in the Carter Coal case and cites:

Edwards vs. *U. S.*, 91 Fed. (2d) 767.
U. S. vs. *Whittenburg*, 21 Fed. Supp. 713.
U. S. vs. *Goldsmith Fruit Company*, 19 Fed. Sup. p. 147.

However, the statute and an order thereunder ve been held to constitute invalid delegation of wer.

Fosgate Company vs. *Kirkland*, 19 Fed. Supp. 152.

It is not necessary to decide that question at this ne but such allegations should not be stricken om the answer; in view of the need for an early termination of this case it seems unnecessary and desirable to prolong the discussion of the de-nse since the Court is of the opinion that they ould not be stricken out but that the defendants ould have opportunity to present their defenses d the proof thereunder and that such defenses e not frivolous nor without some legal standing. Some present doubtful questions, where the ques-ns involved can best be decided on the evidence om which facts can be found. Especially is this where the suit in equity is to enforce an order.

The Court does not intend by this decision to express any opinion on the merits of the defenses but merely that they should not be stricken out on the grounds stated in the motion.

The Court understands that the defenses in all cases are or are to be the same.

Any questions of difference in standing on the part of the defendants appear not to be urged and are not now decided.

The motions are denied.

DECEMBER 22, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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CHARLES ELMORE CROPLEY
CLERK

No. 826

HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK,

vs. *Appellant,*

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

No. 827

DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC.,

vs. *Appellant,*

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

No. 828

METROPOLITAN COOPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC.,

vs. *Appellant,*

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

MILO R. KNIFFEN,
LOUIS S. WALLACH,
Counsel for Appellant, Holton V. Noyes.
SEWARD A. MILLER,
Counsel for Appellant, Dairymen's League Cooperative Association, Inc.
JOHN E. LARSON,
EDMUND F. COOKE,
Counsel for Appellant, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1

Statutes Cited.

Act of Congress of May 12, 1933, Public No. 10, 73rd Congress, 48 Stat. 31, 7 U. S. C. A., Chap. 26, as amended by the Act of Congress, approved August 24, 1935, Public No. 320, 74th Congress, 49 Stat. 750, and as reenacted and amended by the Act of Congress approved June 3, 1937, known as the Agricultural Marketing Agreement Act of 1937, Public No. 137, 75th Congress, 50 Stat. 246	2
Act of Congress of August 24, 1937, Section 2, Public No. 352, 75th Congress, 50 Stat. 751, 28 U. S. C. 349a	2

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action

No. 32

CONSOLIDATED CAUSE.

UNITED STATES OF AMERICA,

Plaintiff,

HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.,

Intervening Plaintiffs,

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.,

Defendants.

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, the intervening plaintiffs-appellants in the above-entitled cause, present the following statement in connection with their petitions for the

allowance of appeals to the Supreme Court of the United States from the decree entered herein on March 21, 1939:

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 2 of the Act of August 24, 1937, Public No. 352, 75th Congress, 50 Stat. 751, 28 U. S. C., Section 349a.

(b) There is involved in this case the validity of certain provisions of the Act of Congress approved May 12, 1933, Public No. 10, 73rd Congress, 48 Stat. 31, 7 U. S. C. A., Chap. 26, as amended by the Act of Congress approved August 24, 1935, Public No. 320, 74th Congress, 49 Stat. 750, and as reenacted and amended by the Act of Congress approved June 3, 1937, known as the Agricultural Marketing Agreement Act of 1937, Public No. 137, 75th Congress, 50 Stat. 246. A compilation of the aforesaid acts of Congress is appended to the statement filed herein by the plaintiff, the United States of America, and is designated therein as "Exhibit A".

(c) The final decree of the United States District Court for the Northern District of New York, a review of which is sought by the appeal herein, was signed on March 21, 1939 and entered on March 21, 1939, and the application for appeal is presented contemporaneously with the presentation of this statement, to wit: on the 21st day of March, 1939.

(d) The nature of the case and the rulings of the Court are such as to bring this case within the jurisdictional provisions relied on for the reasons set forth in the statement filed herein, by the plaintiff, United States of America, and designated therein as (d).

(e) The opinion delivered upon the rendering of the final decree sought to be reviewed herein together with an earlier opinion in the same case are annexed to the statement filed

erein by the plaintiff, United States of America, and desig-ated therein as "Exhibit B" and "Exhibit C" respectively.

Respectfully submitted,

MILO R. KNIFFEN,
Counsel for the Department of Agriculture and Markets of the State of New York and attorneys for the Intervening Plaintiff, Holton V. Noyes, etc.
LOUIS S. WALLACH,
Assistant Counsel.
SEWARD A. MILLER,
Attorney for the Intervening Plaintiff, Dairymen's League Cooperative Ass'n, Inc.
EDMUND F. COOKE,
Attorney for the Intervening Plaintiff, Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc.

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I.
II.
III.
IV.
V.
I.

INDEX

	Page
below	1
ion	1
ute and the regulation thereunder involved	2
s presented	2
t	4
he proceedings below	4
he statute involved	10
rder No. 27	17
A. The issuance of Order No. 27	17
B. The problem with which Order No. 27 deals	17
C. The provisions of Order No. 27	23
he evidence	34
A. Review of the evidence introduced by the United States	34
B. Review of the evidence introduced by the appellee Central New York Co-operative Association, Inc.	40
C. Review of the evidence introduced by the other appellees	41
he findings of fact made and adopted by the court	62
A. Review of the findings of fact submitted by appellant	63
B. Review of the findings of fact submitted by appellees	71
ion of assigned errors intended to be urged	81
of the argument	84
t	93
he constitutionality of the Act	93
A. The provisions of the Act relating to orders regulating the handling of milk constitute a valid exercise of the constitutional power of Congress to regulate interstate commerce	93
1. The provisions authorizing and directing the fixing of minimum prices to be paid to producers	93
2. The equalization provisions	105
B. The Act does not involve any unconstitutional delegation of legislative power	109
1. There is no improper delegation of legislative power to the Secretary of Agriculture	109
2. The provisions of the Act relating to approval by producers do not involve any unconstitutional delegation of legislative power to producers	116

C. The provisions of the Act relating to orders regulating the handling of milk are consistent with the requirements of the Fifth Amendment of the Constitution of the United States.....
1. The provisions authorizing and directing the fixing of minimum prices to be paid to producers do not violate the due process clause of the Fifth Amendment of the Constitution of the United States.....
2. The provisions authorizing the establishment and operation of a market-wide equalization pool do not violate the due process clause of the Fifth Amendment of the Constitution of the United States.....
3. The provisions authorizing the requirement that handlers subject to an order shall pay their pro rata share of the expense of administration do not violate the due process clause of the Fifth Amendment of the Constitution of the United States.....
4. The provisions which permit qualified cooperative marketing associations of producers to blend the net proceeds of all sales in all markets and to make distribution thereof to producers in accordance with the contract between the association and its producers do not violate the due process clause of the Fifth Amendment to the Constitution of the United States.....
(a) The settled legislative policy of treating producers' cooperative associations differently from ordinary business corporations rests upon a reasonable basis of classification approved by the Courts.....
(b) The provisions claimed to be unconstitutionally discriminatory do not discriminate in favor of cooperatives and do not deprive appellees of their property in violation of the Fifth Amendment.....
i. The exemption of cooperatives from returning the uniform price to its members.....

	Page
ii. The exemption of milk sold outside the marketing area from the minimum price requirement	149
D. The lower federal courts have almost uniformly upheld the constitutionality of the Act and the validity of orders issued pursuant thereto	150
II. The validity of Order No. 27	154
A. The District Court erred in holding that Sections 5 and 6 of Article VII are not authorized by the Act	154
1. Appellees have no legal standing to complain of the provisions of Article VII, Sections 5 and 6 of Order No. 27	155
2. The provisions of Article VII, Sections 5 and 6 of Order No. 27 are authorized by the Act	158
B. There was substantial evidence before the Secretary supporting all the findings of the Secretary and all the terms and provisions of Order No. 27	164
1. The determination of the Secretary as to producer-approval of Order No. 27	164
2. The findings of the Secretary as to the reasonableness of the terms and conditions of Order No. 27	166
C. The District Court exceeded its powers with respect to its jurisdiction to review administrative findings and determinations made by the Secretary	167
1. The determination of the Secretary as to producer-approval of Order No. 27	167
2. The findings of the Secretary as to the reasonableness of the terms and conditions of Order No. 27	171
D. In its operation and effect, Order No. 27 does not deprive appellees of their property without due process of law	175
1. The terms of Order No. 27 are not discriminatory as against appellees	175
2. Appellees have sustained no losses by reason of the operation of Order No. 27	176
III. The District Court should have granted the relief demanded in the complaints	182
A. Appellant should not have been denied relief because of the alleged improper motives of the proponents of Order No. 27	182

Page

1. If the Act is constitutional and the Order otherwise valid, the motives of the proponents of the Order are immaterial 182
2. The evidence does not establish that the proponents of the Order acted from any improper motive 185

B. The Act authorizes the granting of the relief demanded 187
C. The appellees are subject to Order No. 27 188
D. The appellees have violated Order No. 27 192

CITATIONS

Cases:

Abie State Bank v. *Bryan*, 282 U. S. 765 125
Acker v. *United States*, 298 U. S. 426 93
Aetna Insurance Co. v. *Hyde*, 275 U. S. 440 ..... 148, 150, 157, 178
Alabama Power Co. v. *Ickes*, 302 U. S. 464 156
American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89 128
American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232 174
Applegate v. *Eagan*, 74 Mo. 258 169
Assigned Car Cases, 274 U. S. 564 ..... 173, 175
Avent v. *United States*, 266 U. S. 127 ..... 111, 115
Baldwin v. *Seelig*, 294 U. S. 511 ..... 103, 104, 122
Barns v. *Dairymen's League Co-operative Association, Inc.*, 220 App. Div. (N. Y.) 624 135
Bennett v. *Board of Trade of City of Chicago*, 90 F. (2d) 735, certiorari denied, 302 U. S. 710 ..... 95, 100
Board of Trade of Kansas City v. *Milligan*, 90 F. (2d) 855, certiorari denied, 302 U. S. 710 ..... 94, 100
Borden's Farm Products Co. v. *Ten Eyck*, 297 U. S. 251 119
Brown v. *Staple Cotton Growers Co-op. Asso.*, 96 So. 849 134
Brown-Forman Co. v. *Kentucky*, 217 U. S. 563 141
Brushaber v. *Union Pacific Railroad Co.*, 240 U. S. 1 137
Butfield v. *Stranahen*, 192 U. S. 470 115
Carter v. *Carter Coal Co.*, 298 U. S. 238 ..... 96, 103, 104, 116, 122, 192
Chicago Board of Trade v. *Olsen*, 262 U. S. 1 ..... 94, 99, 137
Clear Lake Co-operative Live Stock Association v. *Weir*, 206 N. W. 297 134
Colorado v. *United States*, 271 U. S. 153 192
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 192
Coronado Co. v. *U. M. Workers*, 268 U. S. 295 101
Currin v. *Wallace*, No. 275, this term, decided January 30, 1939 ..... 96, 104, 109, 116, 132, 156
Cusack Co. v. *City of Chicago*, 242 U. S. 526 ..... 116, 124, 157, 158
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 96
Dakota Central Tel. Co. v. *South Dakota*, 250 U. S. 163 185
Dark Tobacco Gr. Co-op. Asso. v. *Dunn*, 266 S. W. 308 134

Cases—Continued. Page

Dark Tobacco Growers Co-op. Asso. v. *Robertson*, 150 N. E. 106 134
Dayton-Goose Creek Ry. v. *United States*, 263 U. S. 456 ..... 108, 127, 129
Debs, In re, 158 U. S. 564 ..... 105, 188
Denton v. *Pulaski County*, 185 S. W. 481 169
Douglas v. *Noble*, 261 U. S. 165 171
Edwards v. *United States*, 16 F. Supp. 53; 91 F. (2d) 767 ..... 151, 152, 153
Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 ..... 111, 115
Federal Trade Commission v. *Keppel & Bro., Inc.*, 291 U. S. 304 171
Flanagan v. *Federal Coal Co.*, 267 U. S. 222 95
Fletcher v. *Peck*, 6 Cranch 87 185
Flint v. *Stone Tracy Co.*, 220 U. S. 107 137
Fosgate Co., Chester C. v. *Kirkland*, 19 F. Supp. 152 ..... 150, 154
Frischer and Co. v. *Elting*, 60 F. (2d) 711, certiorari denied, 287 U. S. 649 115
Frost v. *Corporation Commission*, 278 U. S. 515 ..... 134, 139
Ganley v. *Wallace*, 17 F. Supp. 115, 95 F. (2d) 364 154
Gibbons v. *Ogden*, 9 Wheat. 1 104
Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412 141
Hampton & Co. v. *United States*, 276 U. S. 394 116
Harrell v. *Cane Growers Co-op.*, 126 S. E. 531 134
Head Money Cases, 112 U. S. 580 ..... 102, 130
Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163 ..... 119, 148, 172
Highland Farms Dairy, Inc. v. *Agnew*, 300 U. S. 608 ..... 119, 121
Hollingsworth v. *Texas Hay Assoc.*, 246 S. W. 1068 134
Horn v. *Detroit Dry Dock Co.*, 150 U. S. 610 156
Houston v. *St. Louis Packing Co.*, 249 U. S. 479 171
Houston, East & West Texas R. Co. v. *United States*, 234 U. S. 342 192
Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139 184
Johnson v. *Drew*, 171 U. S. 93 171
Kansas Wheat Growers v. *Schulte*, 216 Pac. 311 134
Lemke v. *Farmers' Grain Co.*, 258 U. S. 50 ..... 95, 101
Liberty Warehouse Co. v. *Burley Tobacco Growers' Cooperative Marketing Association*, 276 U. S. 71 139
List v. *Burley Tobacco Growers Co-op. Asso.*, 114 Ohio St. 361 134
Luxton v. *North River Bridge Co.*, 153 U. S. 525 105
Mahler v. *Eby*, 264 U. S. 32 114
Mallory Coal Co. v. *National Bituminous Coal Commission*, 99 F. (2d) 399 173

Cases—Continued.

	Page
Manchester Dairy System v. *Hayward*, 132 Atl. 12	134
Marketing Association of Fort Wayne, In re, 8 F. (2d) 626	138
Metropolitan Casualty Ins. Co. v. *Brownell*, 294 U. S. 580	141
Milk Control Board v. *Crescent Creamery, Inc.*, 14 N. E. (2d) 588; rehearing denied, 15 N. E. (2d) 80; appeal dismissed October 10, 1938, 59 S. Ct. 87; rehearing denied 59 S. Ct. 143	107
Milk Producers v. *Bell*, 234 Ill. App. 222	135
Millbank v. *Jones*, 127 N. Y. 370	156
Minnesota Rate Cases, 230 U. S. 352	104
Minnesota Wheat Growers v. *Huggins*, 203 N. W. 420	134
Missouri v. *Holland*, 252 U. S. 416	188
Moore v. *Chicago Mercantile Exchange*, 90 F. (2d) 735, certiorari denied, 302 U. S. 710	94, 100
Mountain Timber Co. v. *Washington*, 243 U. S. 219	126, 129
Mutual Film Corporation v. *Ohio Industrial Commission*, 236 U. S. 230	114
Myers v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41	173
National Labor Relations Board v. *Greyhound Lines*, 303 U. S. 261	173, 175
National Labor Relations Board v. *Jones & Laughlin*, 301 U. S. 1	190
Nebbia v. *New York*, 291 U. S. 502	20, 22, 104, 105, 118, 119, 122
Nebraska Wheat Growers v. *Norquist*, 204 N. W. 798	134
New England Divisions Case, 261 U. S. 184	108, 126, 129
New York Central R. Co. v. *White*, 243 U. S. 188	126, 129
New York Central Securities Co. v. *United States*, 287 U. S. 12	111, 114
Noble State Bank v. *Haskell*, 219 U. S. 104	126
Norman v. *B. & O. R. Co.*, 294 U. S. 240	105
Northern Wisconsin Co-op. T. P. v. *Bekkedal*, 197 N. W. 936	134
Oregon Growers Co-op. Asso. v. *Lentz*, 212 Pac. 811	134
Pacific States Box and Basket Co. v. *White*, 296 U. S. 176	171, 173, 175
Panama Refining Co. v. *Ryan*, 293 U. S. 388	109, 175
Plymouth Coal Co. v. *Pennsylvania*, 232 U. S. 531	124
Potter v. *Dark Tobacco Growers Co-op*, 201 Ky. 441	134
Poultry Producers v. *Barlow*, 208 Pac. 93	134
Public Service Commission of Montana v. *Great Northern Utilities Co.*, 289 U. S. 130	148, 150
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U. S. 83	101
Puget Sound Power & Light Co. v. *Seattle*, 291 U. S. 619	141, 156
Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330	129

Cases—Continued.

	Page
Red "C" Oil Co. v. *North Carolina*, 222 U. S. 380	171
Schechter Poultry Corp. v. *United States*, 295 U. S. 495	109
Shafer v. *Farmers Grain Co.*, 268 U. S. 189	101
Shields v. *Utah Idaho Central R. Co.*, 305 U. S. 177	168, 171
Singer Sewing Machine Co. v. *Brickell*, 233 U. S. 304	141
South Carolina Cotton Growers v. *English*, 133 S. E. 542	134
Southern Railway Company v. *King*, 217 U. S. 524	156
Stafford v. *Wallace*, 258 U. S. 495	93
Standard Oil Company (Indiana) v. *United States*, 283 U. S. 163	100
State Board of Commissioners of Indiana v. *Jackson*, 283 U. S. 527	141
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297	175
Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420	99, 115
Thompson, et al. v. *Consolidated Gas Utilities Corp., et al.*, 300 U. S. 55	127, 128, 166
Tobacco Growers Co-op. Asso. v. *Jones*, 185 N. C. 265	134
Tyler v. *Judges of Court of Registration*, 179 U. S. 405	124
Union Bridge Co. v. *United States*, 204 U. S. 364	115
Union Pacific R. Co. v. *Meyers*, 115 U. S. 1	105
United States v. *Babcock Dairy Co., et al.*, unreported (N. D. Ohio)	153
United States v. *Bell Telephone Co.*, 128 U. S. 315	188
United States v. *Beranek*, unreported (W. D. Mich.)	153
United States v. *Bland*, unreported (S. D. Ga.)	153
United States v. *Buckley*, unreported (N. D. Cal.)	153
United States v. *Butler*, 297 U. S. 1	152
United States, et al. v. *David Buttrick Co., et al.*, 15 F. Supp. 655; 91 F. (2d) 66, certiorari denied, 302 U. S. 737	94, 95, 151, 154
United States v. *Carolene Products Co.*, 304 U. S. 144	150
United States v. *Chemical Foundation*, 272 U. S. 1	111, 115, 155
United States v. *Coombs*, 12 Pet. 72	105
United States v. *Corinth Creamery, Inc.*, 21 F. Supp. 265	153
United States v. *Des Moines & Co.*, 142 U. S. 510	185
United States v. *Goldsmith Fruit Co.*, 19 F. Supp. 147	153
United States v. *Krechting*, unreported (S. D. Ohio)	153
United States v. *Morris*, unreported (S. D., S. C.)	153
United States v. *Old Settlers*, 148 U. S. 427	185
United States v. *Whiting Milk Co.*, 21 F. Supp. 321	153
United States v. *Wiggins*, unreported (E. D., N. C.)	153
Virginian R. Co. v. *United States*, 272 U. S. 658	173, 175
Wallace v. *Hudson-Duncan & Co.*, 21 F. Supp. 295, 98 F. (2d) 985	151
Warren v. *Alabama Farm B. Cotton Association*, 104 So. 264	134

Cases—Continued. Page

Washington Cranberry Asso. v. *Moore*, 201 Pac. 773 134
Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116 116
Water Service Co. v. *Redding*, 304 U. S. 252 135
Wayman v. *Southard*, 10 Wheat. 1 115
Western Paper Makers Chemical Co. v. *United States*, 271 U. S. 268 ..... 173, 175
Whittenburg, Henry E., et al., v. *United States*, 21 F. Supp. 713, 100 F. (2d) 520 ..... 150, 152, 153, 154
Wisconsin Railroad Comm. v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563 102

Statutes:

Act of August 24, 1937, c. 754, sec. 2, 50 Stat. 752; 28 U. S. C. Sec. 349a 1
Act of June 16, 1933, c. 98, [illegible] Stat. 257; 12 U. S. C. A. Secs. 1134–1134 (m), 1138–1138 (e) 136
Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U. S. C. A. Secs. 601 et seq 2
Agricultural Marketing Act of June 15, 1929, c. 24, 46 Stat. 11; 12 U. S. C. A. Secs. 1141, 1141 (j) 136
Capper-Volstead Act, c. 57, 42 Stat. 388; 7 U. S. C. A. Sec. 291 ..... 135, 139
Clayton Act, c. 323, 38 Stat. 730; 15 U. S. C. A. 12–27, 44 ..... 97, 135
Commodity Exchange Act (formerly Grain Futures Act, c. 360, 42 Stat. 998, 7 U. S. C. A. 1–17), c. 545, 49 Stat. 1491–1501; 7 U. S. C. A. Secs. 1–17a 93, 97, 99, 136, 137
Federal Income Tax Law of 1913, c. 16, 38 Stat 172 137
Federal Register Act, c. 417, 49 Stat. 502; 44 U. S. C. Supp. IV, Sec. 307 155
Federal Trade Commission Act Sept. 26, 1914, c. 311, 38 Stat. 717; 15 U. S. C. Secs. 41–65 97
Income Tax Laws, 1934, 1936, and 1938, 48 Stat. 700, c. 690, 49 Stat. 1673, c. 289, 52 Stat. 480 (26 U. S. C. A. Sec. 103 (12) 137
McKinley Tariff Act, c. 27, 44 Stat. 91; 26 U. S. C. A. Sec. 750 (b) 136
Packers and Stockyards Act, c. 69, 42 Stat. 159; 7 U. S. C. A. Secs. 181–229 ..... 93, 97
Robinson-Patman Act of June 19, 1936, c. 592, sec. 4, 49 Stat. 1528; 15 U. S. C. A. Sec. 13 (a) 135
Rogers-Allen Act (New York, Laws of 1937, c. 383) 17
Sherman Antitrust Act, c. 647, 26 Stat. 209; 15 U. S. C. A. Secs. 1–7 97
Tobacco Inspection Act, c. 623, 49 Stat. 731; 7 U. S. C. A. Secs. 511a–511q 116
Transportation Act 1920, c. 91, 41 Stat. 456 127
War Finance Corporation Act of April 5, 1918, c. 45, 40 Stat. 506, 512; 15 U. S. C. A. Sec. 348 135

n the Supreme Court of the United States

OCTOBER TERM, 1938

No. 771

UNITED STATES OF AMERICA, APPELLANT

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED TATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Two opinions were rendered by the District Court. e first (R. 105) was rendered in denying and over- ng certain motions of the United States to strike ignated portions of the several answers. The ond (R. 743) was rendered after trial. Neither nion is as yet reported.

JURISDICTION

urisdiction of the Court rests on Section 2 of the of August 24, 1937, c. 754, § 2, 50 Stat. 752 (28 S. C., Supp. IV, 349a). The decree of the District rt was entered March 21, 1939. The petition for eal was allowed March 21, 1939. The case was keted in this Court on March 23, 1939. The Court ed probable jurisdiction on March 27, 1939.

THE STATUTE AND THE REGULATION THEREUNDER INVOLVED

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C., Supp. IV, §§ 601 *et seq.*, hereinafter referred to as "the Act." An annotated compilation of the Act is attached to this brief as "Appendix A."

The regulation involved is Order No. 27, Order * * * Regulating Such Handling of Milk in the New York Metropolitan Marketing Area As Is In Interstate Commerce, and As Directly Burdens, Obstructs, or Affects Interstate Commerce, issued on August 5, 1938 (effective September 1, 1938) by the Secretary of Agriculture of the United States pursuant to the provisions of the Act, and is hereinafter referred to as "Order No. 27." A copy of Order No. 27 is attached to this brief as "Appendix B."

QUESTIONS PRESENTED

1. Whether the provisions of the Act authorizing and directing the issuance by the Secretary of Agriculture of orders regulating such handling of milk and its products as is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects interstate or foreign commerce, are a constitutional exercise by Congress of the power to regulate interstate and foreign commerce.

2. Whether Section 8c (5) (B) (ii) of the Act, authorizing provisions, in orders regulating the handling of milk, for a market-wide equalization pool, as applied in Order No. 27, deprives the appellees of liberty or property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

3. Whether Section 8c (5) (F) of the Act, providing that a cooperative marketing association engaged in making collective sales or marketing of milk or its products for the producers thereof, shall not be prevented from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers, deprives the appellees of liberty or property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

4. Whether the Act provides for an unlawful delegation of legislative power.

5. Whether the District Court erred in substituting its judgment for the judgment of the Secretary of Agriculture as to the reasonableness of the terms and conditions of Order No. 27, in view of its finding that substantial evidence supporting all of the findings of the Secretary of Agriculture and all the terms and conditions contained in Order No. 27, and the reasonableness thereof, was introduced at the hearing held by the Secretary of Agriculture prior to the promulgation of Order No. 27.

5. Whether the District Court erred in setting aside the determination of the Secretary of Agriculture, approved by the President, that Order No. 27 was approved or favored by at least two-thirds of the producers who, during the month of May, 1938, which had been determined by the Secretary to be a representative period, had been engaged in the production of milk for sale in the marketing area specified in Order No. 27.

7. Whether all of the terms and conditions of Order No. 27 are authorized by the Act, and whether Order No. 27 is valid and enforceable.

STATEMENT

I. The Proceedings Below

On October 27, 1938, the United States, pursuant to the provisions of Section 8a (6) of the Act (Appendix A, p. 2), commenced this action in the District Court of the United States for the Northern District of New York against the appellees Rock Royal Co-operative, Inc.; Central New York Co-operative Association, Inc.; and Schuyler Junction New York Milk Shed Co-operative, Inc. The complaint sets forth that the appellees are handlers of milk subject to Order No. 27; that the Order was issued in accordance with the provisions of the Act; and that the appellees were handling milk in violation of the provisions of the Order and refused to comply with its provisions. The complaint sought an injunction restraining the appellees from con-

tinuing to handle milk in violation of the Order and a mandatory injunction requiring them to comply with its provisions (R. 1).[1]

On November 19, 1938, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, petitioned for leave of court to intervene as a plaintiff, and filed a complaint substantially identical with the complaint of the United States, and sought the same relief (R. 47, 48).

On November 23, 1938, the United States commenced an action against the appellee Jetter Dairy Company, Inc., in the same court making similar allegations and seeking similar relief, except that no alternative relief under Official Order No. 126 was sought (R. 40).

On December 2, 1938, the two cases were consolidated with the consent of all parties (R. 61).

Thereafter, on December 15, 1938, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, having been granted leave of court to intervene as a party plaintiff, filed a complaint as intervening plaintiff in the consolidated

[1] The complaint also sets forth the issuance, by the Commissioner of Agriculture and Markets of the State of New York, of Official Order No. 126 regulating, in the same manner as Order No. 27, such handling of milk in the New York Metropolitan marketing area as is strictly intrastate in character and not subject to federal regulation, and seeks, in the alternative, injunctive relief requiring the appellees to compy with the provisions of Official Order No. 126, if the court should find that they are not subject to Order No. 27.

cause against the defendant Jetter Dairy Company, Inc. (R. 55).

In due time all of the appellees filed answers. The answers of Rock Royal Co-operatives (R. 63); Schuyler Junction New York Milk Sh Co-operative (R. 70); and Jetter Dairy Company (R. 85), admitted the issuance of Order No. 27 by the Secretary of Agriculture and the issuance of Official Order No. 126 by the Commissioner of Agriculture and Markets of the State of New York; admitted that producer-referenda were conducted by the Secretary of Agriculture and the Commissioner of Agriculture and Markets, respectively, to determine whether the orders were favored by producers as required by the respective statutes under which they were issued, admitted that the Secretary of Agriculture made the determination required by Section 8c (9) of the Act and that this determination was approved by the President; admitted that E. M. Harmon was duly designated as Market Administrator under both orders and that he prescribed the necessary forms to be used by handlers in making the reports required under the orders; admitted that each of the appellees operated a duly approved milk plant for receiving milk to be sold in the marketing area, as defined in the orders; challenged the validity of both orders on the ground that the producer-referenda were illegal and ineffective to put them into operation, and that the orders and the statutes under which they were issued violated the Fifth and Fourteenth Amendments, respectively. The answer of the appellee

Central New York Co-operative Association (R. 76), denied knowledge as to most of the allegations of the complaint, challenged the validity of the orders and the statutes pursuant to which they were issued, and set up the additional defense that by reason of its form of organization it was, in effect, a producer and not subject to the provisions of either order.

The answers of Rock Royal Co-operative, Inc.; Schuyler Junction New York Milk Shed Co-operative, Inc.; and Jetter Dairy Company, Inc., also set up certain affirmative defenses. The United States filed a motion to strike these affirmative defenses on the ground that the matters alleged and the issues raised therein (a) failed to state a legal defense to plaintiff's claim, and (b) were redundant, immaterial, impertinent, and scandalous (R. 83). Thereafter, on December 13, 1938, the Jetter Dairy Company, Inc., filed its amended answer, modifying in some respects the allegations contained in its affirmative defenses (R. 85), and the United States filed a motion to strike certain designated portions of the affirmative defenses from the amended answer on the same grounds as those of its motion to strike the affirmative defenses from the original answer (R. 103, 104).

Throughout all of the affirmative defenses runs the central theme that the promulgation of Order No. 27 was part of a conspiracy entered into by an organization of producer cooperatives known as the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. (hereinafter called the "Bargaining Agency"), the Dairymen's League Cooperative As-

sociation, Inc. (hereinafter called the "League"), and others, to secure a monopoly in the fluid milk business in New York City by driving the appellees and others out of business, and to use Order No. 27 and Official Order No. 126 as a means of accomplishing that objective. The sections of the several answers which the United States moved to strike apparently attempted to present four separate defenses to the action brought by the United States, as follows:

> (1) Order No. 27 is invalid because its enactment was brought about by the Bargaining Agency, the League, and others as part of a conspiracy to injure the appellees by using the statutes and agencies of the United States and of the State of New York as instruments of coercion, monopoly, and restraint of trade.
>
> (2) Order No. 27 is invalid because certain handlers, including the League, have attempted to use it as a means of securing a monopoly.
>
> (3) Order No. 27 is invalid because it may be used as a means of creating a monopoly and tends to create a monopoly.
>
> (4) Order No. 27 is invalid because, prior to the referendum among producers, the Bargaining Agency, and the League, in carrying out the alleged conspiracy, carried on a campaign of false and misleading propaganda with the purpose of deceiving producers as to the nature of the order and thereby influencing them to vote in favor of the order.

The District Court heard argument on the motions to strike on December 13, 1938, and on December 22,

1938, rendered its written opinion (R. 105) overruling and denying the motions to strike, and entered its order accordingly (R. 104).

Thereafter, the Bargaining Agency and the League, at the suggestion of the District Court, and with the consent of all parties, were permitted to intervene in the consolidated cause for the purpose of defending against the acts charged against them by the appellees in those portions of the several answers containing the affirmative defenses designated in the aforesaid motions to strike.

The case went to trial for final decree on December 27, 1938, upon a stipulation with exhibits attached, oral testimony and exhibits, and was argued and submitted by counsel for the respective parties on January 18, 1939.

On February 23, 1939, the District Court rendered its written opinion (R. 743) holding that:

(1) The appellees are subject to Order No. 27, if such order is valid, and, therefore, it is unnecessary for the court to pass upon the validity of the state order.

(2) Order No. 27 unlawfully discriminates in favor of large cooperatives and deprives proprietary handlers and small cooperatives, such as the appellees, of their property without due process of law, in violation of the Fifth Amendment.

(3) This discrimination is necessarily present in Order No. 27 by reason of the provisions of the Act, particularly the provisions of Section 8c (5) of the Act, specifying the terms

which an order pertaining to milk shall contain; and, therefore, the Act is unconstitutional.

(4) The Secretary's determination, approved by the President pursuant to Section 8c (9) of the Act, that Order No. 27 was approved or favored by more than two-thirds of the producers, producing milk for sale in the marketing area, was ineffective to put Order No. 27 in operation, because the referendum among producers, conducted by the Secretary pursuant to Section 8c (19) of the Act, was influenced by false and misleading propaganda in favor of the Order carried on by the Bargaining Agency and the League and by misleading statements contained in a pamphlet issued by the Department of Agriculture.

(5) "The Court does not find any sections of the Act which clearly and definitely authorize" Sections 5 and 6 of Article VII of Order No. 27, and, "if there be none, the order does not comply with the Act."

The District Court entered its findings of fact and conclusions of law on March 21, 1939 (R. 127), and on the same day entered its final decree, dismissing the action (R. 743). The findings of fact and conclusions of law proposed by the United States, with the District Court's action thereon noted in the margin, appear in the record, at pages 167–189.

II. The Statute Involved

Section 1 of the Act declares that "the disruption of the orderly exchange of commodities in interstate

commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce."

Section 2 of the Act declares that it is the policy of Congress "through the exercise of the powers conferred upon the Secretary of Agriculture under this title to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power, with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." Section 2 also provides that the base period in the case of all agricultural commodities, except tobacco and potatoes, shall be August 1909 to July 1914 (Appendix A, pp. 1–2). This provision is qualified by Section 8e of the Act, which provides that, if the Secretary finds and proclaims as to any commodity that the purchasing power during the base period specified in Section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period shall be August 1919 to July 1929, or all that portion thereof for which statistics are available (Appendix A, p. 13). In making Order No. 27 the Secretary of Agriculture found it necessary to exercise the authority conferred by Section 8e, and

designated August 1921 to July 1929 as the base period (Appendix B, p. 2.)

This provision is further qualified by Section 8c (18) (Appendix A, p. 11) which requires the Secretary, whenever he finds that the prices which will give milk or its products a purchasing power equivalent to their purchasing power during the base period as determined pursuant to Section 2 and Section 8c of the Act are not reasonable in view of the price of feeds, the available supplies of feeds and other economic conditions which affect market supply and demand for milk and its products, to fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. In promulgating Order No. 27 the Secretary found that the minimum prices fixed in accordance with its terms are such prices as will reflect the factors enumerated in the foregoing section, insure a sufficient quantity of pure and wholesome milk, and be in the public interest (Appendix B, p. 2).

Two methods are provided in the Act to be used in accomplishing the statutory purpose. The first of these is provided in Section 8b, which authorizes the Secretary to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity in interstate commerce.

The other method is the issuance of orders by the Secretary regulating the handling of agricultural commodities in interstate commerce. Orders may be issued with or without the execution of a marketing

reement. The more important provisions of the t dealing with the issuance of orders are found in bsections (1), (2), (3), (4), (5), (7), (8), (9), (10), 2), (15), and (19) of Section 8c. Section 8c (1) thorizes the Secretary to issue, and from time to ne amend, orders applicable to handlers of the ricultural commodities specified in Section 8c (2). ction 8c (2) specifies milk as one of the commodities to which an order may be made. The orders are regulate "only such handling of such agricultural mmodity, or product thereof, as is in the current interstate or foreign commerce, or which directly rdens, obstructs, or affects interstate or foreign mmerce in such commodity or product thereof" ppendix A, p. 3). The term "interstate or foreign mmerce" is defined in Section 10 (j) of the Act ppendix A, p. 15).

Section 8c(3) requires the Secretary to give notice and opportunity for, a hearing upon proposed ders. Section 8c (4) provides that the Secretary all issue an order if, upon the evidence introduced such hearing, he finds (in addition to other dings which he is required to make) that the issuce of the order will tend to effectuate the declared licy of the Act (Appendix A, pp. 3–4).

Subsections (5) and (7) of Section 8c set forth ecifically the terms and conditions which may be luded in orders regulating the handling of milk ppendix A, pp. 4–5, 6–7). The provisions of se subsections will be discussed later in this brief connection with the provisions of Order No. 27

(see pp. 23 to 33, *infra*). Subsection (10) provides that no order shall be issued unless it regulates the handling of the commodity in the same manner as a marketing agreement upon which a hearing has been previously held (Appendix A, p. 9).

Section 8c (8) provides, subject to the qualifications expressed in subsections (9), (12), and (19) of Section 8c, that no order shall become effective unless handlers who handle not less than 50 percent of the volume of the commodity in the area covered by the order have signed a marketing agreement entered into pursuant to Section 8b, and unless the Secretary determines that the issuance of the order is approved or favored by at least two-thirds of the producers producing the commodity for sale in the marketing area during a representative period, or by the producers of two-thirds of the volume of the commodity sold during a representative period within the marketing area (Appendix A, pp. 7–8).

Section 8c (9) provides that, notwithstanding the refusal or failure of handlers to enter into a marketing agreement, an order shall become effective if the Secretary, with the approval of the President, determines (a) that the failure or refusal of the handlers to sign the marketing agreement tends to prevent the effectuation of the declared policy of the Act, and (b) that the issuance of the order is the only practicable means of advancing the interest of the producers of the commodity pursuant to the declared policy, and is approved or favored by at least two-thirds of the producers who have been engaged in the

production of the commodity covered by the order, or by producers who have produced for market at least two-thirds of the volume of the commodity covered by the order (Appendix A, pp. 8–9).[2]

Section 8c (19) provides that the Secretary of Agriculture may conduct a referendum to determine whether the issuance of an order is approved or favored by producers and that the requirements of approval or favor shall be held to be complied with if, of the total number of producers or volume of production represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required (Appendix A, p. 12).

Section 8c (12) provides that the Secretary shall "consider the approval or disapproval by any cooperative association of producers bona fide engaged in marketing the commodity or product thereof covered by such order or in rendering services for or advancing the interests of the producers of such commodity as the approval or disapproval of the producers who

[2] In the instant case the Secretary of Agriculture, on August 5, 1938, tentatively approved a marketing agreement regulating, in the same manner as Order No. 27, the handling of milk in the marketing area. Opportunity was given to all handlers to execute this agreement. Handlers of more than 50 percent of the volume of milk covered by Order No. 27 which was marketed within the marketing area had failed or refused to sign said marketing agreement on August 24, 1938, on which date the Secretary of Agriculture, having previously conducted a referendum pursuant to the provisions of Section 8c (19), made, with the approval of the President, the determinations required by Section 8c (9). The determination of the Secretary was based on the number of producers and not on the volume of production represented in the referendum.

are members of, stockholders in, or under contract with, such cooperative association of producers" (Appendix A, p. 9).

Section 8c (15) provides for administrative review by the Secretary on the petition of a handler alleging that any provision of an order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or exemption therefrom. The Secretary's ruling on such petition is appealable to the district court (Appendix A, p. 10). The filing of such a petition in good faith, and not for purposes of delay, stops the running of the criminal provisions contained in Section 8c (14) while such proceedings are pending, but is not a bar to the prosecution of an action by the United States pursuant to Section 8a (6) of the Act which confers jurisdiction upon the district courts of the United States to enforce, and to prevent and restrain any person from violating, any order issued under the Act (Appendix A, p. 2).

Section 10 (i) directs the Secretary upon request of the duly constituted authorities of any state, "in order to effectuate the declared policy of this title, and in order to obtain uniformity in the formulation, administration, and enforcement of federal and state programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any state * * *," and authorizes the Secretary to cooperate with such authorities and to issue orders complementary to

orders or other regulations issued by such authorities (Appendix A, p. 15).[3]

III. Order No. 27

A. The Issuance of Order No. 27

The appellees in effect concede that all requirements of the Act with reference to the issuance of orders were complied with by the Secretary in issuing Order No. 27 (R. 251–257, 269, 272), but contend that the Secretary's determination that the order was approved by more than two-thirds of the producers, as required by Section 8c (9) of the Act (Appendix A, pp. 8–9), was incorrect and not supported by substantial evidence because of alleged misrepresentations in connection with the referendum and was therefore invalid and ineffective to place Order No. 27 in operation. The validity of the Secretary's action in this respect is discussed, *infra*, pp. 166–171.

B. The Problem With Which Order No. 27 Deals

Before discussing the provisions of Order No. 27, a brief explanation of certain aspects of the milk in-

[3] Order No. 27 is complementary to Official Order No. 126 (R. 402) issued by the Commissioner of Agriculture and Markets of the State of New York pursuant to the provisions of the Rogers–Allen Act (N. Y. Laws of 1937, chapter 383), which authorizes the Commissioner to cooperate with the Federal Government in its control of prices of milk handled in interstate commerce and to join with the federal authorities in conducting joint investigations and holding joint hearings, to issue joint and concurrent orders or orders supplementary to those of the Federal Government, and to designate a joint agent, or joint agencies, to carry out and enforce such joint, concurrent or supplementary orders.

dustry, developed in the evidence, may be of assistance in understanding the terms of the order, its purpose, and the way in which it operates.

One of the most important uses of milk is for consumption in fluid form as an article of diet. If the producers in a given area could produce just enough milk at all seasons of the year to satisfy the demands of the consumers for fluid milk, or if milk could be stored for a considerable period of time, the problems with which this order deals would not exist. But the nature of milk prevents an exact correlation between supply and demand and makes the storage of milk impossible. The demand by consumers for milk fluctuates from day to day and, to a certain extent, from season to season. In normal conditions these fluctuations are not great in amount, but it is necessary for dealers to have available every day throughout the year a supply of milk adequate to meet those fluctuating demands. Because milk cannot be stored the dealers must so conduct their business that they receive every day at every season of the year enough milk to supply all the possible demands which may be made upon them by consumers (Pl. fg. 12, R. 171).

The supply of milk available from producers is subject to seasonal fluctuations which, even under normal conditions, are substantial. The amount of milk produced by a cow depends upon the weather, the feed supplied to the cow, and the cow's stage of lactation. Many producers, particularly those with a small number of cows, cannot arrange to have an equal number of cows producing milk at all seasons

of the year; a producer in this situation therefore has more milk to dispose of in some seasons of the year than in others. Because of these characteristics of the production of milk the number of cows necessary to produce the supply required by all consumers in a given market in the seasons when production is smaller will produce an amount in excess of the supply required for that market in seasons when production is larger (Pl. fg. 12, R. 172).

Thus, if the great metropolitan area of New York is to have an adequate supply of milk, the farmers who furnish that supply must produce from day to day and from season to season more milk than is required for fluid purposes. The amount of this surplus milk will vary from season to season, but in any given day or period, after all the demands of the consumers for fluid milk have been satisfied, a surplus remains which will not be used for fluid consumption. This surplus must be disposed of as condensed milk or butter, or in some other form, in competition with milk which is not required to meet the expensive sanitation requirements imposed by local health regulations on milk produced for consumption in fluid form. Because of this competition, surplus milk commands a price substantially lower than the price received for fluid milk (Pl. fg. 12, R. 172).

A supply of surplus milk is not only inevitable, but desirable. However, stable market conditions depend upon the equitable distribution of the burden of that surplus among all persons engaged in the industry. In the absence of some form of regulation the pressure

of unrestrained competition tends to compel those engaged in handling milk to attempt to shift the burden of the surplus to others. A handler who finds that his supply of surplus milk is increasing is likely to attempt to dispose of that milk in fluid form. That disposition can best be accomplished by cutting the price at which fluid milk is offered for sale. This leads to retaliatory price cutting by other handlers whose market for fluid milk is threatened. This price cutting inevitably leads to a decrease in the price which the handlers pay to the producers and to disorderly marketing conditions (Pl. fg. 12, R. 172).

Although price cutting results in diminished returns to producers, it does not necessarily result in a decrease in the price paid by the ultimate consumer because the resulting saving is often absorbed as profits by intervening middlemen. Furthermore, diminished returns to the producer lead to one result which is detrimental to the ultimate consumer. Milk is an excellent medium for the growth of bacteria. Consequently it must be produced and handled under strictly sanitary conditions, the maintenance of which is expensive. When the competitive pressure becomes great, the tendency on the part of both producers and handlers is to relax in their vigilance and care against the contamination of milk. The result is that the supply of milk available to the consuming public deteriorates in quality.[4]

[4] The problems which have been described above were well summarized in *Nebbia* v. *New York*, 291 U. S. 502, as follows (pp. 516–518):

The regulation of milk in the State of New York, nd more especially in the New York metropolitan

"Milk is an essential item of diet. It cannot long be tored. It is an excellent medium for growth of bacteria. hese facts necessitate safeguards in its production and andling for human consumption which greatly increase the ost of the business. Failure of producers to receive a easonable return for their labor and investment over an xtended period threatens a relaxation of vigilance against ontamination.

* * * * * *

"The fluid milk industry is affected by factors of instabil-y peculiar to itself which call for special methods of control. nder the best practicable adjustment of supply to demand he industry must carry a surplus of about 20 percent, ecause milk, an essential food, must be available as emanded by consumers every day in the year, and demand nd supply vary from day to day and according to the season; ut milk is perishable and cannot be stored. Close adjust-ent of supply to demand is hindered by several factors ifficult to control. Thus surplus milk presents a serious roblem, as the prices which can be realized for it for other ses are much less than those obtainable for milk sold for nsumption in fluid form or as cream. A satisfactory abilization of prices for fluid milk requires that the burden surplus milk be shared equally by all producers and all stributors in the milkshed. So long as the surplus burden unequally distributed the pressure to market surplus milk fluid form will be a serious disturbing factor. The fact that e larger distributors find it necessary to carry large quan-ties of surplus milk, while the smaller distributors do not, ads to price cutting and other forms of destructive competi-on. Smaller distributors, who take no responsibility for e surplus, by purchasing their milk at the blended prices e., an average between the price paid the producer for ilk for sale as fluid milk, and the lower surplus milk price id by the larger organizations) can undersell the larger stributors. Indulgence in this price cutting often compels e larger dealer to cut the price, to his own and the pro-cer's detriment."

milk marketing area, has been a matter of grave concern to the State of New York for a number of years.[5]

Successive investigations of the milk industry have been made and successive attempts have been made to regulate the New York metropolitan milk marketing area. Prior to 1937, the last attempt was the creation by the Legislature of the State of New York in April 1933 of a Milk Control Board with broad powers to regulate the dairy industry of the state, including the power to fix prices to be paid to producers and to be charged to consumers for milk. As a result of the inability of the state to regulate the milk which moved in the current of interstate commerce, handlers purchased their milk in other states at prices lower than those fixed by the Milk Control Board, and the operation of the order broke down. The statute creating the Milk Control Board was enacted for only one year at a time, and in 1937 it was allowed to lapse (Pl. fg. 12, R. 173).

[5] As was pointed out by this Court in *Nebbia* v. *New York* 291 U. S. 502, at pages 521–522:

"Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862 and subsequent statutes have been carried into the general codification known as the Agriculture and Markets Law. A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control."

C. THE PROVISIONS OF ORDER NO. 27

Order No. 27 regulates such handling of milk in the New York metropolitan milk marketing area as is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce. The New York metropolitan milk marketing area is defined to include the City of New York and the Counties of Nassau, Suffolk, and Westchester, all in the State of New York (Appendix B, p. 3).

Article II of Order No. 27 provides for the appointment by the Secretary of Agriculture of a Market Administrator with power to administer the terms and provisions of Order No. 27 and to receive, investigate and report to the Secretary complaints of violation of the order (Appendix B, p. 3). The appointment of a Market Administrator is authorized by Section 8c (7) (C) of the Act (Appendix A, p. 7).

Article III of Order No. 27 establishes nine separate classifications of milk ranging in value from Class I, which includes fluid milk, chocolate milk, and whole-milk drinks, down to Class IV-B, which is American Cheddar cheese (Appendix B, pp. 4–5). The milk is classified in accordance with the form in which it is utilized at, or is moved from, the plant at which received from producers except that, in certain cases where milk is moved to a second plant, it may be classified in accordance with its utilization at such second plant. Section 8c (5) (A) of the Act specifically authorizes the classification of milk in accordance with its use and the fixing of minimum

prices to be paid by all handlers for milk in each such classification (Appendix A, p. 4).

Article IV prescribes the formulas by means of which the Market Administrator computes the price to be paid for each class of milk (Appendix B, p. 6). The Market Administrator simply performs the mathematical function of computing the prices in accordance with these formulas. The prices fixed by Article IV are minimum, and not maximum prices, and nothing in the order prevents a handler from paying, or a producer from demanding, more than the minimum prices.

Article IV further provides that any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum class prices. Specific authority for this provision is found in Section 8c (5) (A) of the Act (Appendix A, p. 4). With the exception of this provision fixing minimum prices at which a cooperative may sell to other handlers, the order does not purport to regulate the price at which a handler may sell milk either at wholesale or retail.

Article IV further provides that the minimum prices for Class I (fluid milk) and Class II–A (fluid cream) apply to all milk in these classes which is sold in or passes through a plant in the Marketing Area. The minimum prices for all other classes apply to all milk of a handler in these classes regardless of where sold except that, if a handler sells Class I

milk outside of the marketing area the minimum prices do not apply to the percentage of his milk in the designated manufactured milk classes equal to the percentage of his total milk which is sold outside of the marketing area as Class I.

The minimum class prices computed and announced by the Market Administrator in accordance with Article IV fix the cost of milk to all handlers. By multiplying the total quantity of milk utilized by all handlers by the class prices the total return due to all producers is computed. Articles VI and VII provide an effective, practicable, and equitable method for distributing the amount of money thus computed among all producers. This method of payment has two important aspects: (1) the payment of the uniform price, and (2) the operation of the Producer Settlement Fund (Appendix B, pp. 10–14).

The Uniform Price.—Where a handler utilizes milk in a number of classes it is not possible to tell in which class the particular milk delivered by a particular producer was utilized. Even in the absence of an order it would be necessary for the handler to pay to each producer a price which represents a composite of the value of all the milk which the handler disposes of in fluid form and the value of all the milk utilized in the various surplus classes. Accordingly, Article VII, Section 1 provides for the payment of a uniform price to producers by all handlers except cooperative associations (Appendix B, p. 12). The reasons for this exception and the

effect thereof are discussed, *infra* (pp. 48–52, 143–149). This uniform price represents the blended value per hundredweight of all the milk in all classes utilized by all handlers and consequently, even though the class prices remained the same, would vary from month to month depending upon the percentage of milk utilized in the different classes by all handlers subject to the order.

The directions for computing the uniform price are found in Article VI (Appendix B, pp. 10–12). The method of computation is illustrated by the following simplified hypothetical example:

Assuming that—

(1) There are only two handlers, A and B, in the market, and each handles exactly one-half of the milk;

(2) The total amount of milk subject to the order which is handled during the particular month amounts to 20 hundredweight;

(3) Handler A utilizes all his milk as fluid milk (Class I);

(4) Handler B utilizes all his milk in the manufacture of butter (Class IV–A);

(5) The Class I price is $2.50 per hundredweight, and the Class IV–A price is $1 per hundredweight,

a computation of the uniform price for this delivery period would be as follows:

A's net pool obligation, 10 cwt. at $2.50=$25.

B's net pool obligation, 10 cwt. at $1=$10.

Total value of milk delivered by all producers=$35.

Total amount of milk delivered = 20 cwt.

Uniform price would be $\frac{\$35}{20} = \$1.75$.

Of course in actual operation the computation of the uniform price is more complicated because of the large number of handlers and classes of milk involved and the fact that many handlers operate more than one plant, and because additional steps are required to compute and deduct from the total value the payments authorized by Sections 5 and 6 of Article VII for services to the market as a whole which inure to the benefit of producers, and to make proper adjustments to reflect differentials for butter fat variation and the location of plants as required by Section 1 of Article VI.[6]

The Producer Settlement Fund.—The purpose of providing for the payment to producers of a uniform price reflecting the value of both the fluid milk and the surplus milk is to distribute the burden of the surplus milk equitably among all producers. This distribution is accomplished through the operation of the Producer Settlement Fund, which the Market Administrator is required to establish and maintain pursuant to Article VII, Section 7, of the Order (Appendix B, p. 14).

The effect of Order No. 27 is to create a market-wide pool of milk so that each handler, in effect, purchases his milk at the class prices from a pool created by all porducers supplying milk to the market and

[6] Defendants' Ex. No. 37 (R. 359, 667) shows the Market Administrator's computation of the uniform price for the month of November 1938.

not from the individual producers who deliver the milk to him. It may happen that, by reason of having a utilization of milk higher than the average for the market, a handler will be obligated to pay more for his milk than the producers who delivered the milk to him are entitled to receive. In such case he pays the uniform price to his producers and pays the balance to the Market Administrator. The Market Administrator does not retain the amount of these payments but, in turn, pays the money over to handlers who, by reason of having a greater utilization of milk in the lower classes, are obligated to pay for their milk less than their producers are entitled to receive. The Market Administrator pays to each such handler a sum which, when added to the total cost of the handler's milk at the class prices, will enable him to pay his producers the uniform price.

Authority for the payments to the Producer Settlement Fund is found in Section 8c (5) (C) of the Act (Appendix A, p. 5). It should be emphasized that the money involved in the payments to the Producer Settlement Fund is not money belonging to the handlers, because all handlers pay the same class prices for milk used, but is money which represents a part of the value of the milk delivered by producers. The payments are merely an important step in the distribution of the total value of the milk among all the producers in the market.

The operation of the Producer Settlement Fund may be illustrated by referring again to the hypothetical example appearing on page 26, *supra*.

In accordance with the requirements of Section 1 of Article VII (Appendix B, p. 12), Handler A will pay to his producers a total of $17.50, representing 10 hundredweight of milk received, at $1.75 per hundredweight, and, in accordance with Section 8 of Article VII (Appendix B, p. 14), will pay the remaining $7.50 to the Producer Settlement Fund. In accordance with the provisions of Section 9 of Article VII (Appendix B, p. 14), Handler B will receive from the Producer Settlement Fund $7.50 which, together with the $10 representing the value of the 10 hundredweight of milk delivered to him according to the use which he has made of it, enables Handler B to pay all of his producers at the uniform price of $1.75 per hundredweight.

These payments to producers are subject, of course, to the transportation and location differentials and the butterfat differential provided for in Sections 2 and 3 of Article VII (Appendix B, p. 12).

Article VIII (Appendix B, p. 15) requires each handler to pay to the Market Administrator a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handlers and which was utilized in Classes I, II–A, and II–B, as his pro rata share of the cost of the administration of the order. The exact amount is determined by the Market Administrator, subject to review by the Secretary. At the time of the trial below the amount determined was 2 cents per hundredweight. This provision of

Order No. 27 is authorized by Section 10 (b) (2) of the Act (Appendix A, p. 14).

Provisions Applicable to Cooperative Associations.— Any realistic approach to the problem of regulating the handling of milk must recognize the cooperative association as a separate and distinct type of organization requiring special treatment. The cooperative is composed of producers, who have their milk collected and sold by the cooperative which then distributes the proceeds among them. To the extent that it engages in the handling of milk it may be a handler but even in that case it is a handler composed of producers whose milk it handles. Both the Act and Order No. 27 recognize this dual nature of a cooperative.

Article I of Order No. 27 defines "handler" to include "a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association receives payment" (Appendix B, p. 3).

As a handler, the cooperative is required to pay the minimum class prices fixed by the order, and to make the same payments to the Producer Settlement Fund as any other handler. In other words, the cooperative is required to participate in the market-wide pool and, in effect, to purchase its milk from the pool created by all producers and not merely from the producers who are members of the cooperative. Otherwise such a cooperative would

not carry its fair share of the market-wide burden of the surplus milk

The cooperative is not, and cannot, by reason of Section 8c (5) (F) of the Act (Appendix A, p. 5), be required to pay to its producers each month the full uniform price (Article VII, Section 1; Appendix B, p. 12).

The producers who deliver milk to a cooperative association occupy a dual relationship to the cooperative. They are producers of the milk sold and as such receive the proceeds of its sale. But, as members of the association they are also participants in a handling enterprise. As such they share not only its income but also its cost. If a producer owned stock in a proprietary corporation which was conducting a handling enterprise, he would receive the uniform price each month for milk sold to the corporation, and his share in the profits or losses of the handling enterprise would be reflected in the accounts of the corporation. In the case of a cooperative, these profits or losses are reflected directly in the amount returned to the producer for his milk. The amount returned to its producer members by a cooperative therefore varies in accordance with the net returns on its operations in marketing the milk of its members. Furthermore, a cooperative association is a service organization and normally performs many services for its members, such for example as weighing and testing the milk of its members and handling all the milk of all its members even though no profitable market exists for all such milk. The expenses incurred in performing such services may

preclude the possibility of the cooperative returning to its members an amount of money equal to the uniform price.

Article IV of Order No. 27 (Appendix B, p. 6) provides that any handler purchasing milk from a cooperative which is also a handler must pay not less than the minimum prices. This provision is designed for the protection of producers and is required by Section 8c (5) (F) of the Act (Appendix A, p. 5). A handler purchasing milk from another handler which is not a cooperative may pay any price that is agreed upon by contract, and the handler from whom he purchases, being obligated to pay the minimum price, may sell the milk to him at less than cost if such handler so desires. Article IV, however, prevents a handler from purchasing milk from a cooperative at less than the class prices fixed under the order.

Article VII, Section 5 (Appendix B, p. 13) provides for certain payments to cooperative associations. Inasmuch as the cooperative associations represent the producers, they have an interest in securing a utilization of milk in the market which will return to producers the highest possible uniform price. This section provides for certain payments to cooperatives to compensate them for services performed for the market as a whole. Such payments stand on the same basis as the market service payments, for which provision is made in Section 6 of Article VII (Appendix B, p. 13). These pro-

visions are discussed more fully hereinafter (*infra*, pp. 154–164).

The Relation Between Order No. 27 and Official Order No. 126.—Order No. 27 and Official Order No. 126 represent a joint effort by the national and state governments to solve the problem of milk control for the New York metropolitan milk marketing area. Federal participation in this program is necessary because of the fact that approximately 50 percent of the milk is handled in the current of interstate commerce (R. 261).

Joint public hearings were conducted by an employee of the Department of Agriculture who was designated by the Secretary of Agriculture and by the Commissioner of Agriculture and Markets to conduct such hearings (R. 251). Upon the evidence introduced at the said hearings the Secretary and the Commissioner of Agriculture and Markets issued Order No. 27 and Official Order No. 126, respectively (R. 251, 252). The two orders are identical in their terms except that the definition of handler in Order No. 27 is limited to persons handling milk "which handling is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce."

While the Secretary and the Commissioner have issued separate orders the two operate exactly as though one joint order had been issued. The same Market Administrator has been appointed by the Secretary and by the Commissioner to administer both orders. Only one market-wide pool of milk

is established. The two orders are intended to be complementary and every handler supplying milk to the marketing area must of necessity be subject to one order or the other.

IV. The Evidence

Prior to the trial, the appellant, the intervening plaintiff, Holton V. Noyes, appellant in Cause No. 826, and the appellees entered into a "Stipulation of Facts and Evidence" (R. 250), consisting of eighty-five numbered paragraphs with forty-three exhibits. The League and the Bargaining Agency were subsequently permitted to intervene, subject to the aforesaid stipulation (R. 249). The stipulation expressly provided that all parties reserved the right to object to any part thereof on the ground that it was irrelevant or immaterial, but all other grounds of objection were waived (R. 268).

A. Review of the Evidence Introduced by the United States

Appellant introduced in evidence certain designated paragraphs of the aforesaid stipulation (R. 269) which established that Order No. 27 was issued by the Secretary in strict compliance with the terms of the Act; that there was ample evidence before the Secretary supporting all the terms and conditions of the Order and the reasonableness of such terms and conditions; that the appellees are subject to the Act and the Order; that the appellees have violated the Act and the Order; that the Act and the Order constitute a valid exercise by Congress of the power

to regulate interstate commerce; and that appellant is entitled to the relief demanded in its complaints. The essential facts established by the evidence introduced by appellant are as follows:

Pursuant to the provisions of Sections 8b and 8c of the Act, the Secretary gave notice of public hearings on a proposed marketing agreement and a proposed order regulating the handling of milk in the marketing area, which includes the City of New York and the counties of Nassau, Suffolk, and Westchester, all in the State of New York. The Commissioner of Agriculture and Markets of the State of New York (hereinafter called the "Commissioner"), pursuant to the provisions of Chapter 383 of the Laws of 1937 of New York, gave notice of public hearings to be held at the same times and places on an order substantially identical with the aforesaid order (R. 250).

Pursuant to the terms of the notices, joint public hearings were conducted by Glen J. Gifford, an employee of the Department of Agriculture, who was designated by the Secretary and by the Commissioner to conduct such hearings. In accordance with the terms of the notices, these hearings were held at Albany, Malone, Syracuse, Elmira, and New York, New York, during the months of May and June, 1938. All interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed order. The hearings were attended by producers, representatives of producers, handlers, and consumers of milk. All

of the defendants knew of the hearings but none of them appeared or was represented at any hearing (R. 251).

The evidence introduced at the hearings consisted of 2,979 pages of oral testimony and 88 exhibits of documentary character (Ex. 3 to stip., R. 269; Tr. 3989–9320).[7] These exhibits in general contain statistics, descriptive information, and economic studies pertaining to the milk industry in the New York Milk Shed. Substantial evidence was introduced at the hearings supporting all the findings of the Secretary and all the terms and conditions contained in Order No. 27 (Pl. fg. 11, R. 171).

At the conclusion of the hearings, briefs were submitted by nineteen parties, including handlers, individuals, and representatives of producers. Thereafter, the Secretary, by notice published in the Federal Register on July 23, 1938, notified all interested persons of his findings on the evidence and of the terms and provisions determined by him to be proper in an order regulating the handling of milk in the marketing area and invited the filing of briefs and written arguments in support of, or in opposition to, such proposed findings and provisions. In response to this notice, briefs were filed by twenty-five parties. After consideration of such briefs, the Secretary, on August 5, 1938, issued Order No. 27, and tentatively approved a marketing agreement, regulating the handling of milk in the marketing area

[7] Wherever the abbreviation Tr. is used in this brief the reference is to the original transcript.

in the manner provided in the Act.[8] The Order contains the terms and conditions authorized by the applicable provisions of the Act and no others, regulates the handling of milk in the same manner as, and applies only to, persons in the respective classes of industrial or commercial activity specified in the Marketing Agreement on which the hearings were held, and contains all the findings which the Secretary is required to make by the applicable provisions of the Act. The Order was published in the Federal Register on August 9, 1938 (R. 251-252, 269).

Pursuant to Section 8c (19) of the Act, the Secretary conducted a referendum of producers to assist him in determining whether the issuance of the Order was approved or favored by at least two-thirds of the producers who, during the month of May 1938, which month he had determined to be a representative period, were engaged in the production of milk for sale in the marketing area. The referendum was held at 308 designated polling places throughout the milkshed, the location of which was such that every producer delivering milk to a plant approved by an authorized health authority for the receiving of milk to be sold in the marketing area had ready access to one or more polling places (Tr. 9321).

Prior to the referendum there were sent to every producer who, on the basis of available information it appeared might be eligible to vote in the referendum: (a) a copy of Order No. 27; (b) a schedule of

[8] On the same date, the Commissioner of Agriculture and Markets duly issued Official Order No. 126 (R. 252, 269).

polling places; (c) a pamphlet prepared by the United States Department of Agriculture, entitled "Questions and Answers on the Federal-State Milk Program for New York"; and (d) a pamphlet prepared by the United States Department of Agriculture entitled "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27." Copies of these documents were sent to approximately 70,000 producers (R. 253, 269). Approximately eighty-seven percent of the votes cast in the referendum were in favor of the proposed Order (R. 253, 269).

After conducting the referendum, the requisite percentage of handlers having failed to sign a marketing agreement, the Secretary, on August 24, 1938, made a determination that the refusal or failure of handlers to sign the Marketing Agreement tended to prevent the effectuation of the declared policy of the Act; that the issuance of the Order was the only practical means of advancing the interests of producers of milk pursuant to such declared policy; and that the issuance of the Order was approved or favored by at least two-thirds of the producers, who, during the month of May 1938, were engaged in the production of milk for sale in the marketing area. This determination was approved by the President. On August 26, 1938, the Secretary issued an order providing that Order No. 27 should become effective on September 1, 1938. This Order was published in the Federal Register on August 27, 1938 (R. 253-

254, 269). At the time of the trial, Order No. 27 had not been terminated (R. 257, 269).

Approximately one-third of the milk produced for sale in the marketing area is produced in States other than New York. Approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area. A large part of the milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area, is intermingled with the milk which has traveled in the current of interstate commerce. Milk handled by some of the appellees travels through New Jersey on its way to the marketing area and all milk handled by the appellees is sold in the marketing area in competition with milk from other States. Unless the milk produced for sale in the marketing area which does not travel directly in the current of interstate commerce is subject to the same regulation as the milk which travels directly in the current of interstate commerce, the result will be discrimination against milk which travels directly in the current of interstate commerce (R. 261, 269). The handling of milk by all of the appellees is either in the current of interstate commerce or directly burdens, obstructs and affects interstate commerce. Each of the appellees is a handler as defined in Order No. 27, and the appellees are indebted to the Market Administrator for payment to producers through the Producer Settlement Fund in the amounts set opposite their

respective names in paragraph 62 of the stipulation (R. 265, 269).

B. REVIEW OF THE EVIDENCE INTRODUCED BY THE APPELLEE CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC.

The only evidence introduced by the appellee, Central New York Co-operative Association, Inc., was offered in support of its claim to an exemption as a producer-distributor from the equalization provisions of the Order. This claim is based upon the provisions of Article VI, Section 1, subsection 3, of the Order, which permit a handler, in computing his net pool obligation, to "Subtract pro rata out of each class the quantity of milk received from the handler's own farm." A cooperative association is a handler within the meaning of Article I, Section 1 of the Order, and is subject to the equalization provisions of the Order.

Appellee contends that it owns the farms of its members within the meaning of Article VI, Section 1 of the Order. The evidence establishes, however, that the appellee, Central New York Co-operative Association, Inc., owns no farms but markets the milk produced by members upon their own farms (R. 265, 269). The milk of its members is received at four country receiving plants and is shipped from such plants to a depot in New York City which it leases. The milk is then distributed and sold in the New York metropolitan area to retail stores and consumers through Hegeman Farms Corporation, Hamilton Milk & Cream Co., Inc., and Cato Milk Com-

pany, Inc., all wholly owned subsidiaries of said appellee. Central New York Co-operative Association, Inc., also markets the milk of approximately seventy-five producers who are not members of, and do not have any written contracts with, Central New York Co-operative Association, Inc. The milk of such producers is marketed and the proceeds thereof remitted to them in the same manner as though such producers were members of the Central New York Co-operative Association, Inc. (R. 265–267, 274). The evidence establishes that the relationship between this appellee and its members is no different from the relationship between any other cooperative such as the League, and its members.

Central New York Co-operative Association, Inc., is holding in its treasury a sum in excess of $5,000, which represents the difference between the aggregate distribution to its members for the month of September 1938 at the uniform price announced by the Market Administrator and the total amount available at that time for distribution, and which would otherwise have been distributed to its producers (R. 267, 274).

REVIEW OF THE EVIDENCE INTRODUCED BY THE OTHER APPELLEES

The appellees' pleadings nowhere alleged, and the appellees offered no evidence to prove, that the action of the Secretary in issuing Order No. 27 was not justified by existing economic conditions; that Order No. 27 was not issued in strict accordance with the

Act; or that Order No. 27 contains any provisions not authorized by the Act; or that there was not ample evidence before the Secretary to support all the terms and conditions of Order No. 27 and the reasonableness of such terms and conditions.

The trial was devoted almost entirely to the introduction by appellees other than the appellee Central New York Co-operative Association, Inc., over objections of appellant, of evidence apparently intended to support the affirmative defenses which appellant had moved to strike. While it is difficult either to summarize these affirmative defenses or to state accurately what the evidence introduced by appellees was intended to prove, appellees were apparently attempting to establish that Order No. 27 and Official Order No. 126 were submitted by the Bargaining Agency to the Secretary and to the Commissioner, respectively, as part of a conspiracy entered into between the Bargaining Agency, the League, the Borden Company and the Sheffield Company for the purpose of securing a monopoly in the distribution of fluid milk in the marketing area; that, as part of such conspiracy, the promulgation and adoption of both Orders were brought about by fraudulent misrepresentation; that the proponents of the Orders caused to be inserted therein various provisions which discriminate in favor of cooperatives and large handlers; and that the Bargaining Agency coerced handlers into signing marketing agreements and complying with the Orders.

To support these contentions, appellees introduced evidence showing that the League sold, either in its own wholesale business or to other distributors, approximately 34% of the fluid milk sold in the marketing area during the months of September, October, and November 1938 (R. 262, 273); that the League sells milk to the Borden Company, and that the Borden Company and the Sheffield Company are the largest handlers in the marketing area (R. 261, 262, 273).

It was conceded by appellant that the League actively sponsored and supported the passage of the Rogers-Allen Law (New York, Laws of 1937, Chapter 383) (R. 374) and that the Bargaining Agency submitted to the Secretary and to the Commissioner the proposed Orders on which hearings were held (R. 263, 273). The League and the Sheffield Producers' Cooperative are both members of the Bargaining Agency (R. 263). One of the attorneys for the League drew the first draft of the proposed Order and submitted it to a lawyers' committee consisting of four members, one of whom was attorney for the League, and one of whom was attorney for the Sheffield Producers' Cooperative (R. 374), but there is no evidence that these two cooperatives, or either of them, dominated the affairs of the Bargaining Agency.

There is no question but that both the Bargaining Agency and the League were active in bringing about the adoption of Order No. 27, but there is no evidence that in so doing they were influenced by any con-

sideration other than the belief that the Order would serve the best interests of producers. The Sheffield Company, one of the alleged conspirators, actively opposed the Order and filed briefs with the Secretary in opposition to the Order (Ex. 23E to stip., R. 274, 535; Ex. 3 to stip., R. 269, Tr. 8783; Ex. 27 to stip., R. ~~269~~ 274, Tr. 9419).

Through their respective newspapers, the Milk Producers' Market News and the Dairymen's League News, the Bargaining Agency and the League urged producers to vote in favor of the Order (Exs. 23–23H to stip., R. 274, 511–548; Exs. 24–24J to stip., R. 274, 549–594), and radio speeches urging the adoption of the Order were made by representatives of the Bargaining Agency (Exs. 23I–23P to stip., R. 274, Tr. 9394–9414).

It is contended by appellees that the explanations of the Order in these newspapers and in the radio speeches are fraudulent and misleading. Appellees also contend that the pamphlet entitled "New York Milk, Explanation of the Federal-State Marketing Plan Contained in Order No. 27" (Ex. 9 to stip., R. 269, 436), which was issued by the Department of Agriculture and mailed to all producers, is false and misleading.

The proposed Order received widespread publicity. The full text of the Order was published in the Dairymen's League News (Ex. 24E to stip., R. 274, 574), and the Dairy Farmers' Union (Ex. 27 to stip., R. 274, Tr. 9420). The latter paper violently opposed the Order (Ex. 27 to stip., R. 274, Tr. 9415–

9422). Pamphlets in opposition to the Order were passed out at the various hearings (Ex. 28 to stip., R. 274, 637–644). Copies of the Order were mailed to all producers (R. 253, 269), and there was every opportunity for producers to become familiar with the scheme embodied in the Order. Furthermore, the producers in the New York milkshed had long been familiar with the principles upon which the Order was based. Classified price and equalization plans for their own members had been employed by the League (Ex. 3 to stip., R. 269, Tr. 6387) and the Sheffield Producers' Cooperative (Dfdt's. Ex. 68, R. 377, 730) for years, and a classified-price plan similar to Order No. 27 had been in effect in the State of New York under state milk control (Ex. 3 to stip., R. 269, Tr. 7515). Appellees did not produce a single witness at the trial to testify that he had been mislead by the publicity which the Order had received.

The pamphlet issued by the Department of Agriculture states that the program is designed to:

> (1) Establish uniform prices for milk sold by producers to handlers in the metropolitan market;
>
> (2) Assure uniform returns to producers for milk sold in the marketing area regardless of the handler to whom the milk is sold or the use made of the milk by the individual handler;
>
> (3) Assure each producer a fair share of the fluid milk market; and

> (4) Provide for the control of surplus milk supplies so that the burden is borne fairly by all producers interested in the metropolitan market, and enable the use of surplus so that it will bring the highest return to producers.

Appellees now contend that these statements are false and misleading because the pamphlet takes for granted the fact that producers organized as a cooperative association are permitted to continue to do business as a cooperative association; and does not explain that such associations are permitted under the Order to continue to return to their members the net proceeds of their milk sold through the Cooperative instead of buying the milk and *paying* them for it at the exact uniform price each month.

The alleged falsity of the above statements rests not upon any facts in evidence or apparent on the face of the order and the pamphlet but upon a legal argument conceived and presented by counsel at the trial in the District Court. Certainly, the failure of those who prepared the explanatory pamphlet issued by the Department of Agriculture to conceive that such an argument might be made and to point out in the pamphlet wherein it is specious cannot be held to amount to misrepresentation or fraud upon the producers; particularly in view of the fact that a copy of Order No. 27 itself accompanied the pamphlet (R. 253, 269) and of the further fact that the order is designed to have, and as shown by the only evidence on the point in the case, will have precisely the

effects described in the pamphlet. (See, *infra*, p. 51.) What has been said with reference to the pamphlet issued by the Department of Agriculture is also true of the statements published by the Bargaining Agency and the League.

Another step in the alleged conspiracy which appellees sought to establish and by which apparently they seek to invalidate the Order was coercion by the Bargaining Agency upon various handlers to compel them after the Order was issued either to sign a marketing agreement or to comply with the terms of the Order under threat of withholding milk from such handlers if they refused to comply. There is some evidence in the record that employees of the Bargaining Agency and E. Manning Gaynor, an employee of the New York State Department of Agriculture and Markets, threatened to withhold milk from Eisenberg Farms Corporation, but the evidence of appellees on this question is vague and unconvincing, and Mr. Gaynor denied on the stand that he had ever participated in any such activity. There is no evidence connecting any representative of the Secretary of Agriculture with such activity.

Appellees attempted to prove that the Act and the Order contain various provisions which discriminate in favor of cooperatives and large handlers and against the appellees. These alleged discriminations are claimed to result from (1) the failure of the Order to require cooperative associations to return the uniform price to producers each month; (2) the failure to regulate milk received at approved plants and sold

outside of the marketing area; (3) the "payments to cooperative associations" and "market service payments" authorized by Sections 5 and 6 of Article VII; (4) Class III–A, IV–A, and IV–B prices which are allegedly so low as to discriminate in favor of handlers who purchase milk in these classes; (5) butter fat differentials which are alleged to be unreasonably high; (6) transportation differentials which are alleged to be unduly favorable to handlers whose plants are located close to the marketing area; and (7) nearby differentials which are paid to producers in certain counties in or close to the marketing area and are also alleged to be discriminatory.

(1) *The failure to require cooperatives to return the uniform price to producers each month.*—Article VII, Section 1, of Order No. 27 expressly exempts cooperative associations from returning to their producers the exact uniform price each month. This exemption is required by Section 8c (5) (F) of the Act, which prohibits the Secretary from inserting in any order, any provision which would prevent a cooperative qualified under the Capper-Volstead Act from blending the net proceeds of all its sales in all markets in all use classifications and "making distribution thereof to its producers in accordance with the contract between the association and its producers" (Appendix A, p. 5).

To support the contention that these provisions of the Act and of the Order result in discrimination against the appellees (only one of which is not a cooperative association), the appellees introduced evi-

nce that the League returned to its producers an
nount less than the uniform price for the months of
ptember (Dfts. Ex. 11, R. 331, 654), October (Dfts.
. 12, R. 331, 655), and November (Dfts. Ex. 13,
332, 677) 1938. From this alone it is argued that
e difference between the sums actually paid and the
iform price constitutes a fund which naturally
d inevitably is used by the League and other large
operatives to undersell proprietary handlers in the
ew York market. Appellees attempted to estab-
h that the League was using this alleged advantage
cut prices in the marketing area, and to take away
e business of the appellee Jetter Dairy Company,
c., and other handlers, but the testimony offered
t only fails to support any such contention, but
irmatively establishes the opposite.

Four storekeepers (Max Bronfeld, R. 288–290;
se Paley, R. 290–293; Herman Lavender, R. 293–
5; Israel Hoch, R. 295) who operate stores in the
rketing area, testified for appellees as to price-
tting by various handlers, but not one of these
tified as to price-cutting by the League or any
ier cooperative subsequent to the effective date of
Order. Three distributors (Alex Eisenberg, R.
)–282; Samuel Miller, R. 317, 319–325; Aaron
benfeld, R. 344, 355–359), testified for appellees
to price-cutting by various handlers, and not one
these testified that the League or any other coop-
tive had engaged in price-cutting. Alex Eisen-
g testified that he had lost no trade to the League
280). Aaron Rubenfeld testified that the League

was not responsible for price-cutting (R. 356). The only witness who testified as to the loss of any business to the League was Samuel Rootstein, Sales Manager for the Triboro Milk & Cream Company. He produced a list of customers lost by the Triboro Milk & Cream Company which listed 57 stops which had been lost to 8 different handlers, in most instances subsequent to the effective date of the Order, but listed not a single stop lost to the League or to any other cooperative (Pl. Ex. G, R. 391, 651).

On direct examination, Rootstein testified that Triboro Milk & Cream Company lost 10 cases of milk to the League and 10 cases to Gold Medal (an independent handler which is not a party to this cause), at 744 Fox Street, on September 4, 1938 (R. 388–389). However, plaintiff's Exhibit G shows that the 10 cases lost to Gold Medal were lost in August 1938, which is before Order No. 27 went into effect.

On cross-examination Rootstein testified that the Lincoln Milk & Cream Company, the business of which was purchased by the League, was delivering 8 cases of milk to 744 Fox St. prior to July 1, 1938, and that between July 1 and September 1, the Triboro Milk & Cream Company captured that business from the Lincoln Milk & Cream Company. There was no evidence that the League regained this business by price-cutting. Rootstein testified that after September 4, 1938, Triboro Milk & Cream Company reduced its price to the 744 Fox St. customer from 9¾¢ to 9¢ in order to retain the balance of the business, but there is no evidence that the loss of business to the League was caused by price-cutting on the part of the League (R. 390, 391).

On redirect examination Rootstein testified that either Jetter Dairy Company or Triboro Milk & Cream Company had lost 6 or 8 cases of milk to the League at 452 E. 146th St., but no details were given with reference to this alleged loss (R. 394).

On the other hand the evidence shows that the League lost 14% of its glass-bottled milk sales in the City of New York between September 1, 1938, and November 25, 1938 (R. 400).

Thus there is no evidence whatever that, if any competitive advantage exists, it has been used by the League or any other cooperative to the detriment of other handlers, but there is positive evidence to the contrary. The evidence also establishes that this provision of the Act, carried out in the Order, does not confer any competitive advantage on the League.

Appellees apparently assume that a cooperative association of producers will not return to its members the net proceeds of the sale of their milk, which constitute the principal regular income to its producers, but will use some part of these proceeds to cut its prices for fluid milk. There is no evidence to support this theory and the only evidence on this point in the record controverts it. An affidavit of E. W. Gaumnitz, Chief of the Dairy Section of the Agricultural Adjustment Administration is in evidence as part of the "Stipulation of Facts and Evidence" (R. 257–259, 272). Most of this affidavit was introduced in evidence by the appellees. In this affidavit, Gaumnitz points out that the primary

interest of a coope ve association is in securing the highest possible return for its members; that the very nature of a cooperative association precludes the possibility that its officials could continue to withhold the money of its members and use that money as a competitive weapon; and that cooperative associations could not continue to exist and perform the services for their members which justify their continued existence if they were required to return the full uniform price each month.

(2) *The failure to regulate milk received at approved plants and sold outside of the marketing area.* A handler operating a plant approved by the appropriate health authority for the receiving of milk to be sold in the marketing area can sell part of the milk received in such plant in the State of New Jersey or in other markets provided the plant is also approved by the health authorities for such markets. Order No. 27 does not attempt to fix the price to be paid producers for fluid milk sold outside of the marketing area.

Some of the larger companies market part of the milk from approved plants in the marketing area, and part of the milk in other markets including New Jersey and the cities in northern New York. The League (Dfts. Ex. 49, R. 360, 674) and the Sheffield Farms Company (Dfts. Ex. 51, R. 360, 676), are among the handlers which sell milk in the marketing area and also sell milk outside the marketing area.

In making payment to producers, a proprietary handler must pay for the milk sold in the marketing

area at the class prices and pays for the fluid milk sold outside the marketing area at the price agreed upon with its producers. However, Article IV, Section 1 of the Order requires any handler which utilizes part of its milk in the various manufacturing classes to allocate a percentage of the milk used in the manufacturing classes to its "out of market sales" of fluid milk. The same thing is true of cooperative associations, except, of course, that a cooperative association will return to its producers the net proceeds of its sales of milk outside of the marketing area instead of arriving by negotiation at a price to be paid for such milk, and will blend the proceeds of such milk with the proceeds of milk sold in the marketing area.

The appellees contend that the sale of milk in the State of New Jersey is highly profitable and that because a handler selling milk both in the market and out of the market may make a profit on the out-of-market sales, it follows naturally and inevitably that the profits so derived will be used for the purpose of underselling other handlers in the marketing area.[9]

[9] The New Jersey Milk Control Board has fixed the price at which milk may be sold to stores in the State of New Jersey at 12¢ in the more populous areas, and 11¢ in the rural sections (R. 372). The price to producers in the State of New Jersey has been fixed at $2.76 at the plant regardless of where the plant is located (R. 372). A large part of the milk sold in the State of New Jersey is shipped in from other States and is unregulated so that milk from New York approved plants must compete not only with milk produced in the State of New Jersey but also with unregulated milk (Pl. fg. 14, R. 177).

The companies which now sell milk from approved plants in both markets, sold milk from approved plants in both markets prior to the effective date of Order No. 27 (Ex. 18 to stip. R. 272, Tr. 9345, Ex. 18a to stip. R. 272, Tr. 9357, Ex. 19 to stip. R. 272, Tr. 9376, Ex. 20 to stip. R. 272, Tr. 9380.) Pressure from producers normally forces the handler to pay for the milk which is shipped to New Jersey, the prevailing competitive price for New York milk (pl. fg. 14, R. 177). With Order No. 27 in effect, this would normally be the uniform price. Prior to the issuance of Order No. 27 the competitive price for milk shipped to the New York market was substantially lower than the uniform price for the months of September, October, and November (Ex. 26a to stip. R. 274, 607; Ex. 24a to stip. R. 274, 557, Deft's Ex. 11, R. 331, 654). If the New Jersey operations have been profitable since Order No. 27 went into effect, it follows that they were more profitable prior to that time, since the only change in conditions has been an increase in the price which the handler must pay for milk sold in the State of New Jersey. If the selling of milk in both markets results in a competitive advantage, the promulgation of Order No. 27 has tended to lessen this advantage.

But there is no evidence that such a competitive advantage exists and there is evidence that the Order does not give rise to any such advantage. One of appellees' witnesses testified that his company withdrew from the New Jersey market as of the effective date of the Order (R. 314). The witness

Rubenfeld testified that he had made a profit on his New Jersey operations, but there is no evidence that any such profits were used to undersell in the New York market. The evidence shows that the League and the companies controlled by Rubenfeld, both of which handlers sell milk in the State of New Jersey, have actually lost business in the marketing area since the effective date of Order No. 27 (R. 343, 400). The only evidence as to cutting of prices in the marketing area by companies doing business in the State of New Jersey is that Breakstone Brothers, Inc., a subsidiary of Sheffield, has been cutting prices (R. 296). The Sheffield Farms Company opposed the issuance of Order No. 27 (~~R. 170~~ Supp. p. 44), and mathematical computations from Defendants' Exhibits Nos. 39 (R. 359, 669), 40 (R. 359, 670), 41 (R. 359, 670), and 43 (R. 359, 673) will show that the Sheffield Farms Company has been required under the Order to pay to the Producer Settlement Fund, sums which have averaged substantially in excess of $100,000 per month.

(3) *Payments to cooperatives and market service payments authorized by Sections 5 and 6 of Article VII of the Order.*—The payments to cooperatives and the market service payments authorized by Sections 5 and 6 of Article VII of Order No. 27 are asserted by appellees to be discriminatory as against them and other small handlers. To support this claim of discrimination appellees introduced only evidence showing the amounts of market service payments claimed and received by certain handlers, including the

League (Dfts. Ex. 46, R. 360, 674), the Sheffield Company (Dfts. Ex. 77, R. 395, 740), The Borden Company (Dfts. Ex. 77, R. 345, 740), and the Middletown Milk & Cream Company (Dfts. Ex. 29, R. 348, Tr. 9635) and the amounts received by the League and (other cooperatives) pursuant to Section 5 of Article VII (Dfts. Ex. 46, R. 360, 674, Dfts. Ex. 39, R. 359, 670; Dfts. Ex. 41, R. 359, 672).

No evidence was introduced showing or purporting to show that the handlers receiving these payments do not perform valuable services for the market as a whole; that the compensation for the services performed is excessive; or that the actual cost of performing such services is less than the amount of the payments.

It is stipulated that the average cost of handling milk at country receiving stations varies from 15¢ to 30¢ per cwt. (R. 401). The 23¢ handling charge which is allowed by Section 6 of Article VII is the average between the high and the low figures. It is also stipulated that the mileage allowances represent approximately the average cost of transporting milk by truck (R. 741). One of the appellees' witnesses (Rubenfeld, R. 358), testified that in the absence of such market service payments his company would be unable to accept any milk from producers over and above the amount necessary to meet its own needs. Appellees did not contend that there was not ample evidence before the Secretary to justify these payments. A summary of the evidence before the Secretary is contained in paragraphs 13 (D) and 13 (E)

f plaintiff's proposed findings of fact (R. 175–177).[10]
Appellees apparently assume that it is necessary
or a handler to have manufacturing facilities in
rder to qualify for market service payments, but
uch is not the case. Section 6 of Article VII is
esigned primarily to enable the small cooperative or
he small proprietary handler to accept all the milk
f all producers and to dispose of the surplus over and
bove its fluid milk requirements by transferring it
o some plant equipped for manufacture. This pro-
ision is available to the appellees at any time and the
ecord establishes that it has been freely used by
mall handlers as well as large to enable them to
ispose of their surplus milk (Gaynor, R. 371;
liller, R. 316, 317; All, R. 306).

(4) *Class III–A, IV–A, and IV–B prices.*—To
upport their claim that the Class III–A, IV–A, and
nd IV–B prices are so low as to result in discrimina-
on in favor of handlers which engage in manu-
acturing operations, appellees produced two wit-
esses; one of whom operated a butter factory
Barber, R. 295), and the other of whom operated a
heese factory (Mills, R. 301).

[10] The District Court found that there was substantial
idence before the Secretary to justify all the terms and
nditions of Order No. 27 (R. 171), but refused to find the
cts to be as stated in paragraphs 13 (D) and 13 (E) with
e cryptic notation "Refused as not relating to demon-
able facts." (R. 175, 177.) It is assumed that the District
urt did not mean to refuse to find that there was evidence
fore the Secretary as stated in these paragraphs, but meant
at in its opinion the statements of fact therein contained
not be demonstrated to be correct.

The witness Barber testified that the prices which he had paid for the cream equivalent of 100 pounds of 3.5 milk were *below* the Class IV–A prices fixed in the Order (R. 296; Dfdts. Ex. 39, 40, 41, R. 359, 669-672). On cross examination it developed that his company has a preferred up-state market near his plant and that it manufactures butter on a year-round basis and not merely during the flush season (R. 297). The cost of manufacturing butter is higher when the operations are seasonal and intermittent (R. 325). The skimmed milk was proved to have very little value (Miller, R. 312). The witness Bullock testified that he had sold skimmed milk during the short season for 25¢ per cwt. (R. 363, 364) but this, of course, does not establish that skimmed milk has any substantial value during the flush season, which is the period during which butter is made as a surplus operation.

The witness Mills testified that he paid about 20¢ per cwt. more than the Class IV–B price for milk to be manufactured into cheese, during the months of September and October 1938 (R. 302). This however, was during the short season at which time there would normally be a shortage of milk available for the manufacture of cheese.

Appellees have never contended that there was not ample evidence before the Secretary to support the reasonableness of these class prices. A summary of the evidence introduced at the hearing before the Secretary is contained in paragraph 13 (A) of appellant's proposed findings of fact (R. 173). This

proposed finding was granted by the District Court.

(5) *Butter fat differentials.*—The reasonableness of the butter fat differentials is not attacked in the pleadings and the contention that these differentials are too high was first heard during the trial. It was stipulated that there is only one grade of Grade B milk irrespective of butterfat content (R. 401), but it is neither asserted nor proved that the butterfat content is not one of the factors affecting the price at which fluid milk can be sold. The witness All testified that a New York City distributor had declined to accept the milk of the Worcester County Cooperative because of the high butterfat content (R. 306) but this witness also testified that he had been able to divert the milk to a manufacturing plant and account for it to the pool at the Class IV–A price (R. 309).

Appellees have never contended that there was not ample evidence to support the reasonableness of the butter fat differentials. A summary of the evidence introduced at the hearing before the Secretary is contained in paragraph 13 (C) of appellant's proposed findings of fact (R. 175). This proposed finding was granted by the District Court.

(6) *Transportation differentials.*—It was stipulated that the transportation differentials are based upon the standard tank-car rate approved by the Interstate Commerce Commission, which rates are 70% of the standard rates for the shipment of milk in less than carload lots. Truck competitive rates have been established at certain points which are somewhat

lower than the approved tank-car rates for these points. It was also stipulated that the trucking allowances in Section 6 of Article VII represent the approximate cost of transporting milk by tank truck (Dfdt.'s Ex 78, R. 395, 741). There are no established truck rates (R. 376).

Appellees have never contended that there was not ample evidence before the Secretary to support the reasonableness of the transportation differentials. A summary of that evidence is contained in paragraph 13 (B) of appellant's proposed findings of fact (R. 175). This proposed finding was granted by the District Court.

(7) *Nearby differentials.*—No evidence was introduced by appellees in support of their contention that the payment of special differentials to producers in 18 counties near the marketing area constitutes a discrimination against appellees. Appellees failed to prove that the operations of the alleged conspirators are such that the alleged competitive advantages resulting from the nearby differentials (and also transportation and butter fat differentials) work in their favor. There was ample evidence before the Secretary to justify the reasonableness of the nearby differentials. The 18 counties to which the nearby differentials apply are all very close to the marketing area and are separated from the rest of the milkshed by nonproductive mountainous territory (Ex. 9 to stip. R. ~~260~~ 274, 582). The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an

almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential (Ex. 3 to stip. R. 269, Tr. 7324, 7405, 9437).

The theory of appellees' case, as pointed out above, appears to be that the alleged discriminatory provisions of Order No. 27 make it possible for certain large cooperative and proprietary handlers to undersell other distributors in the market with the purpose and effect of securing a monopoly in the distribution of fluid milk. The evidence wholly failed to establish that the provisions of the Order have any discriminatory effect, and likewise failed to establish that the alleged conspirators have been using any of these alleged advantages to cut prices in the fluid market. Appellees introduced evidence to show that the reasonable cost of a quart of milk delivered to a store in New York City by a handler who pays producers the Class I price, is from 9¢ to 9¾¢, that on September 1, 1938, handlers generally raised prices from the prevailing low levels to 9¾¢ per quart but that subsequently prices broke in some sections of New York City to from 8¢ to 9¢. The evidence shows, however, that the price-cutting was started and has been continued almost exclusively by the so-called independents, and that the only one of the larger companies which has engaged in price-cutting has been the Sheffield Farms Company through its subsidiary, Breakstone Brothers, Inc. (R. 280, 282, 288–295, Pl. Ex. G., R. 391, 651). As pointed out *supra*,

at p. 55, Sheffield Farms Company opposed the Order, and its operations are such that it has been forced to pay substantial amounts into the Producer Settlement Fund.

Two of appellees' witnesses testified that, in their opinion, the break-down in prices in the marketing area subsequent to September 1, 1938, resulted primarily from the willingness of some of the independents to cut prices on the chance that the District Court would refuse to enforce Order No. 27, and that thus they could avoid paying the prices fixed in the Order (R. 324, 356).

In view of the failure of appellees to support their affirmative defenses, appellant rested at the conclusion of appellees' case without offering any evidence in rebuttal.

V. The Findings of Fact Made and Adopted by the Court

At the conclusion of the trial, both sides submitted proposed findings of fact. The Court noted its rulings on the proposed findings on the margins thereof (R. 167–232). The proposed findings of fact submitted by the appellee Central New York Co-operative Association, Inc., were all granted without objection and are not included in the record. Subsequently, the Court prepared findings of facts and conclusions of law in which it incorporated such of the findings proposed by the appellees Jetter Dairy Company, Inc.; Rock-Royal Co-operative, Inc., and Schuyler Junction New York Milk Shed Co-operative, Inc., as were granted (paragraphs 1–101,

R. 127–161), and such of the proposed findings submitted by the appellee, Central New York Co-operative Association, Inc., as did not duplicate proposed findings submitted by the other appellees (paragraphs 102–108, R. 161–162), and incorporated by reference, the paragraphs of appellant's proposed findings of fact which were granted (paragraph 109, R. 162).

A. REVIEW OF THE FINDINGS OF FACT SUBMITTED BY APPELLANT

The proposed findings of fact submitted by appellant outline the steps taken by the Secretary in promulgating Order No. 27 and show that the Order was issued in strict compliance with the applicable provisions of the Act. Substantially all of the proposed findings relative to the issuance of the Order were granted by the Court except paragraph No. 8 (R. 169), which the Court said was substantially the same as paragraph No. 11 of appellee's proposed findings, and paragraph No. 9, which the Court said was the same as appellee's paragraph No. 12. Paragraph No. 8 of appellant's proposed findings is identical with appellees' proposed finding No. 11, which was granted, except for the phrase "said Order containing the terms and conditions *held by the Secretary to be* authorized by the applicable provisions of the Act and no others." Appellant's proposed finding No. 8 eliminates the italicized words. It is nowhere alleged in the pleadings and, we submit, there is no evidence in the record that Order No. 27 contains any unauthorized terms and conditions.

This question is briefed more fully *infra* at pp. 158 to 164. Similarly appellant's proposed finding No. 9 is identical with appellees' proposed finding No. 12 which was granted, except for the inclusion of the phrase "held by the Commissioner." It is nowhere alleged in the pleadings and there is no evidence in the record that Official Order No. 126 contains any unauthorized terms or conditions.

Appellant's proposed finding No. 11 states that "substantial evidence supporting all of the findings of the Secretary and the terms and conditions contained in Order No. 27 and the findings of the Commissioner and the terms and conditions contained in Official Order No. 126 was introduced at the said hearing." This proposed finding was granted (R. 171).

Appellant's proposed finding No. 12 (consisting of subsections A to G), contains a summary of the evidence before the Secretary showing that marketing conditions for milk flowing into the New York Metropolitan Area were so disrupted as to result in impairment of the purchasing power of such milk and that the issuance of the Order would tend to effectuate the declared policy of the Act. The District Court noted on the margin "Granted that there was such evidence but these are not all found as facts" (R. 171). However, in ruling on paragraph 12 (E) the Court refused to find that there was evidence before the Secretary that the terms and provisions of Order No. 27 would tend to effectuate an equitable distribution of the burden of surplus (R. 172). In view of the Court's finding that there was evidence

before the Secretary to support all the terms and conditions of the Order and the granting of substantially all of appellant's proposed findings Nos. 12 and 13, the refusal to find that there was evidence that the terms and provisions of Order No. 27 would tend to effectuate the distribution of the burden of surplus must have been intended by the District Court as a finding that, while there was evidence to support the various provisions of the Order, the evidence would not have convinced the Court that the terms and provisions of the Order would tend to effectuate such a distribution.

Paragraph No. 13 (consisting of subsections A to F), of appellant's proposed findings, contains a summary of the evidence before the Secretary with reference to the terms and conditions of the Order which are challenged by appellees. The District Court noted on the margin: "granted that there was some evidence, but these are not found as facts" (R. 173).

The Court, however, made the following notation on the margin with reference to subparagraph D, "Payments to Co-operative," "Refused as not relating to demonstrable facts" (R. 175). With reference to subparagraph E "Market Service Payments" the Court made the notation, "Refused for same Reason" (R. 176).

The exact meaning to be attached to the District Court's qualified refusal to find the facts as stated in subparagraphs 13 (D) and 13 (E) is not entirely clear, but it would appear that the Court did not intend to refuse to find that evidence, as outlined in

these paragraphs, was before the Secretary, but intended rather to hold that the Secretary should have disregarded such evidence because the Court did not believe that the facts stated therein could be demonstrated to be true. In other words, it seems that the District Court was not finding that there was not evidence before the Secretary, but was passing upon the credibility and weight of such evidence.

Paragraphs 19, 20, and 22, of appellant's proposed findings of fact were granted. These findings outline the steps taken by the Secretary to ascertain which cooperative associations were qualified to vote, and establish that none of the appellees ever attempted to qualify to vote for their producers (R. 179–180).

Paragraph 14 of appellant's proposed findings demonstrates that the failure of Order No. 27 to regulate milk sold outside of the marketing area does not confer any advantage on handlers who also sell fluid milk in the State of New Jersey. The District Court granted this finding except that it refused to find that the prevailing market prices prior to the adoption of Order No. 27 were substantially lower than the uniform prices in effect under the Order (R. 177). This finding should have been granted in its entirety. See *supra* p. 54.

Paragraphs 27, 28, 29, and 30 of appellant's proposed findings of fact, which establish that Section 8c (5) (F) of the Act confers no competitive advantages upon cooperatives, were nearly all refused by the District Court (R. 181–183) although they were taken almost verbatim from the Stipulation of Facts

and Evidence (R. 257–260, 272). While it is true that some of the statements therein represent the opinions of Dr. Gaumnitz, Dr. Gaumnitz was qualified as an expert witness (R. 257), and no evidence was introduced to refute his statements. The complete failure of appellees to establish that any cooperative had initiated or engaged in price cutting in the Metropolitan marketing area also sustains these proposed findings. See *supra* pp. 49–51.

The District Court granted so much of paragraph 31 of appellant's proposed findings as states that the League had lost part of its wholesale business since September 1, 1938, but refused to find that the League did not initiate price cutting in the marketing area and has not engaged in price cutting but that price cutting was initiated by some of the so-called independents and has been engaged in most actively by such independents (R. 183). On the evidence before the Court, this finding should have been granted in its entirety, *supra* pp. 49–51.

Paragraphs 32, 33, and 34 of appellant's proposed findings of fact were granted (R. 183–184). These findings establish that all of the milk which is produced for sale in the marketing area either moves in the current of interstate commerce or burdens, obstructs, or affects interstate commerce; and that the appellees are all handlers as defined in Order No. 27 and are indebted to the Market Administrator in the sums set opposite their respective names in paragraph 34.

Paragraph 35 of appellant's proposed findings was granted (R. 184). This finding is that the appellee, Central New York Co-operative Association, Inc., does not own any farms; that it handles milk produced by its members upon their own farms, and also the milk of approximately seventy-five producers who are not members of, and have no written contracts with, this appellee.

The District Court refused to find, as requested in paragraphs 42–46, inclusive (R. 185–186) of appellant's proposed findings, that the Bargaining Agency did not enter upon a program to secure for any of its members an unlawful competitive advantage over the appellee Jetter Dairy Company, Inc., and others, that it did not enter upon a program to establish a monopoly in its members or companies dealing with its members; that neither the Bargaining Agency nor the League entered upon a program to confiscate the property rights of the appellee, Jetter Dairy Company, Inc., and that the Bargaining Agency was not at any time dominated or controlled by the League, or the Sheffield Cooperative. If these issues have any proper place in the case, the burden of proof with reference to them was on the appellees, and the appellees failed to sustain this burden. On the evidence before the Court, these proposed findings should have been granted.

The District Court refused to find the facts as stated in paragraphs 47, 48, and 49 of appellant's proposed findings with reference to the price returned

by the League to its producers during the months of September, October, and November, 1938 (R. 186). On the evidence before the Court, these findings should have been granted (Dfts. Ex. 11, R. 331, 654; Dfts. Ex. 12, R. 331, 655; Dfts. Ex. [illegible], R. ~~332, 665~~ 364 477).

The District Court refused to find, as requested in paragraphs 51 and 52 of appellant's proposed findings (R. 187), that the League has not achieved nor attempted to achieve a monopoly in the handling of milk in the marketing area during the period since the Orders went into effect, and that the Orders do not tend to create a monopoly. If these issues have any proper place in the case, the burden of proof with reference to them was on the appellees, and the appellees failed to sustain this burden. On the evidence before the Court, these proposed findings should have been granted.

The District Court found, as requested in paragraph 55 of appellant's proposed findings, that E. M. Harmon, the Market Administrator, "at no time coerced or intimidated any handler of milk; nor did he threaten to use or use his influence to cut off any handler's supply of milk in order to induce said handler to sign a marketing agreement or to comply with Order No. 27 or for any other purpose; nor did any person, agency or association, acting under the said E. M. Harmon's direction, or with his advice or consent, threaten, coerce, or intimidate any handler in any manner whatsoever, or for any purpose

connected with the formulation, promulgation, administration, or enforcement of the marketing agreement, or Order No. 27 or otherwise" (R. 187), but refused to find as requested in paragraph 56 of appellant's proposed findings (R. 187) that none of the defendants were in any way threatened, coerced, or intimidated. On the evidence before the Court, this finding should have been granted. If this issue has any proper place in this case, the burden of proof with reference to it was on appellees, and appellees failed to sustain that burden. The only evidence in the case bearing any possible relation to alleged coercion exercised upon the appellees, is the evidence of the witnesses, George Wilson (R. 283), Howard Richmond (R. 286), and Leonard Faulkner (R. 287). George Wilson testified that an employee of the Diarymen's League had asked him "Wouldn't you prefer drawing your milk to the Dairymen's League where you would be sure of getting your check every month," and told him that one of his neighbors had said that the Jetter Dairy Company had kept back a two week's check from him (R. 284).

Howard Richmond testified that employees of the Bargaining Agency assisted in the formation of a cooperative association among the producers delivering milk to one of the plants of the Jetter Dairy Company; that, at the request of someone claiming to be a representative of the Bargaining Agency, he had signed a letter to the Jetter Dairy Company asking that it become a member of the distributors'

Bargaining Agency, and that the alleged representative of the Bargaining Agency had mailed the letter to the Jetter Dairy Company (R. 286).

Leonard Faulkner, a producer who delivers milk to the Jetter Dairy Company, testified that E. Manning Gaynor, an employee of the New York State Department of Agriculture and Markets, told him that if the producers did not get busy and compel Jetter to sign a marketing agreement they "would get a big gypping on September milk" (R. 288). There was no evidence that this alleged conversation was followed by any action and when Gaynor was called to the stand by appellees as their witness, he was not asked about this alleged conversation. It is submitted that this evidence falls far short of establishing that the appellees were threatened, coerced, or intimidated.

B. Review of the Findings of Fact Submitted by Appellees

The findings of fact proposed by the appellee, Central New York Co-operative Association, Inc., were all taken from the "Stipulation of Facts and Evidence" and were adopted by the District Court without objection. The other appellees presented to the Court proposed findings of fact consisting of 104 numbered paragraphs. Appellant objected to Paragraphs 7; 11 to 18, inclusive; 21 to 27, inclusive; 36 to 62, inclusive; 64 to 79, inclusive; and 81 to 104, inclusive; and filed with the District Court a detailed statement of the basis of its objections to each of

these proposed findings (R. 233–245). Over appellant's objection, the District Court, with few modifications, adopted all of these proposed findings with the exception of Paragraphs 7 and 61 (R. 127-161).

In general, appellees' proposed findings either are entirely unsupported by the evidence or are inaccurate and argumentative. Some are simply statements of fragments of the evidence and even include quotations from two issues of the Dairymen's League News, namely the issues of September 6, 1938 (R. 155) and October 11, 1938 (R. 157, 159), which were never offered or received in evidence.

A complete discussion of the proposed findings submitted by appellees which were adopted by the District Court would unduly burden this statement and appellant has, therefore, selected for detailed discussion only Paragraphs 38 to 45, inclusive, of appellee's proposed findings (R. 201–205), which summarize the purported competitive advantages conferred upon the League by Order No. 27. These were adopted by the District Court as Paragraphs 37 to 44 of its findings of fact (R. 136–139).

In these findings the amazing conclusion is reached that, under the Order, the League received competitive advantages ranging from $2.21 per cwt. in November to $3.30 per cwt. in September on all the milk distributed by it in its own wholesale business.

The conclusion of the District Court as to the competitive advantage enjoyed by the League is

based not upon facts disclosed by the record or otherwise evident but upon at least six separate erroneous assumptions. These assumptions may be analyzed as follows:

> (1) The assumption that $2.76 per cwt. is the Reasonable Value of Milk Delivered to an Approved Plant in the 201–210 Mile Zone for Sale in the State of New Jersey in Fluid Form.

The State of New Jersey Milk Control Board has fixed a price of $2.76 per cwt. to be paid to producers for milk delivered to an approved plant in the State of New Jersey (R. 372). The District Court assumed and found without any proof that this is the reasonable value of milk delivered to a plant outside of the State of New Jersey in the 201–210 mile zone for sale in the State of New Jersey. There is no basis for this assumption. The New Jersey price is not fixed at the 201–210 mile zone with appropriate transportation differentials, but is fixed at the plant to which milk is delivered in the State of New Jersey, which may be a country plant or may be located in the northern New Jersey marketing area. To compare this price with the price paid in the 201–210 mile zone, plainly it would be necessary to deduct appropriate transportation differentials. But even were due allowance made for transportation, the price fixed by the New Jersey Milk Control Board is not the proper standard by which to judge the value of milk purchased in other States for sale

in the State of New Jersey. The New Jersey price applies to only a small part of the milk which supplies the New Jersey market. Unpriced Class I milk (milk received at a plant approved for the New York market, but sold outside of the New York market) which is sold in the New Jersey market comes into direct competition with milk which is produced outside the State of New Jersey at plants which are not approved for the New York marketing area (Ex. 18 to stip. R. 272, Tr. 9345; Ex. 20 to stip. R. 272, Tr. 9380). The market value for unpriced Class I milk which is sold in the New Jersey market is determined by the prices paid for such unapproved milk rather than by the prices paid to producers in the State of New Jersey. There is no evidence in the record as to the value of, or the prices paid for, milk produced outside of the State of New Jersey for sale within the State of New Jersey at plants which are not approved for the New York marketing area.

(2) The assumption that, in Return for the Payments to Co-operative Associations Authorized by Section 5 of Article VII, the Co-operative Associations which received such Payments Perform no Service Involving either Expense to Themselves or Value to the Market.

There is no evidence in the record to support this premise. The only evidence introduced by appellees which in any way relates to co-operative payments is

the evidence as to the sums actually paid to the different co-operatives pursuant to Section 5 of Article VII of the Order. There was ample evidence before the Secretary to support the reasonableness of these payments (Ex. 3 to stip. R. 269, Tr. 5597). This evidence is summarized in Paragraph 13 (D) of appellant's proposed findings of fact (R. 175). These payments are only compensation for services performed by co-operatives in keeping surplus facilities available and in operating in such a manner as to insure the highest possible return to producers. See *infra*, pp. 155–164. The cooperative payments represent compensation for services rendered and expenses incurred for the benefit of the market as a whole. In the absence of any evidence that such services were not rendered or that these payments are not reasonable compensation for such services there is no basis for the bald assumption that these payments represent a competitive advantage to the League.

(3) The assumption that the Market Service Payments Authorized by Section 6 of Article VII of the Order are mere Gratuities, that the League Incurred no Expense in Earning the Market Service Payments which it received, and that the Services Performed by the League in return for these Payments are of no value to the Market.

As in the case of the co-operative payments no evidence was introduced by appellees tending in any way to impeach the reasonableness of these payments. Their reasonableness was amply supported

by the evidence before the Secretary (Tr. 5174). This evidence is summarized in Paragraph 13 (E) of appellant's proposed findings of fact (R. 176).

The evidence clearly establishes that a handler who diverts his surplus milk to a manufacturing plant incurs expenses substantially equal to the market service payments received (R. 401, Dft. Ex. 78, R. 395, 741) and that a handler could not without loss accept surplus milk from producers at a plant lacking manufacturing facilities unless reimbursed for these expenses (R. 355, 358). See *infra*, p. 163. Since the League has actually incurred this expense in disposing of surplus milk and thereby performing a definite service for the market, there is no basis for any finding that the market service payments received by it constitute a competitive advantage.

(4) The assumption that the "base price" paid by the League in the 201–210 mile zone is a Figure Comparable to the Uniform Price.

There is probably not sufficient evidence in the record to explain the meaning of "base price" but it is clear from Defendants' Exhibits Nos. 11 (R. 331, 654), 12 (R. 331, 655), and 54 (R. ~~352~~ 368, 677) that in accounting to its producers, the League employs differentials over and above those required by Order No. 27. The total of such differentials must, of course, be deducted in computing the "base price." The average amount actually returned by the League to its producers in the 201–210 mile zone is the only figure which would make a fair basis of comparison. The average amounts returned by the League at the

01–210 mile zone after deducting all service costs ere $1.83, $1.87 and $2.07, for the months of Sepember, October, and November, 1938, respectively, s compared with "base prices" of $1.75, $1.81 and 2.01, respectively, and uniform prices of $1.87, $1.91, nd $2.10, respectively.

(5) The assumption that the League accounted to its producers for the Class I milk sold outside of the marketing area at only the "base price" paid by it in the 201–210 mile zone.

Paragraph 2 of Section 1 of Article IV specifically rovides that when a handler sells Class I milk outide of the marketing area [11] a portion of his milk, n the manufacturing classes is likewise unpriced. he District Court ignored this provision of the rder and based its findings on the assumption that ll of the surplus milk handled at a plant which is pproved for both the New York and the New ersey markets is accounted for to the pool and ccordingly that the Class I milk which is sold in he State of New Jersey carries with it none of the urden of the surplus. That this assumption is ntrue is evident from the terms of the Order. ursuant to Article IV of the Order a handler selling ilk in both markets is allowed to account to the ool for only a designated percentage of the milk hich he handles in the lower manufacturing classes. he blended price paid by a handler who sells milk

[11] Class I milk sold outside of the marketing area is not bject to the provisions of the Order. See *supra*, pp. 24–25.

in both markets represents not a blend between the uniform price and the price paid for the Class I milk sold outside of the marketing area but a blend between the uniform price and prices paid for Class I milk sold outside the marketing area, Class II-A milk sold outside the marketing area, and milk in the manufacturing classes which under Article IV is required to be allocated to the Class I milk sold outside of the marketing area and for which the handler gets no equalization credit from the pool.

The operation of this section of the Order is illustrated by the report of the Middletown Milk and Cream Co. for the month of November 1938, covering its Slate Hill Plant (Defts. Ex. 27 (A) R. 348, 661).[12] This plant is located at the 81–90 mile zone in Orange County, so that the cost to the handler of Class I milk delivered to this plant and shipped to the marketing area is $2.45, the Class I price, plus 8¢ transportation differential, plus 5¢ location differential, or a total of $2.58 per cwt. An analysis of this report will show that the cost to this handler for Class I milk sold outside of the marketing area was $2.62 per cwt. Columns 10, 12, 13, and 14 of Dfts. Ex. 27A show 421,627 pounds of unpriced Class I milk (milk sold outside the marketing area) and 84,939 pounds of unpriced Class II-A milk. Columns 12, 13, and 14 further show that of 243,184 pounds of Class III-D milk handled, the handler

[12] There are no reports of the League in evidence but Defendants' Exhibit No. 13 shows that the League occupies a similar position.

ld claim credit in the pool for only 168,762 nds, the part allocated to the market under the der, leaving 74,422 pounds unpriced. Dfts. Ex. (R. 348, 666) shows that the Middletown Milk l Cream Company paid its producers for all milk eived at the plant at the rate of $2.38 per cwt. for k containing 3.5% butterfat at the Slate Hill nt. This was five cents less than the uniform ce plus freight and nearby differentials. In ring the cost to this handler of his Class I un-ced milk, it must be borne in mind that the price d included 74,722 pounds of unpriced Class III–D k on which the class price for the month of vember was only $1.052 (Dfts. Ex. 41, R. 672,), as well as 84,939 pounds of Class II–A milk for ich the class price was only $1.90 per cwt. If the ue of unpriced Class II–A and III–D milk is ired at the class prices, the net cost to this handler his Class I unpriced milk in the 81–90 mile zone s nearly $2.62 per cwt., to which must be added cost of transportation to the New Jersey market. ere is no basis in the record for the Court's assump-n that this price is less than the reasonable value such milk.

(6) The assumption that, through the cumulative effect of these assumed discriminatory advantages under the Order, the League has acquired a large fund which it has used for the purpose of underselling proprietary handlers in the market instead of passing such benefits on to its producers in the form of increased returns.

The fallacy of this premise is two-fold: (1) the court's assumption that such discriminatory advantages under the Order exist, and (2) that any fund so acquired has been used by the League for the purpose of underselling proprietary handlers in the market. As pointed out, *supra*, pp. 48–60, not one of the assumed advantages is shown by the evidence actually to exist, and there is no foundation for the court's finding that such advantages do exist. The court, however, believing that such discriminatory advantages exist, drew the inference that, since the money thus acquired was not passed on to the producers, such money must have been dissipated by price-cutting.

The court, having aggregated its unproved assumptions that competitive advantages claimed to have been created by the Order actually existed, reached the fantastic conclusion that they resulted in total advantage to the League ranging from $3.30 per cwt., or 7¢ per qt., in September, to $2.21 per cwt., or 4⅘¢ per qt., in November.

Had these alleged advantages actually existed and had they all been used by the League to cut prices, as the contention appears to be, it would have meant that the League was selling all its milk in the marketing area at prices which averaged only 2 to 2½¢ per qt. in September and only 4½ to 5¢ per qt. in November. The lowest price at which the League was proved to have sold milk in the marketing area was 9¢ per qt. (R. 292, 391). The League has actually lost a part of its wholesale business in the

marketing area since September 1, 1938 (R. 400). Despite the facts wholly uncontradicted by anything in the record, that the League has not cut prices, and has lost business since the order was in effect by reason of its failure to cut prices, it has still been unable to return the uniform prices to its producers *supra*, p. 76. These facts alone would seem to demonstrate conclusively that the advantages assumed and incorporated in findings by the District Court not only do not in fact exist but on the contrary, that the order falls somewhat short of fully equalizing the burden of the surplus and the cost of performing services for the market heretofore borne by the League and the other cooperatives—that instead of giving the members of the cooperatives an advantage, the order leaves them still bearing more than an equal share of the burdens peculiar to the marketing of milk in the New York area.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Appellant specifies all of the assigned errors set out in its assignment of errors as the assigned errors intended to be urged. These assigned errors are summarized as follows:

The court below erred:

1. In failing and refusing to issue the injunctions and grant the relief prayed in the complaints (Assignments 1 and 2).

2. In failing to find without qualification, change, or omission the facts stated in the proposed findings

of fact submitted by appellants (Assignments 3 and 4).

3. In finding the facts to be as set forth in paragraphs numbered 17, 20 to 26, inclusive, 36 to 59, inclusive, 70 to 77, inclusive, 79 to 97, inclusive, 97a, 100, and 101 of its findings of fact (Assignment 5).

4. In making its conclusions of law (Assignments 6, 7, and 8).

5. In overruling and denying appellant's motions to strike from the answers of the appellees certain affirmative defenses set up therein, and in receiving, over appellant's objection to the relevance thereof, evidence offered by appellees to support such affirmative defenses (Assignments 9, 10, 11, 12, 18, 19, and 20).

6. In holding that the appellees have any legal standing to assert in this proceeding that the provisions of Order No. 27 are discriminatory as to them without having first exhausted the administrative remedy for such grievances provided in Section 8c (15) of the Act (Assignment 13).

7. In holding that the provisions of Section 8c (5) (B) (ii) of the Act are violative of, and inconsistent with, the requirements of the Fifth Amendment to the Constitution of the United States (Assignments 14 and 15).

8. In holding that the provisions of Section 8c (5) (B) (ii) of the Act are not within the grant of power conferred upon Congress by Article I, Section 8, clause 3, of the Constitution of the United States (Assignment 16).

In holding that the provisions of Section 8c (5) of the Act, which permit a cooperative associa- of producers to blend the net proceeds of all s of milk in all markets and to make distribution eof to its producers in accordance with its con- t with such producers, as applied in Order No. unlawfully discriminate against the appellees and ate to take the property of appellees without process of law (Assignments 17, 28, 29, 30, 31, nd 33).

. In holding that the Secretary's determination, oved by the President, made pursuant to Sec- 8c (9) of the Act, that Order No. 27 was approved vored by more than two-thirds of the producers ucing milk for sale in the marketing area, was ective to put Order No. 27 in operation (Assign- ts 21, 22, and 23).

. In holding that the Order unlawfully dis- inates against the appellees and operates to their property without due process of law ignments 24, 25, 26, 27, and 40).

. In holding that the payments out of the Pro- r Settlement Fund to cooperative associations, as ided for in Article VII, Section 5 of Order No. 27, [redacted] (Assignments 34, 35, and 36).

. In holding that the market service payments to lers, provided for in Article VII, Section 6 of r No. 27, are [redacted] (Assignments 37, 38, and 39).

SUMMARY OF THE ARGUMENT

I. THE CONSTITUTIONALITY OF THE ACT

A. The provisions of the Act regulating the handling of milk constitute a valid exercise of the constitutional power of Congress to regulate interstate commerce. It is settled that sales of commodities for transportation in interstate commerce are subject to regulation by Congress. The power of Congress to regulate the prices of commodities moving in interstate commerce has never been directly passed on by this Court, but this power is evident from the federal power to regulate other terms of contracts in or directly affecting interstate commerce, and to regulate activities which affect prices in interstate commerce for the purpose of regulating such prices, and from the power of the states to fix prices which, in the field of the state police power is commensurate with the Federal power in the field of interstate commerce.

The equalization provisions of the Act are necessary to make effective the price-fixing provisions. Moreover, maldistribution of the burden of surplus milk among producers results in the disruption of the flow of milk in interstate commerce. Price fixing alone is not sufficient to cure this condition. Price fixing and market-wide equalization are both necessary in order to distribute the burden of the surplus equally among all producers. The provisions of the Act are reasonably designed to effect this end. The power to impose a regulation includes the incidental power to levy a charge on handlers in order to defray the costs of administration (see pp. 92–108 *infra*).

B. The Act does not involve any unconstitutional delegation of power to the Secretary of Agriculture. Congress has defined the policy and established the standards to guide the execution of that policy through each of the steps required in initiating and administering an order. The facts to be found and applied in making the determinations required by the Act are all ascertainable from information available to the Secretary. Their ascertainment and application are guided in each instance by a statutory designation of the objectives which Congress seeks to obtain, the factors it intends the Secretary to consider, and the character of the action to be taken on the facts found. These specifications are found in the Act in detail as precise as is consistent with the effective administration of a plan for regulating complex economic relationships.

The provisions of the Act authorizing the Secretary to conduct a referendum among producers does not constitute an unlawful delegation of legislative power to the producers. The producers have no power to impose an order. The determination of the Secretary as to producer approval of an order is merely a condition to the effectiveness of a regulation imposed by Congress. The Secretary is free to determine the facts from any available source. The referendum among producers is only a means provided by the Act to assist him in determining the required facts. (See pp. 108–118 *infra*).

C. The provisions of the Act relating to orders regulating the handling of milk are consistent with

the requirements of the Fifth Amendment. The provisions authorizing and directing the fixing of minimum prices to be paid to producers do not violate the due process clause of the Fifth Amendment. In *Nebbia v. New York, supra*, this Court held that the fixing by a State of prices to be paid for milk does not violate the Fourteenth Amendment. The restraint imposed upon Congress by the Fifth Amendment is no greater than the restraint imposed upon the states by the Fourteenth Amendment.

The provisions setting up the producer settlement fund do not violate the due process clause of the Fifth Amendment. These provisions do not take away money from one handler and give it to another, but simply equalize the burden of surplus milk so that the pressure of that surplus will not disrupt marketing conditions and depress prices to all producers. This surplus is an indispensable incident to the milk business, and orderly marketing conditions require that it be equally distributed. A producer who previously enjoyed a fluid milk market is compensated for the loss of that market by the higher average of prices and the resulting orderly marketing conditions. Analogies are found in the Workmen's Compensation Acts, Bank Deposit Insurance Acts, and the decisions of this Court upholding the power of Congress to require railroad companies to share the burdens incident to the operations of an efficient national transportation system, even though those burdens bear more heavily on some railroad companies than on others.

The provisions authorizing the Secretary to require handlers subject to an order to pay their share of the expense of administration do not violate the due process clause. As incidental to a valid regulation, Congress can require the persons subject thereto to contribute to the expenses of administering the regulation.

The provisions of the Act which permit cooperative associations to blend the net proceeds of all sales in all markets and to make distribution thereof to producers in accordance with the contract between the association and its producers do not violate the due process clause of the Fifth Amendment. Cooperative associations are required to account to the equalization pool at the class prices for milk handled by them but are not required to return an amount equal to the exact uniform price to their producers each month.

The difference in treatment accorded to cooperative associations is based upon substantial differences between such associations and other handlers and reflects a long standing policy of Congress. The validity of this classification has been consistently upheld by the courts. Cooperative associations are simply groups of producers distributing their own milk, whereas other handlers purchase milk from producers and have an interest different from, if not antagonistic to, producers. The nature of the cooperative association requires that it be exempted from such provision and also precludes the possibility that such exemption would be used as a competitive

weapon to enable it to undersell other handlers (Supp. 118–150 *infra*).

II. The Validity of the Order

A. The pleadings do not allege that Sections 5 and 6 of Article VII are not authorized by the Act and in any event appellees are not injured by these provisions and have no standing to complain of them. The cooperative payments authorized by Section 5 of Article VII reimburse cooperative associations for services which they perform in supplying milk to the Class I market during times of short supply and in securing the utilization of milk at times of long supply in such a manner as to insure the greatest possible return to producers. This provision is authorized by Section 8c (5) (B) of the Act, which authorizes the Secretary to incorporate in an equalization plan such adjustments as are necessary equitably to apportion the total value of the milk purchased by any handler or all handlers among producers and associations of producers on the basis of their marketings of milk. These provisions are also authorized by Section 8c (7) (D). They are necessary to effectuate the other provisions of the Order because cooperative associations could not afford to perform without compensation the services specified in this section. The market service payments authorized by Article VII, Section 6) are likewise necessary to effectuate the other provisions of the Order. These payments reimburse handlers for the expenses incurred in receiving surplus milk from producers and transferring such milk to a plant where

it can be utilized in manufactured form. In the absence of such a provision, it would not be possible for handlers to accept this milk from producers.

B. There was substantial evidence before the Secretary supporting the terms and provisions of Order No. 27, and the District Court so found. There was also substantial evidence before the Secretary supporting all the findings of the Secretary. The determination of the Secretary that the order was approved or favored by at least two-thirds of the producers was based upon a referendum fairly conducted. Prior to the referendum, producers had every opportunity to become familiar with the terms of the Order. The District Court erred in finding that there was no substantial evidence to support the Secretary's determination (Supp. 164–167, *infra*).

C. The District Court exceeded its powers with respect to its jurisdiction to review the administrative findings and determinations made by the Secretary.

The finding of the District Court that there was no substantial evidence before the Secretary to support a finding as to producer approval is so obviously wrong that it is clear that the District Court was passing on the weight of the evidence, and there was no evidence to support this finding of the court. The referendum was fairly conducted and there was no misrepresentation as to the terms of the Order. Even if there had been, this would not have affected the validity of the Secretary's determination. The District Court erred in substituting its judgment for the judgment of the Secretary and holding that certain provisions of the

Order are discriminatory. The determinations of the Secretary are conclusive upon the Court if supported by substantial evidence (see pp. 167–175 *infra*).

D. In its operation and effect Order No. 27 does not deprive appellees of their property without due process of law. None of the various provisions which are asserted by appellees to be discriminatory are in fact discriminatory. The failure to require cooperatives to return the uniform price to producers each month does not enable cooperatives to undersell appellees in the market because cooperatives are interested in securing the highest possible returns for producers and the nature of the cooperative assures that it will return the producers the highest possible amount and not dissipate the producers' money in price cutting. There is no evidence that any cooperatives have engaged in price cutting, but there is affirmative evidence establishing the opposite. The failure to regulate milk received at approved plants and sold outside the marketing area is not discriminatory. There is no evidence that the prices paid by handlers for such milk are unreasonably low or that any profits derived from sales out of the market are used to depress prices in the market.

The payments to cooperatives and market service payments simply reimburse cooperatives and other handlers for the expenses incurred in performing definite services for the market and are not discriminatory. The Class III–A, IV–A, IV–B prices, the butter fat differentials, and transportation and location differentials are all reasonable and confer no

competitive advantage upon any group of handlers at the expense of any other group.

Even were the terms of the Order shown to confer competitive advantages on certain groups, there is no evidence in the record that any of the appellees have been injured. They have not established that the operation of the order has made their business unprofitable or that they operate with reasonable efficiency. There is no evidence that the prices of milk in the sections of the marketing area in which they sell milk are lower than the delivered cost of milk. There is no evidence that any of the groups of handlers which are claimed to have competitive advantages engaged in price cutting except one handler who opposed the order. There is no showing that the class prices are unduly high. The evidence establishes that the break-down of prices in the marketing area has resulted from the willingness of handlers to gamble that the order will not be enforced and they will be able to retain profitably the business acquired by price cutting. The real complaint of the appellee Jetter Dairy Company, Inc., is that the Order prevents it from engaging in reckless price cutting by passing back competitive losses to the producer. While the appellee Central New York Cooperative Association, Inc., would be able to return a higher price to its producers if it were exempted from the Order and if the Order were enforced against everyone else, it cannot be ~~assured~~ assumed that it would be able to return as high a price if the Order were not in effect (see pp. 176–182 *infra*).

III. The District Court Should Have Granted the Relief Demanded

A. If the Act is constitutional and the order is otherwise valid, its validity would not be affected by the alleged fact that its proponents proposed the Order as part of a conspiracy to injure the appellees. But there is no evidence that the proponents of the Order acted from improper motives and the reasonable inference is that they were actuated by a desire to improve the position of the producer (see pp. 183–188 *infra*).

B. Section 8a (6) of the Act clearly vests the District Court with jurisdiction to grant the relief demanded (see pp. 188–189 *infra*.

C. The appellees are all subject to Order No. 27. Each of the appellees is engaged in the handling of milk received at one or more approved plants and each of the handlers is a handler as defined in Order No. 27. Some of the milk of some of the appellees is shipped to the marketing area through the State of New Jersey and all milk handled by the appellees is sold in the marketing area in competition with milk which travels to the marketing area through the current of interstate commerce. Approximately 50% of the milk which is sold in the marketing area travels to the marketing area in interstate commerce and unless all milk sold in the marketing area is subject to the same regulation, the result will be discrimination against the milk which travels in the current of interstate commerce. The operations of all the appellees are either in the current of inter-

tate commerce or burden, obstruct, or affect interstate commerce. Congress has power to regulate prices in intrastate sales to protect interstate commerce from discrimination (see pp. 189–193, *infra*).

D. The appellees have violated Order No. 27: It is conceded that all of the appellees have violated Order No. 27 except that the appellee Central New York Cooperative, Inc., asserts that the milk handled by it is exempted from the equalization provisions of the Order because produced on the "handler's own farm." This appellee owns no farms but handles the milk produced by its members upon farms owned by them and all the milk handled by it is subject to the equalization provisions of the Order (see pp. 193–195, *infra*).

ARGUMENT

I. The Constitutionality of the Act

THE PROVISIONS OF THE ACT RELATING TO ORDERS REGULATING THE HANDLING OF MILK CONSTITUTE A VALID EXERCISE OF THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE

. The provisions authorizing and directing the fixing of minimum prices to be paid to producers.

Section 2 of the Act (Appendix A, pp. 1–2) declares hat it is the policy of Congress "through the exercise of the powers conferred upon the Secretary of griculture * * * to establish and maintain uch orderly marketing conditions for agricultural ommodities in interstate commerce as will establish rices to farmers at a level that will give agricultural ommodities a purchasing power with respect to rticles that farmers buy, equivalent to the purchas-

ing power of agricultural commodities in the base period."

Section 8c (1) of the Act (Appendix A, p. 3), which authorizes the Secretary of Agriculture to issue marketing orders, expressly provides that the orders shall regulate "only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."[13]

[13] Section 10 (j) of the Act (Appendix A, pp. 15-16) defines interstate or foreign commerce as follows:

"The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed."

The definition in Section 10 (j) is essentially the same as that in the Packers and Stockyards Act (c. 69, 42 Stat. 159; 7 U. S. C. 181–229) and in the Commodity Exchange Act (c. 369, 42 Stat. 998, as amended by c. 545, 49 Stat. 1491–1501; 7 U. S. C. 1–17a). The constitutionality of both of these statutes has been sustained by this Court. *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262

The regulation provided by the Act is strictly con-ned to transactions in or directly affecting interstate ommerce. After summarizing the provisions of the ct relating to orders regulating the handling of ilk, the Circuit Court of Appeals for the First Cir-uit observed in *United States et al.* v. *David But-ick Company et al.*, 91 F. (2d) 66, at page 68 (cer-orari denied, 302 U. S. 737):

> It is apparent from a reading of these provisions that neither section 8b nor section 8c (1) and its subdivisions *have any direct relation to the control or regulation of agricultural production, but solely to the marketing of milk and certain fruits bought and sold in interstate commerce—a matter within the exclusive control of Congress and not of the states.* [Italics supplied.]

The Act does not forbid, nor does it authorize an rder which forbids, the shipment of milk in inter-ate commerce. It does not attempt to limit the nount of milk which may be shipped by a producer a handler. Under the Act and the Order a roducer is free to produce as much milk as he ishes and to sell it all in interstate commerce. It clearly distinguishable therefore from the process-g tax and benefit payment provisions of the Agri-ultural Adjustment Act, which were held invalid in

S. 1; *Moore* v. *Chicago Mercantile Exchange*, 90 F. (2d) 5 (C. C. A. 7), certiorari denied, 302 U. S. 710; *Bennett* v. *ard of Trade of the City of Chicago*, 90 F. (2d) 735 (C. C. A. certiorari denied, 302 U. S. 710; *Board of Trade of Kansas ty* v. *Milligan*, 90 F. (2d) 855 (C. C. A. 8), certiorari nied, 302 U. S. 710.

United States v. *Butler*, 297 U. S. 1. That decision has no application here. *United States et al.* v. *David Buttrick Company et al.*, *supra*, at page 68.

This Act regulates the prices to be paid for milk which is in interstate commerce, or which affects such commerce, and provides additional regulation to assure that interstate commerce in milk shall not be disrupted. It is settled that sales of commodities for transportation in interstate commerce are interstate commerce and are subject to regulation by Congress. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 60; *Currin* v. *Wallace*, No. 275, this Term, decided January 30, 1939.

Although this Court has never directly passed upon the question of the power of Congress to regulate the price of commodities moving in interstate commerce, in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the separate opinion of the Chief Justice and the dissenting opinion pointed out that Congress has constitutional authority to impose such regulations on commodities moving in interstate commerce. That case involved the constitutionality of the Bituminous Coal Conservation Act of 1935, which attempted to regulate labor relations and wages in the coal industry, and the price of coal moving in interstate commerce. The majority of the Court held that the labor provisions of the Act were unconstitutional, that the price provisions were inseparable from the labor provisions and that, consequently

he whole statute must fall. The majority did not nd it necessary to pass on the constitutionality of he price provisions, but in his separate opinion the hief Justice said (p. 319):

* * * The Act also provides for the regulation of the prices of bituminous coal sold in interstate commerce and prohibits unfair methods of competition in interstate commerce. *Undoubtedly transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce and the control of charges and the protection of fair competition in that commerce are familiar illustrations of the exercise of the power*, as the Interstate Commerce Act, the Packers and Stockyards Act, and the Anti-Trust Acts abundantly show. . The Court has repeatedly stated that the power to regulate interstate commerce among the several states is supreme and plenary. *Minnesota Rate Cases*, 230 U. S. 352, 398. It is "complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. We are not at liberty *to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce.* See *Nebbia* v. *New York*, 291 U. S. 502.

Whether the policy of fixing prices of commodities sold in interstate commerce is a sound policy is not for our consideration. The question of that policy, and of its particular applications, is for Congress. * * * [Italics supplied.]

The dissenting opinion, referring to value of coal for interstate transportation, stated (p. 326):

> *To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences.* The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. *Baldwin* v. *Seelig*, 294 U. S. 511. They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. Cf. *Head Money Cases*, 112 U. S. 580, 593; Story, Commentaries on the Constitution, § 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy. [Italics supplied.]

Although, aside from these two opinions, members of this Court have not passed upon federal legislation directly fixing prices in interstate commerce, the power of Congress to regulate contracts in or directly affecting interstate commerce has been frequently exercised and has never been doubted. Upon that power rest many of the most familiar federal statutes—for example, the Sherman Anti-Trust Act (15 U. S. C. 1–7), many provisions of the Clayton Act (15 U. S. C. 12–27, 44), the Federal Trade Commission Act (15 U. S. C. 41–65), the Commodity Exchange Act (7 U. S. C. 1–17a), and the Packers and Stockyards Act (7 U. S. C. 181–229). Section 3 of the Clayton Act, prohibiting so-called tying clauses, illustrates the exercise by Congress of its power to

prohibit certain types of terms in contracts of sale. The power of the Federal Trade Commission to prohibit unfair forms of advertising can only be sustained because such advertising is incidental to interstate sales.

Price is a term like any other term in a contract, and the power to regulate terms of contracts carries with it the power to regulate the price, both being subject to the requirements of due process. Congress has exercised this power, for example, in Section 2 of the Clayton Act, which directly regulates the price term in interstate commerce by prohibiting discrimination in prices to different purchasers. Again, in the Packers and Stockyards Act Congress has authorized the Secretary of Agriculture to regulate the service charges of market agencies buying or selling livestock on commission bases or furnishing stockyard services.[14]

It is well established also that Congress has power to regulate activities which affect prices in interstate commerce even though the activities regulated may not be themselves in interstate commerce. And Congress may impose such regulations for the purpose of affecting such prices. In *Stafford* v. *Wallace*, 258 U. S. 495, upholding federal regulation of intrastate transactions at stockyards, this Court pointed out pp. 514–515):

[14] *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426.

> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. * * * Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. * * *

In the Grain Futures Act (42 Stat. 998; 7 U. S. C. 1–17), upheld in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, Congress made use of the commerce power to regulate trading practices on grain exchanges. The regulation was held to be valid because of the effect of these practices in depressing the price of commodities moving in interstate commerce. The Court said (pp. 39–40):

> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. Sales of an article which affect the country-wide price of

> the article directly affect the country-wide commerce in it.[15]

In *Standard Oil Company (Indiana)* v. *United States*, 283 U. S. 163, the Court declared (p. 169):

> Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or *to fix the price* of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. [Italics supplied.]

In *Coronado Co.* v. *United M. Workers*, 268 U. S. 295, the Court said (p. 310):

> But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce *or the price of it in interstate markets*, their action is a direct violation of the Anti-Trust Act. [Italics supplied.]

Since the federal power recognized in these and other cases extends to the regulation of activities which affect interstate prices and may be exerted for the purpose of affecting such prices through regu-

[15] This Court has refused to review by writs of certiorari the decisions of two circuit courts of appeals upholding the constitutionality of the Commodity Exchange Act, which amplified and extended the Grain Futures Act. *Bennett et al.* v. *Board of Trade of the City of Chicago et al.*, 90 F. (2d) 735 (C. C. A. 7), certiorari denied, 302 U. S. 710; *Board of Trade of Kansas City, Missouri, et al.* v. *Milligan et al.*, 90 F. (2d) 855 (C. C. A. 8), certiorari denied, 302 U. S. 710; *Moore* v. *Chicago Mercantile Exchange et al.*, 90 F. (2d) 735 (C. C. A. 7), certiorari denied, 302 U. S. 710.

lation of such activities, *a fortiori* the power must extend to the regulation of interstate prices themselves. Obviously, the most direct and appropriate way to regulate prices is to regulate prices. Certainly Congress may do directly that which it may do indirectly.

Furthermore, the power of the Federal Government to regulate prices of commodities moving in interstate commerce is evident from the decisions of this Court which deny the power of the states to regulate either the price of commodities in interstate commerce or activities which affect prices in interstate commerce although recognizing the existence of power in the states to regulate prices or to regulate activities affecting prices which are within the sphere of state police power.

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, in striking down a North Dakota statute which regulated the grain business and included a provision for the fixing of prices by a state officer, the Court stated at p. 60–61:

> It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases *and to secure payment to them of fair prices* for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce, if legislation of that character is needed.

See also *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.

Similarly, in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, it was held

that the rates for electricity produced within one state and sold within that state for transmission to another state are not subject to regulation by the state. The majority and minority opinions state clearly that the power to regulate the rates resides in the Federal Government. The Court said (p. 90):

> The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, *if such regulation is required it can only be attained by the exercise of the power vested in Congress.* [Italics supplied.]

In the dissenting opinion it was said (p. 91):

> If the Commission lacks the power exercised, it is solely because the electricity is delivered for use in another State. That fact makes the transaction interstate commerce, *and Congress has power to legislate on the subject.* [Italics supplied.]

In the *Head Money Cases*, 112 U. S. 580, a decision that a federal statute regulating immigration was a valid exercise of the commerce power was reached on the basis of prior decisions, holding state regulation of the same subject matter unconstitutional. Of these cases the Court said (p. 593–594):

> It cannot be said that these cases do not govern the present, though there was not then before us any act of Congress whose validity was in question, for the decisions rest upon the ground that the state statutes were void only because Congress, and not the states, was authorized by the Constitution

> to pass them, and for the reason that Congress could enact such laws, and for that reason alone were the acts of the state held void. *It was therefore of the essence of the decision which held the state statutes invalid that a similar statute by Congress would be valid.* [Italics supplied.]

On the basis of these principles, *Baldwin* v. *Seelig*, 294 U. S. 511, sustains the existence of the federal power to fix prices in interstate commerce. A provision in the New York Milk Control Act forbade all sales of milk bought in other states at a price less than that permissible in New York. The provision was held to be invalid, even as applied to milk sold in other than the original containers, because it was an attempt to regulate interstate commerce. The Court said (p. 522):

> * * * If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted *by subjecting commerce between the states to the power of the nation.* [Italics supplied.]

Such exclusion of the states from the regulation of prices and of activities affecting prices in interstate transactions points directly to the conclusion expressed in the dissenting opinion in the *Carter* case, *supra*, p. 95, that the constitutional inhibition of state regulation of prices in interstate transactions discloses the existence of that power in Congress—that

to hold otherwise would be to create a vacuum in the field of interstate commerce from which both state and federal authority would be excluded, although the power of the states to regulate prices within the field of their police power had been approved. *Nebbia* v. *New York*, *supra*.

But, as the opinion of the Chief Justice in the same case points out (*supra*, p. 96), the power of the Federal Government in the field of interstate commerce is coextensive with the power of the states in their spheres, and with respect to interstate commerce the power of Congress is a plenary power "complete in itself," and subject only to the limitations of the Fifth Amendment. *Minnesota Rate Cases*, 230 U. S. 352, 398; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 227; *Currin* v. *Wallace*, No. 275, *supra*. The power of Congress in the field of interstate commerce is commensurate with this power of the states. See *Baldwin* v. *Seelig*, *supra*; see also *Carter* v. *Carter Coal Co.*, *supra*.[16]

2. The Equalization Provisions

If Congress has the constitutional power to enact the price-fixing provisions, such power necessarily

[16] It seems clear that just as the power of the States to fix prices is not precluded by the Fourteenth Amendment, the power of Congress to fix prices in the field of interstate commerce is not precluded by the Fifth Amendment. In *Nebbia* v. *New York*, in sustaining the power of the State of New York to fix prices in intrastate transactions the Court pointed out (p. 525) that:

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare."

carries with it the power to enact such provisions as are necessary or appropriate to the effective exercise of the price-fixing power and the accomplishment of the desired protection to interstate commerce in milk. The intent of the framers of the Constitution to confer upon Congress full power to carry into effective execution the powers expressly delegated to the Federal Government is clear from the last clause of Section 8 of Article I of the Constitution. Wide latitude is accorded by the courts to Congress in its determination of what means are necessary and appropriate to effectuate its policy in the exercise of its granted powers.[17]

That market-wide equalization is an appropriate means of protecting interstate commerce in milk cannot be doubted. The troubles which have beset the milk industry in the past have resulted primarily from the failure to distribute equally among producers the burden of the surplus milk. In *Nebbia* v. *New York*, *supra*, this Court made reference to these facts as expressed in the following statement, quoted in that opinion at pp. 517–518.

> A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed, the pressure to market surplus milk in fluid form will be a serious disturbing factor.

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[17] *Union Pacific R. Co.* v. *Meyers*, 115 U. S. 1, 18; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *United States* v. *Coombs*, 12 Pet. 72, 78; *In re Debs*, 158 U. S. 564, 578; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 303.

To assure a satisfactory stabilization of prices for milk, it is not sufficient to fix the price to the handler. If a classified price scheme is adopted, it is necessary also to include some provision for distributing the advantages of the fluid milk market and the burden of the surplus among all producers. The disruptions of interstate commerce in the past have resulted from two factors, the competitive advantage enjoyed by handlers who assumed no responsibilities for the disposition of any of the surplus milk, and competition among producers to secure a greater proportionate share of the fluid milk market. The fixing of minimum prices to be paid by handlers for milk classified according to its use is designed to correct the first of these conditions by requiring all handlers to pay the same price for all milk which they purchase in the same class, but market-wide equalization is necessary to correct the destructive competition between producers, which has been one of the major causes of unstabilized marketing conditions.[18] If

[18] This may best be illustrated by an example. For the month of September, the Class I (fluid milk) price was $2.45 per cwt. The Class IV–A (butter) price was 93½ cents. Let it be assumed that two handlers, both of which are approved for the New York market, have plants located within a short distance of each other. "A" handles all the milk which it receives in fluid form. "B" makes 90% of its milk into butter and 10% is sold as fluid. Producers delivering milk to "B" produce milk of the same quality and are forced to comply with the same sanitary requirements as the producers delivering milk to "A", but under a classified price scheme which did not involve equalization, "A" would pay its producers $2.45 per cwt. for all milk delivered, whereas "B" would pay its producers for 90% of their milk at the

the classified use plan be accepted as an appropriate method of pricing milk to handlers, some form of equalization is necessary, if the producer is to realize the benefits of those prices. The market-wide equalization pool is a recognized method of solving the problem of surplus milk.[19] The differentials and

Class IV–A price, and for 10% of their milk, at the Class I price, making a blended price to its producers of approximately $1.07 per cwt.

Since the Class IV–A price represents the approximate value of milk for the manufacture of butter, "B" could not afford to pay a higher price for its milk, but, on the other hand, the producers delivering milk to "B" cannot comply with the sanitary requirements and produce milk for sale at this price. The result is that they must evade the sanitary requirements or seek a more advantageous market. Faced with this situation, the likelihood is that they will attempt to sell milk to "A" at prices below the Class I price but higher than they are receiving from "B". An equalization scheme removes the incentive on the part of producers to evade the order by assuring each producer his proportionate share of the Class I market at a reasonable price. In the example just given, if it be assumed that "A" and "B" are the only handlers supplying the marketing area, the uniform price would be $1.76. Each producer would receive this amount. Instead of paying its own producers $2.45, "A" would pay them $1.76 and would pay the balance of 69¢ to the Market Administrator. The Market Administrator would pay this sum to "B", who would add it to the price of $1.07 per cwt. which he owed for his milk and pay his producers the uniform price of $1.76. In this way the depressing effect of competition between producers is avoided, each handler pays the same price for his milk in the same class and each producer receives the same price for his milk.

[19] A market-wide equalization pool created under an Indiana statute was upheld in *Milk Control Board* v. *Crescent Creamery, Inc.*, 14 N. E. (2d) 588. Rehearing denied, 15 N. E. (2d) 80. Appeal dismissed October 10, 1938, 59 Sup. Ct. 87. Rehearing denied, 59 Sup. Ct. 143.

special payments for which provision is made in the Order are necessary to complete the equitable distribution of the burden of surplus milk. Since equalization is necessary to enable the producer to realize the benefit of the prices fixed by the Order and to insure the free flow of milk in the current of interstate commerce, it follows that the provisions of the Order setting up the Producer Settlement Fund are within the powers conferred upon Congress by Section 8 of Article I of the Constitution. An analogy may be found to support this conclusion in decisions dealing with the power of Congress over the rates charged by interstate railroads. It is well settled that the power of Congress to fix the rates charged by interstate carriers carries with it the power to provide for an equitable distribution of the proceeds of those rates.[20]

The same reasoning supports the constitutionality of the charge for administrative expenses imposed by Article X of Order No. 27.

B. THE ACT DOES NOT INVOLVE ANY UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

1. There is no improper delegation of legislative power to the Secretary of Agriculture

This Court has said that "legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly" and that "the Constitution has never been regarded as denying to the Congress the neces-

[20] *New England Divisions Case*, 261 U. S. 184, and *Dayton Goose-Creek Ry. v. United States*, 263 U. S. 456.

sary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."[21]

Congress has defined the policy and established the standards to guide the execution of that policy through each of the steps required for initiating and administering the orders. The facts to be found and applied in making the determinations required by the Act are all facts ascertainable from information available to the Secretary. Their ascertainment and application in determining when an order shall be issued or amended, in determining the subjects and the area to which it shall apply and in selecting terms, determining minimum prices and providing for other details of its operation, are guided in each instance by a statutory designation of the objectives Congress seeks to attain, the factors it intends the Secretary to consider, and the character of the action to be taken on the facts found. These specifications of the ends and the means of each action are found in the Act in detail as precise as is practicably consistent with effective administration of a broad plan for regulating intricate and complex economic relationships.

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[21] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 530. *Currin* v. *Wallace*, No. 275, this Term, decided January 30, 1939.

The objective is a price to producers which will give to milk and its products which are in or which affect interstate commerce a purchasing power equivalent to a "parity price" defined in the Act [22]. In considering whether an order shall be issued, where it shall apply,[23] and what its terms shall be, the Secretary is to ascertain first those prices which will give milk a purchasing power equivalent to this parity price—equivalent to that of milk during a defined base period,[24] if there are adequate figures available for making that determination. If not, a different base period, also specified in the Act, is to be used.[25] These provisions indicate a careful regard by Congress for the practical necessity of a workable standard.[26]

This formula for determining the "parity" objec-

[22] Section 2 (Appendix A, p. 1) defines the policy to be "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period. * * *"

[23] See Section 8c (11) (Appendix A, p. 9).

[24] Section 2 (Appendix A, p. 1) defines the base period for milk as the pre-war period August 1909 to July 1914.

[25] Section 8 (e) (Appendix A, p. 13) provides that if the purchasing power of the commodity cannot be established for the 1909–1914 period from available statistics, the base period shall be the later period August 1919 to July 1929, or that portion of the later period for which the Secretary finds that the purchasing power of the commodity can be satisfactorily determined from such statistics.

[26] In issuing Order No. 27 the Secretary found that the purchasing power of milk handled in the marketing area could not be satisfactorily determined from statistics available for the base period August 1909 to July 1914, but could

tive is clear and fundamentally simple. It is to be applied to figures available to the Secretary and regularly gathered by the Department independently of the Act.[27] It is subject, however, to certain prescribed adjustments.

In the case of milk, Section 8c (18) (Appendix A, p. 11) requires the Secretary to adjust the parity objective of the order so as to reflect feed supplies and feed prices, and other conditions which affect supply and demand for milk and milk products in the marketing area. In case he finds that the parity price derived through the basic formula is unreasonable in view of these factors, he is to adjust the prices sought to be obtained through an order to a level which will reflect such factors and will provide adequate quantities of wholesome milk and be in the public interest. See *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24–25; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285; *Avent* v. *United States*, 266 U. S. 127; *United States* v. *Chemical Foundation*, 272 U. S. 1. He is also to adjust the minimum prices from time to time after the order is issued if that is necessary to reflect changes in the relationship of

be determined for the period August 1921 to July 1929, and therefore found and proclaimed the latter period to be the base period for the purposes of the Order (Appendix B, p. 2).

[27] Since 1909 the Department has collected information on prices of articles that farmers buy and has published at quarterly intervals an index of prices based on such information. These statistics have been collected according to a regularly established procedure and are the official statistics used by the Department in its activities.

these modifying factors. Such adjustments relate to practical economic factors which are evident from information available to the Secretary, and the effect of which upon the supply and demand for milk, and upon the reasonableness of milk prices may be readily ascertained. The Act thus makes it clear that the Secretary is not to prescribe prices designed merely to attain the mathematical parity level without regard for the practical limits to fair and effective regulation which these factors impose.

Similarly, by virtue of Section 2 (1) (Appendix A, p. 2), the Secretary is required to make further adjustment in the prices sought to be obtained through any order from the figure which would give the purely mathematical parity purchasing power in order to take into account consumers' interests. This section makes it clear that the Secretary is not to issue orders calculated to raise prices suddenly to the parity level in disregard of the possibly adverse effect of such sudden adjustments upon consumers, and, indeed, upon the likelihood of making the regulation effective at all. Instead he is to adjust the prices sought to be obtained, downward from those which would bring full parity returns, to such extent as is necessary to approach the parity level "by a gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets." Moreover, he is prohibited by Section 2 (2) from authorizing action designed to keep prices above the

parity level. The appellees certainly cannot object to this provision, which merely prevents the prices required from approaching too suddenly, or from exceeding, the higher prices which the Act would require to be prescribed or otherwise achieved in the absence of the provision.

The Secretary is to commence proceedings for issuance of an order only when he has reason to believe that the issuance of the order will tend to accomplish the establishment of prices for the commodity, determined according to the standards indicated above. But he is not authorized to issue the order merely upon the basis of a reason to believe that it is likely to establish prices at that level. He is required to give due notice and an opportunity for hearing on the proposed regulation, and is to receive evidence, and must make a finding that the issuance of the order and the terms which it contains (which must be terms prescribed in the Act and no others) [28] will tend to effectuate the establishment of the prices determined according to the formula just described.

Thus the statute supplies practical working guides for determining the objective of each order. And it prescribes the terms of the orders and the other steps to be taken in attaining that objective. These constitute definite directions for administrative action in a channel the direction and limitations of which the Act makes plainly evident. The Act leaves the Secretary some discretion but no more than is rea-

[28] Section 8c (5) (Appendix A, p. 4) and Section 8c (7) (Appendix A, p. 6).

onably consistent with fair adaptation of the regula-
ion to contingencies and conditions certain to be
ncountered in administering an Act of this charac-
er; no more than is necessary to find facts which
Congress has clearly specified and to apply the law
airly to the facts found. The alternative of definite
igid specification, in the Act, of exact prices to be
ixed, exact commodities to be affected, and exactly
pecified times at which regulations should become
ffective, would be completely unworkable and could
ot avoid unreasonable, arbitrary, and capricious
esults in the face of particular circumstances which
Congress could not conceivably anticipate and pro-
ide for in such detail. Congress has gone far in
rescribing the terms which, alone, an order may
ontain.

We submit that the determinations required to be
ade as to all steps to be taken in the administration
f this Act are guided by objectives more definite, and
tandards of action more precise than those provided
y many statutes heretofore sustained by this Court
gainst attack on the ground of delegation of legisla-
ve power.

In the following cases specific objections that the
ords used in the statute were so indefinite as to
rovide no sufficient standard were overridden.
Mutual Film Corp. v. *Ohio Industrial Commission*,
36 U. S. 230, 245–246 (educational, moral, amusing,
harmless); *Mahler* v. *Eby*, 264 U. S. 32, 40–41
ndesirable residents); *New York Central Securities*

Company v. *United States*, 287 U. S. 12, 24–25 (public interest); *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285 (public convenience, interest, or necessity); *Frischer and Co.* v. *Elting*, 60 F. (2d) 711 (C. C. A. 2, 1932), certiorari denied, 287 U. S. 649 (unfair methods of competition and unfair acts the effect or tendency of which is to destroy or substantially injure an industry). Other cases in which statutes using general words as a standard have been upheld are *Avent* v. *United States*, 266 U. S. 127, and *United States* v. *Chemical Foundation*, 272 U. S. 1 (in the public interest); *Wayman* v. *Southard*, 10 Wheat. 1 (in their discretion deemed expedient); *Buttfield* v. *Stranahan*, 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Company* v. *United States*, 204 U. S. 364 (unreasonable obstruction to navigation); *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420 (just and reasonable commissions).

2. The Provisions of the Act Relating to Approval by Producers Do Not Involve Any Unconstitutional Delegation of Legislative Power to Producers

Section 8c (9) of the Act (Appendix A, p. 8) provides that an order shall not become effective unless the Secretary determines, in addition to other prerequisite facts, that the issuance of the order is approved or favored by at least two-thirds of the producers who, during a representative period, were engaged in the production of milk for sale in the marketing area or by producers who, during such

period produced at least two-thirds of the volume of milk sold in the marketing area.

It is contended that this provision delegates to the producers a legislative power to impose an order upon a particular market. Clearly it does not have that effect. As in the comparable provision of the Tobacco Inspection Act, 49 Stat. 731, 7 U. S. C. §§ 511 (a)–511 (q), considered in *Currin* v. *Wallace*, *supra*, Congress, by this provision has "merely placed a restriction upon its own regulation by withholding its operation as to a given market," unless the Secretary determines that two-thirds of either of two groups of producers favor it. As this Court pointed out in *Currin* v. *Wallace*, such a provision does not involve any delegation of legislative authority to the producers. They may not "make the law and force it upon the minority." Cf. *Carter* v. *Carter Coal Co.*, *supra*. Here, as in the Tobacco Inspection Act, Congress has exercised its legislative authority by imposing a regulation and prescribing the conditions upon which it shall apply. The finding by the Secretary that the producers approve or favor it is merely one of these conditions.[29]

In fact, under the provision in this Act the producers' approval is more clearly only a fact to be found than it is under the provision considered in the *Currin* case. In that case the Secretary was required

[29] See *Hampton & Co.* v. *United States*, 276 U. S. 394, 407; *Cusack Co.* v. *City of Chicago*, 242 U. S. 526; cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 310, 318; *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 122.

to conduct the referendum. If it resulted unfavorably he had no authority to make the regulation effective. Here, on the other hand, Section 8c (9) does not require a referendum among producers but merely requires that the Secretary determine the fact that the required percentage of producers approve the issuance of the order. He is free to ascertain the fact from whatever sources he finds available. A referendum is not necessary.

However, Section 8c (19) authorizes the Secretary to utilize a referendum among producers as a means of ascertaining this fact of producer approval or disapproval, and provides that the requirement of a determination that sufficient producers approve the order shall be satisfied if, of the total number of producers, or the total volume of production represented in the referendum, the percentage approving or favoring the order equals or exceeds the percentage required by Section 8c (9). Since an absolute requirement of a binding referendum among producers such as that involved in the *Currin* case is properly to be considered as merely imposing a condition to be satisfied before the law becomes effective, *a fortiori* this statute imposes only such a condition and plainly involves no unlawful delegation of legislative power to producers.

Moreover, the possibility that an adverse vote of producers may withhold the application of the statute is further diminished in this Act by the provision that approval of the order by the requisite per-

centage of one of several classifications of producers would justify the issuance of the order. For example, although two-thirds of the number of producers might fail to approve, the order could become effective if the producers of two-thirds of the volume of milk production were found to favor it, or vice versa. There can be no doubt that the producer approval required under this Act is only a condition to the regulation becoming effective and that there is no delegation of legislative power to producers.

C. THE PROVISIONS OF THE ACT RELATING TO ORDERS REGULATING THE HANDLING OF MILK ARE CONSISTENT WITH THE REQUIREMENTS OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

1. The provisions authorizing and directing the fixing of minimum prices to be paid to producers do not violate the due process clause of the Fifth Amendment of the Constitution of the United States

The question as to whether the provisions of the Act relating to orders regulating the handling of milk are consistent with the due process clause of the Fifth Amendment should be considered in the light of the general principle laid down in *Nebbia* v. *New York*, 291 U. S. 502 (p. 523):

> But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

Appellees may contend that the concept of due process of law establishes some rigid and closed class or category of businesses affected with a public interest from which the business of handling milk is excluded and that consequently any attempt to regulate the price of milk is an invasion of a right of freedom to contract which is guaranteed by the Fifth Amendment. This contention, however, is foreclosed by decisions of this Court which hold that the concept of due process of law does not prohibit legislation regulating the price at which milk may be sold.[30]

In *Nebbia* v. *New York*, *supra*, a New York statute which established a milk control board and authorized the board to fix prices at which milk might be bought from producers and sold to consumers was attacked on the ground that it violated the due process clause of the Fourteenth Amendment. In sustaining the regulation the Court said (pp. 531–532):

> We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. * * * But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no

[30] *Nebbia* v. *New York*, 291 U. S. 502; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251; *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608.

such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois*, 94 U. S. 113.

(p. 537):

So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, *a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.* If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. [Italics supplied.]

(pp. 538–539):

If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful

> to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixed prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

The principles laid down in that case were recently applied by this Court in upholding the constitutionality of a Virginia statute which provided for regulation of the price of milk.[31]

It may be suggested that although these decisions dispose of the question of due process so far as it relates to price-fixing by a state, they have no application to a case where price regulation is attempted

[31] *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608.

by the Federal Government. As we have indicated above, the due process clause of the Fifth Amendment imposes no greater limitation upon the power of Congress to regulate interstate commerce than the due process clause of the Fourteenth Amendment imposes upon the exercise by a state legislature of its police power.[32] We have pointed out also that the fixing of prices is necessary to correct and prevent the conditions in interstate commerce in milk which this Act seeks to eradicate (*supra*, pp. 104–108). The minimum prices prescribed in the Order apply equally to all handlers with respect to each of the classes of milk established by the Order. There is no discrimination between handlers, and none is claimed with respect to the provisions fixing prices. Nor is there any showing of arbitrary or capricious action in the fixing of these prices. The record is clear that they are fair and reasonable. In these circumstances there is plainly no basis for the contention that the price-fixing provisions deprive the handlers of property without due process of law. The Court has aptly expressed the Government's position in the opinion in *Nebbia* v. *New York*, *supra*, p. 525, already quoted in part (*supra*, p. 104), with respect to the coextensive character of the state and federal powers to fix prices. Its pertinence to the circumstances in this case, additional to the reasonable relation be-

[32] See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, separate opinion of the Chief Justice at p. 319, dissenting opinion at p. 326. See also *Baldwin* v. *Seelig*, 294 U. S. 511.

tween the regulation and the objectives of the Act, perhaps justify its repetition here.

> *The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare.* They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. [Italics supplied.]

2. The Provisions Authorizing the Establishment and Operation of a Market-Wide Equalization Pool

While the provisions of the Order *fixing minimum prices* affect the appellees directly as handlers, the provisions requiring *payment to the Producer Settlement Fund* do not affect the appellees as handlers at all.

It has been pointed out that the purpose and effect of the equalization pool authorized by Section 8c (5) (B) (ii) of the Act (Appendix A, p. 4) is to equalize among producers the burden of the surplus milk while assuring to all producers the benefit of the minimum prices fixed in the Order to be paid by handlers for milk. The payments to the equalization pool (called the Producer Settlement Fund in Order No. 27) do not raise or lower the minimum

prices fixed by the Order and paid by all handlers. They relate only to the distribution among producers of the sums paid by handlers.

This money distributed through the pool does not belong to the handlers and these payments cannot be said to equalize profits among the handlers or to take money which belongs to one handler and give it to another. The money involved in these payments represents a part of the value of the milk delivered by producers; it is money which should be distributed among the producers, and it is this distribution which is accomplished by the equalization payments. The handlers as such have no right to any part of it at any time. When it is paid they are deprived of nothing. They have merely served as a conduit for its distribution among producers. Accordingly, inasmuch as the equalization payments deprive them of no property they can assert no unconstitutional exaction by the provisions which require such payments and are not in a position to contest their validity.[33]

But even if handlers should be said to have a sufficient legal interest to contest the validity of the provisions of the Act authorizing the Producer Settlement Fund, it is plain that these provisions do not violate the due process clause of the Fifth Amendment.

The equalization provisions deal with the problems created by the constant surplus of milk which is

[33] *Cusack Co.* v. *City of Chicago*, 242 U. S. 526; *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531.

always present in the marketing area and which must be present if the demands of the ultimate consumers are to be adequately supplied. The burden of this surplus is an essential and indispensable incident of the milk business. Unless it is shared equally by those engaged in the industry, recurrent disruption of the industry is inevitable.

The equalization payments are essentially fair because they provide for a mutuality of burdens and benefits. Their effect is to give all producers a share of the valuable fluid milk market commensurate with the quantity of milk they deliver and at the same time to enable all producers to bear equally the burdens incident to the inevitable and necessary surplus. A statutory provision which treats all producers with equal fairness, assures them a stable price, protects them from the hazards which have proved so harmful to their welfare in the past, and distributes the necessary burdens of the business equally and fairly among them all does not violate the due process clause of the Fifth Amendment.[34]

[34] It is asserted by the appellee Central New York Cooperative Association, Inc., that the equalization provisions of the Act deprive its producer-members of their property without due process because, if not required to make payments to the Producer Settlement Fund, it will be able to return a greater amount to its members. As pointed out *infra*, p. 182, this assertion is based on the assumption that if there was no order in effect it could sell its milk at the same prices it has obtained under the Order. This assumption ignores the fact that the Order is responsible for the higher prices which it has been able to return to producers. The appellee seeks to avoid the burdens imposed by the Order while enjoying the benefits. There is no basis for the assump-

A precise analogy is found in the Workmen's Compensation Acts. Experience has shown that accidents, with or without fault, are inevitable incidents of industry. The Workmen's Compensation Acts rest upon that fact. A statute which compels all employers in certain occupations to contribute to a common fund is constitutional even though there may be no accidents at all in the plant of a particular employer and many accidents in the plant of another.[35]

Another analogy may be found in statutes which require banks to contribute to a common fund to be used for insurance of deposits in banks which may become insolvent. Such statutes do not violate the due process clause of the Fourteenth Amendment.[36]

This Court has held that Congress in the exercise of its power to regulate interstate commerce may require railroad companies to share the burdens incident to the operations of an efficient national transportation system, even though those burdens bear more heavily on some railroad companies than on others. For example, in the *New England Divisions Case*, 261 U. S. 184, an order of the Interstate Commerce Commission which increased by 15% the share

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tion that, if no order had been in effect, the return to this appellee's producers would have been any higher than or as high as it would have been if this appellee had complied with the Order and made its payments to the Producer Settlement Fund.

[35] *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *New York Central Railroad Co.* v. *White*, 243 U. S. 188.

[36] *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Abie State Bank* v. *Bryan*, 282 U. S. 765.

of several New England railroads in joint through freight rates to the West was held valid. Prior to the making of the order by the Commission, these rates had been divided according to contracts between the carriers. The order was sustained on the ground that it was authorized by the provisions of the Transportation Act, 1920 (c. 91, 41 Stat. 456), and that those provisions of the Act which authorized the apportionment of joint rates on the basis of the greater needs of particular carriers were not unconstitutional.

In *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, the so-called recapture provisions of the Transportation Act of 1920 were upheld. These provisions required in substance, that, if the earnings of a railroad company exceeded a fair rate upon its investment, a part of the excess should be paid into a general railroad revolving fund and used by the Interstate Commerce Commission to assist other railroads which were experiencing financial difficulties. In its opinion the Court pointed out (p. 484) that the excess income over and above a fair rate on the railroad's property was "made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties".

The court below found an analogy in *Thompson et al.* v. *Consolidated Gas Utilities Corp. et al.*, 300 U. S. 55. That case is clearly not in point. The decision rested primarily on the ground that the

evidence clearly showed that the orders issued by the state regulatory body limiting and prorating the production of gas by the several owners of land in a gas field did not bear any reasonable relation either to the prevention of waste or to the protection of correlative rights.

Here the equalization pool authorized by the statute plainly has a *reasonable relation* to the commerce regulation sought to be achieved by the Act.

In *Thompson et al.* v. *Consolidated Gas Utilities Corp. et al., supra,* the Court said (pp. 76–77):

> * * * We assume that the prohibition of any wasteful conduct, whether primarily in behalf of other owners of gas in the common reservoir, or because of the public interests involved, is consistent with the Constitution of Texas and that of the United States, and that to prevent waste production may be prorated. We assume, also, that the State may constitutionally prorate production in order to prevent undue drainage of gas from the reserves of well owners lacking pipe-line connections. If proration were lawfully applied for any such purposes, the fact that thereby other private persons would incidentally and gratuitously obtain important benefits would present no constitutional obstacle. * * *

The court below also cited *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, invalidating the provisions of the first Railway Retirement Act, and found "a close resemblance to the pooling fund," there involved, in the equalization provisions of the Act. That decision is not controlling here.

The opinion of the majority, in holding that an attempt to make one railroad pay to provide payments for superannuated employees of other railroads was a violation of due process, rested heavily upon objections to the provisions of the particular statute there involved as applied to the industry regulated. Furthermore, that case rested in part on the ground that the pooling arrangement there involved was not shown to be related to the preservation of efficiency of interstate transportation and therefore was not an exercise of the federal commerce power upon which it purported to rest. This circumstance greatly limits the application of the Court's comments in that case. They have no application to statutory provisions which, as an essential to a regulation of interstate commerce, distribute equitably the burdens and risks inevitably and necessarily incident to engaging in the business. Cf. *Mountain Timber Co.* v. *Washington, supra; New York Central Railroad Co.* v. *White, supra; New England Divisions Case, supra; Dayton-Goose Creek Railway* v. *United States, supra.* And see the dissenting opinion in *Railway Retirement Board* v. *Alton Railroad Co.*, pp. 384–387.

3. The Provisions Authorizing the Requirement That Handlers Subject to an Order Shall Pay Their Pro Rata Share of the Expense of Administration Do Not Violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States

Section 10 (b) (2) of the Act (Appendix A, p. 14), authorizing the requirement that handlers subject to an order shall pay their pro rata share of the expense of administration, provides a reasonable and appropriate means for the accomplishment of the legitimate purposes of the statute. There can be no question as to the power of Congress to require persons under regulation to contribute to the payment of administrative expenses. In the *Head Money Cases, supra*, this Court sustained the validity of a federal statute which required shipping companies to pay 50¢ for each alien passenger brought into the United States, the money to be paid into the United States Treasury and to be expended by the Secretary of the Treasury to defray the expenses of regulating immigration and for the care of distressed immigrants. The Court upheld the statute as being incident to the regulation of foreign commerce. Although the Court did not discuss the question of due process of law, the implication of its decision sustaining the exaction necessarily is that the imposition of such a charge does not violate the Fifth Amendment.

4. The provisions which permit qualified cooperative marketing associations of producers to blend the net proceeds of all sales in all markets and to make distribution thereof to producers in accordance with the contract between the association and its producers do not violate the due process clause of the Fifth Amendment of the Constitution of the United States.

The appellees contend that the Act, and the Order issued under it, violate the Fifth Amendment because certain provisions of the Order which are required or authorized by the Act appear to be less favorable to some proprietary handlers than to producer-owned cooperative associations which are also handlers.

This contention is wholly unsound. Apparently it rests, in part at least, upon the assumption that the Fifth Amendment requires all handlers to be treated alike in federal legislation.[37] It ignores the fact that there is no equal protection clause in the Fifth Amendment and it disregards the judicial approval long since given to the established legislative policy of Congress, and of the states, to foster and encourage direct marketing of farm products by treating farmers who distribute their own products, and associations of farmers organized for cooperative marketing, differently from persons engaged merely in the business of buying farm products from the producers and selling them to others. It ignores the obvious and fundamental differences between cooperative associations, which are composed of milk producers who have organized to handle and sell their own milk, and proprietary handlers, which, as agencies wholly separate from the producers, engage only in selling, for a profit, milk produced by others and have interests distinct from those of the producers, if not, indeed, antagonistic to them.

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[37] See *Currin* v. *Wallace*, No. 275, this Term, decided January 30, 1939.

It ignores the fact that the differences in treatment accorded by this statute and order are reasonably related to these differences between the two types of handlers and the differences in the value to the market, and the cost to the handlers themselves, of the services they perform. Furthermore, it ignores the fact that these differences in treatment are reasonably adapted to the maintenance of orderly marketing conditions for milk in interstate commerce and are necessary for that purpose. It ignores the fact that the challenged provisions deprive the complaining proprietary handlers not of any vested rights having the character of property, but merely of expedients and advantages by which they have been able to cast upon others the burdens peculiar to milk marketing, while taking its benefits.

It is the Government's position that the differences complained of are based upon a clearly reasonable classification of handlers and are consistent with a long-established legislative policy, approved by the courts, of encouraging producer-owned cooperative marketing agencies; that the differences in treatment of the two types of handlers are appropriate and necessary for the maintenance of the orderly flow of milk into the marketing area through interstate commerce, and are reasonably adapted to that end; and finally, that none of them deprive the appellees of property in violation of the Fifth Amendment but all merely minimize fortuitous opportunities for disruption of the market at the expense of the producers.

(a) *The settled legislative policy of treating producers' cooperative associations differently from ordinary business corporations rests upon a reasonable basis of classification approved by the courts*

State statutes fostering the development of cooperative associations for marketing farm products have been enacted from time to time for many years. Every state except Delaware has made provision by law for incorporation of farmers' cooperatives enjoying special privileges.[38] These laws and the special advantages conferred by them upon farmers' cooperatives have been consistently approved by the courts.[39]

[38] See statutes cited in footnote 11 to the dissenting opinion of Mr. Justice Brandeis in *Frost* v. *Corporation Commission*, 278 U. S. 515, 540, and in footnote 14 to that opinion, pp. 541–542.

[39] *Tobacco Growers Co-op. Asso.* v. *Jones*, 185 N. C. 265; *Kansas Wheat Growers* v. *Schulte*, 216 Pac. 311; *Brown* v. *Staple Cotton Growers Co-op. Asso.*, 96 So. 849; *Northern Wisconsin Co-op. T. P.* v. *Bekkedal*, 197 N. W. 936; *Dark Tobacco Gr. Co-op. Asso.* v. *Dunn*, 266 S. W. 308; *Minnesota Wheat Growers* v. *Huggins*, 203 N. W. 420; *List* v. *Burley Tobacco Growers Co-op. Asso.*, 114 Ohio St. 361; *Dark Tobacco Growers Co-op. Asso.* v. *Robertson*, 150 N. E. 106; *Potter* v. *Dark Tobacco Growers Co-op.*, 201 Ky. 441; *Harrell* v. *Cane Growers Co-op.*, 126 S. E. 531; *Nebraska Wheat Growers* v. *Norquist*, 204 N. W. 798; *Warren* v. *Alabama Farm B. Cotton Association*, 104 So. 264; *Manchester Dairy System* v. *Hayward*, 132 Atl. 12, 19; *Clear Lake Co-operative Live Stock Association* v. *Weir*, 206 N. W. 297; *Hollingsworth* v. *Texas Hay Asso.*, 246 S. W. 1068; *Washington Cranberry Asso.* v. *Moore*, 201 Pac. 773; *Poultry Producers* v. *Barlow*, 208 Pac. 93; *Oregon Growers Co-op. Asso.* v. *Lentz*, 212 Pac. 811; *South Carolina Cotton Growers* v. *English*, 133 S. E. 542;

Congress likewise has adopted the policy of aiding and encouraging the establishment and operation of such cooperatives and in numerous statutes has dealt with such cooperatives differently from proprietary business enterprises.

The Clayton Act, 38 Stat. 730, 15 U. S. C. § 17, confers a qualified and limited exemption from the operation of the anti-trust laws upon nonstock, nonprofit agricultural organizations "instituted for the purpose of mutual help." The Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291, extended this exemption to cooperative associations having common stock. The Robinson-Patman Act of June 19, 1936, c. 592, § 4, 49 Stat. 1528, 15 U. S. C., Supp. IV § 13 (a) also exempts a cooperative association from any requirement of the Act which would prevent the association from returning to its members "the whole or any part of its net earnings or surplus resulting from its trading operations in proportion to their purchases from, to, or through the association."

The War Finance Corporation Act of April 5, 1918, 40 Stat. 512, 15 U. S. C. § 348, authorized advances to cooperative associations of producers whenever they had made advances for agricultural purposes or discounted commercial paper issued for such purposes.

Milk Producers v. *Bell*, 234 Ill. App. 222 and *Barns* v. *Dairymen's League Co-operative Association, Inc.*, 220 App. Div. (N. Y.) 624.

The Grain Futures Act, 42 Stat. 998, 7 U. S. C. § 17 (e) extended privileges to cooperative associations not accorded to other business corporations. When that Act was amended in 1936 and redesignated as the Commodity Exchange Act these provisions were retained, 49 Stat. 1491, 7 U. S. C. Supp. IV, §§ 7 (e), 10 (a).

Cooperative associations were exempted from registration under the McKinley Tariff Act 44 Stat. 91, 26 U. S. C. § 750 (b). The Agricultural Marketing Act of June 15, 1929, 46 Stat. 10, 12 U. S. C. §§ 1141, 1141 (j), expresses a Congressional policy to promote merchandising of agricultural commodities in such a way as to put agriculture on a basis of economic equality with other industries. This was to be accomplished in part "By encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies."

Loans to cooperative associations by the Farm Credit Administration are authorized by 12 U. S. C. § 1141 (e). By the Act of June 16, 1933, 48 Stat. 257, 12 U. S. C. §§ 1134–1134 (m); and 1138–1138 (e), the Governor of the Farm Credit Administration is directed to organize a "Central Bank for Cooperatives" and 12 banks to be known as "banks for cooperatives" to make loans to cooperative associations.

Agricultural associations have been exempt from payment of federal income taxes on corporations since 1913 (38 Stat. 172) and the 1934, 1936, and 1938 income tax laws (48 Stat. 700; 49 Stat. 1673; 52 Stat. 480; 26 U. S. C. §103 (12)) have continued this exemption.

State and federal statutes according special treatment to producers selling their products directly or through cooperative associations of producers have been frequently sustained by this Court.

Provisions of the Federal Income Tax Law of 1913, 38 Stat. 172, exempting "agricultural associations" were sustained in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 173 and in *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 21. Although such exemptions result in definite competitive advantages to such associations, this Court recognized the difference between such associations and ordinary business organizations as a reasonable basis of classification sustaining the exemption.

The Grain Futures Act, 7 U. S. C. § 7(e) was sustained in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, in the face of the contention that certain of its provisions were for the benefit only of farmers' organizations, and that it enabled members of cooperative associations to escape payment of commissions which others must pay, thereby reducing the value of membership on the Board of Trade. Although members of the Board of Trade were in

competition with the cooperative associations, the Court held that the Act did not violate the Fifth Amendment.

That cooperative associations of producers are in a class different from ordinary commercial corporations is implicit in the decision in *In re Marketing Association of Fort Wayne, Inc.*, 8 F. (2d) 626, where it was held that an association "engaged chiefly in promoting, fostering, and encouraging the marketing of dairy products cooperatively" one of the principal objects of which was "to prevent speculation, stabilize the market, and handle co-operatively and collectively the problems of dairy products" is not a "moneyed business or commercial" corporation within the meaning of the Federal Bankruptcy Act.

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, a state statute imposed a license tax upon persons and corporations refining sugar and molasses but exempted planters and farmers grinding and refining their own sugar and molasses.[40] In sustaining the Louisiana statute, the Court said (p. 95) "The discrimination is obviously intended as an encouragement to agriculture and does not deny to persons and corporations engaged in a general refining business the

[40] The Court pointed out that "Congress too has repeatedly acted upon the principle of the Louisiana Statute," and referred to the Act of Congress of August 2, 1813, which imposed a tax on retailers of wines and spirits but exempted "vine dressers who sell at the place where the same is made, wine of their own growth," indicating that such a classification was reasonable.

equal protection of the laws." Exemptions accorded to producers organized into associations do not differ in principle from the exemption granted in the Louisiana statute in favor of individual farmers.

The validity of a Kentucky statute similar to the Capper-Volstead Act was sustained by this Court in *Liberty Warehouse Co.* v. *Burley Tobacco Growers Cooperative Marketing Association*, 276 U. S. 71.

The only case in which this Court has held a discrimination in favor of cooperative associations to be unconstitutional is *Frost* v. *Corporation Commission*, 278 U. S. 515. In that case, an Oklahoma statute which required a showing of public necessity as a prerequisite to the granting of a license to engage in cotton ginning provided that a license should be granted without such a showing upon the petition of 100 citizens and taxpayers for the establishment of a gin to be operated cooperatively. The Court held that a cooperative association formed as a stock corporation under an Oklahoma statute which permitted such corporations to be composed in part of persons other than farmers, to make profits, and to declare dividends, was not sufficiently different from ordinary business corporations to sustain the different treatment provided for by the statute. The court indicated, however (p. 523), that its objection was on this ground alone and would not have applied to an association not for profit, organized without capital stock and restricted to the business of its own members except the selling of products of and buying

of supplies for nonmembers as agent, subject to a limited liability of the nonmembers for the obligations of the association "such services to be performed at the actual cost thereof, including a pro rata part of the overhead expenses" (278 U. S. 523). The cooperative associations involved in this case are nonstock, nonprofit associations.

Moreover the dissenting opinion of Mr. Justice Brandeis points out in detail the bases for recognizing even cooperative corporations of the particular type involved in the *Frost* case as a class of business enterprises distinct and different from ordinary business corporations (278 U. S. 535–550).[41]

This recognition of the constitutional validity of legislative treatment of farmers' co-operatives more favorable than that accorded to ordinary business organizations is consistent with established principles recognizing the reasonableness of treating different types of business enterprises differently even though they are in competition. In *State Board of Commissioners* v. *Jackson*, 283 U. S. 527, this Court, in sustaining the constitutionality of a chain store tax, said (p. 537):

> The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Rfg. Co.* v. *Louisiana*, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain

[41] See also the separate dissenting opinion of Mr. Justice Stone, 278 U. S. 550, 551.

it, *Rast* v. *Van Deman & Lewis Co.* 240 U. S. 342; *Quong Wing* v. *Kirkendall*, 223 U. S. 59. See also *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304; *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580.

As this Court pointed out in *Puget Sound Power and Light Co.* v. *Seattle*, 291 U. S. 619, 625, 626:

> The state may tax different types of taxpayers differently even though they compete. *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331; *Quong Wing* v. *Kirkendall*, 223 U. S. 59. It could not plausibly be argued that a private nonprofit corporation distributing electric current to consumers at cost could not be exempted from taxes borne by others serving the same wants. Compare *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 40; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 418; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322 * * *. The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the

> way. Legislation may protect from the consequences of competition, but the Constitution does not. * * * It [the Fourteenth Amendment] does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different.

The foregoing cases establish that Congress may accord to producer-owned cooperatives treatment different from that accorded to proprietary handlers and that such a law would be sustained even though it could be shown to be drastically discriminatory in favor of the separate class of cooperative handlers. No evidence in this case, however, discloses that any of the provisions of the Act or the Order have accomplished or threaten the accomplishment of any injury or discrimination to the appellees.

(b) The Provisions Claimed To Be Unconstitutionally Discriminatory Do Not Discriminate in Favor of Cooperatives and Do Not Deprive Appellees of Their Property in Violation of the Fifth Amendment

i. The Exemption of Cooperatives from the Uniform Price Requirement

Under terms of the order (Article VII, Section 1)[42] which are prescribed by the Act (Section 8 (c) (5)

[42] Article VII, Section 1 of the order provides:

"*Time of Payment.*—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from

(F)) [a] all handlers of milk, except cooperative associations of producers, must return to producers from whom they buy milk the uniform price established under the order; whereas producers who sell their milk through cooperatives may receive back from the cooperatives less than that amount as their share of the net proceeds of the pooled milk handled by the cooperative. The appellees claim that this provision results in an unreasonable discrimination against handlers which are not cooperatives and results in the property of such handlers being taken in violation of the Fifth Amendment and transferred to producers who sell through cooperatives. The

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producers and he does not pay the uniform price for all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such producer's milk which was paid for at the uniform price and furnish a copy of such statement to the market administrator at the time payment is made."

[a] Section 8c (5) (F) of the Act provides:

"Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk."

alleged taking is said to occur in various ways. All are merely slightly varying consequences of this exemption. The following are typical:

First, it is said that the mere fact that cooperatives may return to producers less than the uniform price enables them to sell milk at lower prices than the proprietary handlers can accept without loss if they pay the class prices.

Second, it is said that, because cooperatives may return to producers less than the uniform price, they are free to deduct from the amount paid to the producers certain expenses of plant operation and certain transportation costs; whereas proprietary handlers may not throw these expenses back upon the producers from whom they buy but must either bear the expenses themselves or pass them on to their customers in the form of competitively disadvantageous, higher prices.

These complaints retain a semblance of plausibility only as long as the essential differences between proprietary handlers and cooperative associations of producers which are also handlers, remain obscured. But vital differences are apparent, and, once recognized, the reasonableness of the exemption becomes apparent. The differences most significant with respect to this particular claim of discrimination rest upon the dual relationship of producers to the cooperatives.

Cooperative handlers are composed of producers. These producers share any income of the cooperative

enterprise, as well as any services it renders. Although they are owners of the handling enterprise, they also supply the milk it handles. Consequently, while they are concerned with what they receive as proceeds of the handling operation, they are more concerned with what they receive for the milk they produce and sell through the cooperative. The owners or stockholders of proprietary handlers, on the other hand, are not milk producers. As owners or stockholders in the distributing enterprise, they have no interest in enhancement of producers' returns. On the contrary, by the nature of their business, they must seek their income solely from the spread between the price paid to producers and that collected from those to whom they sell. The immediate income of such a business is enhanced as the amount paid to the producers is diminished.

Moreover, producers who sell through cooperatives must necessarily share the costs of the enterprise of distribution as well as its services and net returns, whereas producers who sell through proprietary handlers neither directly share the costs of the distributive operation nor share its returns. They merely sell their milk for a price. Furthermore, producers who sell to proprietary handlers have no voice, even indirectly, in the determination of the selling policies of such handlers, or in the determination of what operating costs shall be incurred or what prices shall be paid or received for milk by the handlers. Those who sell through cooperatives do have a voice

and an interest in these matters as members of the handling organization.

The exemption of cooperatives from the necessity of returning the uniform price to producers is merely a reasonable recognition of these differences.

Doubtless it will be said, however, that despite these differences between cooperative handlers and proprietary handlers, and despite the reasonableness of classifying and treating them differently, the difference in treatment required by the Act gives the cooperatives an insurmountable advantage in competition with the proprietary handlers and is therefore arbitrarily unreasonable—that the provision is, as the court below said (R. 769) "* * * more like a case of statutory disarming of one set of competitors and sending (sic) into competitive battle with another set to whom the same statute supplies arms."

But the effect of the Act and the order is only to force the proprietary handlers to compete on an equal basis with the cooperatives. The only weapons of which they are deprived are those offensive weapons (such as the freedom to throw expenses or competitive losses of their proprietary operations back onto the producers in the form of reduced prices), by the use of which, in the past, they have persistently disrupted interstate commerce in milk destined for the New York market and depreciated prices to producers selling into that market. The provision requiring proprietary handlers to pay the

uniform price is essential if such results are to be prevented.

The mere fact that the terms of the Order do not require cooperatives composed of producers to return the uniform price to their members does not, as the appellees would have it appear, relieve cooperatives of the necessity of returning the equivalent of that price. With the Order in effect producers can get the uniform price in cash from any complying proprietary handler. This requirement sets a standard by which producers may judge the adequacy of the return they get for their milk, whether they sell it to a proprietary handler or through a cooperative. Any cooperative adopting a policy of presistently dropping retail prices materially below those of the proprietary handlers, and throwing back upon the participating producers either excessive operating costs or losses resulting from price cutting or other sales policies, would quickly destroy itself. Unless the net value of the services and returns rendered to producers selling through cooperatives at least equal the uniform price which they can get from proprietary handlers under the Order, there is no reason for them to sell through cooperatives. There is no reason to suppose that any producer would continue to accept, through a cooperative, returns smaller than those he could get from proprietary handlers, merely in order to achieve the barren satisfaction of having cooperatives sell larger quantities of milk for less money. His interest lies in getting the best available return from his milk. Obviously no cooperative could long survive

without returning to producers at least the equivalent of the uniform price. The self-interest of the cooperative's members would either force a change of policy, or cause them to abandon the cooperative."

Thus when the appellees' contention is considered more than superficially, it is evident not only that the different treatment accorded to cooperatives does not result in any real discrimination in favor of cooperatives but also that no requirement that cooperatives return uniform prices to their producers is necessary to assure all producers net returns equivalent to the uniform price.

Furthermore, there is no evidence in this case to show that the appellees, or any proprietary handlers, have been damaged or would be damaged by competing with cooperatives on the equalized basis enforced by the Act and Order. See *infra*, pp. 176-182. Without such proof there is no basis for a finding that the order deprives them of property without due process of law. *Hegeman Farms Corp.* v. *Baldwin et al. supra*, 170; *Public Service Commission of Montana* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136; *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447.

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[44] The affidavit of E. W. Gaumnitz (R. 257, 272) sustains this conclusion. There is no evidence in the record contradicting it. The fact seems too obvious to invite contradiction.

ii. The Exemption of Milk Sold Outside the Marketing Area From the Minimum Price Requirement Does Not Deprive the Appellees of Property in Violation of the Fifth Amendment to the Constitution

The appellees claim that the order discriminates against them because it does not require that the Class I prices fixed by the Order be paid for fluid milk sold outside the marketing area. The contention seems to be that this results in an advantage to handlers who sell outside the area not only because they are free to pay less than the Class I price for such milk and thereby to reduce the average price paid for all the milk they handle but also because milk sold outside the marketing area, particularly in New Jersey, brings a higher price than that sold within the marketing area. It is asserted that the profits from such sales are available to such handlers as a back-log which enables them to undersell the appellees in the marketing area. It is claimed that these circumstances result in taking the appellees' property in violation of the Fifth Amendment and transferring of it to those handlers who sell outside the market.

It is obvious that any blending of the prices paid for milk sold outside the marketing area with the price paid for milk in the area could not discriminate in favor of cooperatives as such, for the cooperatives are not required to pay the uniform price even for milk sold within the market. The complaint therefore is not peculiar to cooperatives. If the provision

could have any discriminatory effect at all, it would operate only in favor of proprietary handlers selling milk outside the marketing area.

Moreover as has been pointed out *supra*, pp. 48-60, there is no evidence that this provision is unreasonable or discriminatory in any respect. It is well established that facts supporting the reasonableness of the statute will be presumed to exist until the contrary is shown by affirmative evidence. *United States* v. *Carolene Products Co.*, 304 U. S. 144. The burden is upon the one attacking the statute to show that it is unreasonable or discriminatory. *Aetna Insurance Co.* v. *Hyde, supra; Public Service Commission* v. *Great Northern Utilities Co., supra.* The appellees have completely failed to sustain that burden on this point.

D. THE LOWER FEDERAL COURTS HAVE ALMOST UNIFORMLY UPHELD THE CONSTITUTIONALITY OF THE ACT AND THE VALIDITY OF ORDERS ISSUED PURSUANT THERETO

The lower federal courts have, with only one exception [45] aside from the decision of the District Court in the case at bar, upheld the constitutionality of the Act and the validity of orders issued pursuant thereto.

Three circuit courts of appeals have had occasion to pass upon the constitutionality of the Act and

[45] The only unreversed district court case holding such orders invalid is *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 152 (S. D. Fla.), which, in effect, has been overruled by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Henry E. Whittenburg et al.* v. *United States*, 100 F. (2d) 520.

orders issued by the Secretary of Agriculture pursuant thereto.

In *Edwards* v. *United States*, the Circuit Court of Appeals for the Ninth Circuit, on July 22, 1937, in a unanimous decision, reported in 91 F. (2d) 767, upheld the constitutionality of the Act and the validity of an order regulating the handling in interstate commerce of citrus fruit grown in California and Arizona. The order in that case provided for proration and allotment of shipments of citrus fruit in interstate commerce and, therefore, differs in the form of regulation from Order No. 27; but the restraint upon the freedom of the handler to ship freely in accordance with his contracts in the terminal markets was probably more onerous in its effect upon the handler than the regulatory provisions of Order No. 27 and was just as vigorously attacked as violating the due process clause of the Fifth Amendment as are the provisions of Order No. 27 in the case at bar.

In *Wallace* v. *Hudson-Duncan & Co.*, 98 F. (2d) 985, the same Circuit Court of Appeals again upheld the Act and sustained the validity of an order regulating the shipment in interstate commerce of walnuts grown in California, Oregon, and Washington.[46]

In *United States* v. *David Buttrick Company et al.*, the Circuit Court of Appeals for the First Circuit, in a unanimous opinion on July 16, 1937, reported in 91 F. (2d) 66 (certiorari denied, 302 U. S. 737), held that

[46] The opinion of the District Court, *Hudson-Duncan & Co.* v. *Wallace*, 21 F. Supp. 295, upheld the statute but declared the order invalid as a denial of due process.

the marketing provisions of the Act were a valid exercise of the power of Congress under the commerce clause. The order in that case regulated the handling of milk shipped in interstate commerce to Boston, and the decision of the District Court of Massachusetts (Brewster, J.), 15 F. Supp. 655, dismissing the bill of complaint filed by the Government to enforce compliance with the order, was reversed by the Circuit Court of Appeals. It is true that only two questions were before the court for decision, namely: (1) whether the decision of this Court in *United States v. Butler*, 297 U. S. 1, invalidated the marketing provisions of the Agricultural Adjustment Act, as amended August 24, 1935, and (2) whether such marketing provisions were, upon the face of the Act, a valid exercise of the powers of Congress to regulate interstate commerce.

In *Henry E. Whittenburg et al.* v. *United States*, the Circuit Court of Appeals for the Fifth Circuit, on December 15, 1938, in a unanimous decision reported in 100 F. (2d) 520, upheld the constitutionality of the Act and the validity of an order regulating the handling in interstate commerce of citrus fruit grown in the Lower Rio Grande Valley. The order in this case was similar to the order involved in *Edwards v. United States*, *supra*.

In twelve districts, widely separated and representing nearly every section of the country, the district courts have enforced orders issued by the Secretary pursuant to the Act. In all, twenty-four di

trict judges have issued restraining orders or injunctions requiring compliance with orders issued pursuant to the Act. Some of these cases have proceeded no further than the preliminary stages and are unreported, but in a number of them the opinions or findings of fact and conclusions of law of the court have been reported. A representative case from each of the twelve districts mentioned above is cited in the footnote hereto.[47] In five of these cases the order involved was an order regulating the handling of milk.[48]

Only three federal judges, aside from the District Court in the instant case, have held against the stat-

[47] *United States* v. *Edwards* (S. D. Cal., Yankwich, J.), 16 F. Supp. 53; *United States* v. *Buckley*, (N. D. Cal., St. Sure, J.), unreported; *United States* v. *Goldsmith Fruit Co.* (S. D. Fla., Holland, J.), 19 F. Supp. 147; *United States* v. *Corinth Creamery, Inc.* (D. Vt., Howe, J.), 21 F. Supp. 265; *United States* v. *Whiting Milk Co.* (D. Mass., Sweeney, J.), 21 F. Supp. 321; *United States* v. *Whittenburg et al.* (S. D. Tex., Atwell, J.), 21 F. Supp. 713; *United States* v. *Krechting* (S. D. Ohio, Druffel, J.), unreported. *United States* v. *Wiggins* (E. D. N. C., Pollard, J.), unreported; *United States* v. *Bland* (S. D. Ga., Barrett, J.), unreported; *United States* v. *Morris* (S. D. S. C., Myers, J.), unreported; *United States* v. *Babcock Dairy Co., et al.* (N. D. Ohio, Kloeb, J.), unreported; *United States* v. *Beranek* (W. D. Mich., Raymond, J.), unreported.

[48] *United States* v. *Corinth Creamery, Inc., supra; United States* v. *Whiting Milk Co., supra; United States* v. *Krechting, supra; United States* v. *Babcock Dairy Co., et al., supra; United States* v. *Beranek, supra.*

ute. Two of these have been reversed,[49] and the opinion of the third has, in effect, been overruled.[50]

II. The Validity of Order No. 27

A. THE DISTRICT COURT ERRED IN HOLDING THAT SECTIONS 5 AND 6 OF ARTICLE VII ARE NOT AUTHORIZED BY THE ACT

Section 5 of Article VII provides for payments to cooperative associations to compensate them for the expenses which they incur in conducting their operations so as to supply Class I milk to the marketing area in times of short supply, and to secure the utilization of milk in times of long supply in such a manner as to assure the greatest possible returns to all producers.

Section 6 of Article VII provides for certain payments to handlers to compensate them for the expenses incurred in transporting milk, received at a fluid plant during any period of the year except the short season, to a manufacturing plant where it is utilized in the higher manufacturing classes, and in shipping fluid milk to the marketing area from a manufacturing plant during the short season.

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[49] *United States* v. *David Buttrick Company et al.*, 15 F. Supp. 655, reversed, 91 F. (2d) 66, certiorari denied, 302 U. S. 737; *Ganley* v. *Wallace*, 17 F. Supp. 115, reversed, 95 F. (2d) 364.

[50] *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 152. See *Henry E. Whittenburg et al.* v. *United States*, 100 F. (2d) 520 (Plaintiffs in this case sought to restrain the enforcement of the Florida citrus order, and the opinion was rendered on a motion to dismiss. Before the case could be reached for trial on the merits, it was dismissed by the plaintiffs.)

The appellees attacked these payments as being discriminatory, but it was not alleged in the answers nor claimed at the trial that these provisions of the order are not authorized by the statute. This issue was raised for the first time by the court in its opinion dismissing the complaints, in which it said (R. 772):

> It is urged that no provision of the statute authorizes Article VII, Sections 5 and 6, of the order. * * * The Court does not find any sections of the Act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced.

The conclusions of law submitted by appellees and adopted by the court do not state that the provisions of Sections 5 and 6 of Article VII of the Order are not authorized by the Act. It is therefore not entirely clear whether the District Court intended the foregoing language in its opinion as a definite holding that such provisions are unauthorized. If it should be so construed, we submit that such holding is erroneous.

1. Appellees Have no Legal Standing to Complain of the Provisions of Article VII, Sections 5 and 6 of Order No. 27

Before issuing Order No. 27, the Secretary conducted a hearing and complied with all the applicable provisions of the Act (R. 250–254). The Order was published in the Federal Register (R. 252), and there is a presumption that it was duly issued, prescribed and promulgated (49 Stat. 502, 44 U. S. C., Supp. IV, § 307). *United States* v. *Chemical Foundation*,

272 U. S. 1, 14. The answers filed by the several appellees do not allege that these provisions of the Order are not authorized by the Act. Since a lack of authority in the Act for these payments would clearly be an affirmative defense, it follows that the issue was not before the District Court, and that the court erred in passing on the question.[51]

But even if the issue had been pleaded, appellees have no legal standing to attack these provisions. The purpose and effect of the payments to cooperative associations is to distribute equitably among producers the cost of services which result in a higher uniform price to all producers. These payments are simply one feature of the distribution of the burden of the surplus milk among all producers. The payments out of the Producer Settlement Fund do not affect the price which the appellee Jetter Dairy Company, Inc., must pay for its milk. The fact that these payments may inure to the benefit of a cooperative association which is a competitor of this appellee, in some of its operations, gives it no standing to complain of such payments.[52] Nor does the possibility that these payments may reduce the amount which might be distributed to some producers who are not organized as cooperatives give the appellees any standing to complain. Having shown no injury to themselves they cannot base a constitu-

[51] Rule 8 (c), Federal Rules of Civil Procedure. *Southern Railway Company* v. *King*, 217 U. S. 524; *Horn* v. *Detroit Dry Dock Company*, 150 U. S. 610; *Millbank* v. *Jones*, 127 N. Y. 370.

[52] *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Currin* v. *Wallace*, decided January 30, 1939.

tional objection on the ground that the payments to some producers might be diminished.[53]

Nor have the other appellees any standing to complain of such payments. All of the other appellees are cooperative associations. There is no showing in the record that they cannot qualify to receive cooperative payments. Since this provision of the Order is designed for the benefit of these appellees, it follows that they cannot be heard to complain of its alleged invalidity.[54]

Nor have any of the appellees any standing to complain of the market service payments authorized by Section 6 of Article VII. These payments do not affect the cost to the appellee Jetter Dairy Company, Inc., of its milk. Like the cooperative payments they are paid out of moneys due to producers. Furthermore, all of the appellees are eligible to receive market service payments. None of the appellees have manufacturing facilities except that the appellee Jetter Dairy Company, Inc., separates some cream at its Solsville plant, but it is not necessary to have manufacturing facilities to receive market service payments. If any of the appellees had so desired they might have moved any milk that could not readily be sold as fluid in the marketing area to the Solsville plant of the Jetter Dairy Company, where it could have been converted to cream.

[53] See *Aetna Insurance Co.* v. *Hyde*, *supra*, p. 446, where this Court pointed out that "Companies whose constitutional rights are not infringed may not better their position by urging the cause of others."

[54] *Cusack* v. *City of Chicago*, 242 U. S. 526.

Each would have been reimbursed for his outlay in receiving and hauling this surplus milk to a point where it could be economically utilized. Since this provision of the Order is for the benefit of all appellees, they cannot be heard to complain of its alleged invalidity.[55]

2. The provisions of Article VII, Sections 5 and 6, of Order No. 27 are authorized by the Act

Section 8c (5) (B) provides that in the case of milk and its products, an order may contain a provision for payment to all producers and associations of producers delivering milk to all handlers, of uniform prices for all milk so delivered irrespective of the use made of such milk by the individual handler to whom it is delivered, subject * * * [to] "(d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time." (Appendix A, p. 4) Section 8c (7) (D) provides that orders may contain provisions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order." (Appendix A, p. 7.)

Both the cooperative payments and the market service payments are authorized by Section 8c (7) (D) of the Act, and the cooperative payments are also authorized by Section 8c (5) (B) of the Act.

[55] *Cusack* v. *City of Chicago*, 242 U. S. 526.

The cooperative payments provided for by Section 5 of Article VII are limited to cooperative associations which have their activities entirely under the control of their members, and which exercise full authority in the sale of the milk of their members and make use of that authority so as to supply Class I milk to the marketing area in times of short supply and to secure the utilization of milk in times of long supply in such a manner as to assure the greatest possible return to producers. The Secretary determines whether a cooperative association is qualified to receive these payments by reason of performing such services for the market and the payments continue until the cooperative is disqualified for failure to perform such services.

Since the ability of a cooperative association to perform the services specified in Section 5 varies in accordance with the control which it exercises over the milk of its members, the payments authorized by this section also vary accordingly. A cooperative which is merely a bargaining cooperative can qualify to receive one cent per cwt. on the milk delivered by its members. A cooperative which also reports and collects for the milk of its members exercises a greater degree of control over such milk and can qualify to receive 2½ cents per cwt. A cooperative association which operates its own plants is in a position to exercise full control over the milk produced by its members and can qualify to receive 5 cents per cwt. on the net pooled milk at such plants and, if, in addition to the other qualifications, it has

sufficient plant capacity to receive all the milk of its members and is also willing and able to receive milk from producers who are not members, 5 cents per cwt. on any net pooled milk delivered to another handler, which is reported and collected for by the cooperative.

A cooperative association which qualifies to receive these payments obligates itself to perform the services specified in Section 5. The services performed by cooperatives in return for these payments are two-fold: The first relates to the supplying of Class I milk to the marketing area in times of short supply. A cooperative which qualifies under Section 5 obligates itself to supply all its milk to the marketing area as Class I milk during times of short supply, even though this involves some disruption of its operations and added expense as would happen, for example, if a cooperative association having its plant equipped for making condensed milk, and having a favorable market for the sale of this product should suspend the manufacture of condensed milk in order to augment the supply of Class I milk in the marketing area.

The second obligation assumed by the cooperative association is to utilize its milk in times of long supply in such a manner to insure the greatest possible return to producers. In order to meet its obligation in this respect, a cooperative having manufacturing plants, for example, would have to utilize surplus milk in the higher manufacturing classes in order to increase the return to producers even though, in the

light merely of cost and selling price, it would be more profitable under the existing conditions to utilize milk in one of the lower manufacturing classes.

The proprietary handler could not be expected to perform these services, since, from the nature of their business, proprietary handlers are interested only in the spread between the purchase price and the sale price of milk. A cooperative association on the other hand is interested in securing the highest possible return for its members (R. 257–259, 272). However, since a cooperative association must account to the pool at the class prices, the utilization of milk in the higher classes, while it increases the net return to all producers, imposes a burden on the members of the cooperative if the market for milk in such classes is unfavorable. The payments authorized by Section 5 are designed, in part, to compensate cooperative associations for the losses which they incur in utilizing milk so as to secure the highest possible net return to producers, and therefore such payments are necessary in order "equitably to apportion" the total value of milk among all producers.

Another service which cooperatives perform for the market is the maintenance throughout the year of facilities for handling the seasonal surplus even though these facilities can be employed only during the flush season. The proprietary handler will not maintain manufacturing facilities unless they can be utilized sufficiently to return a profit on his manufacturing operations. The maintenance of such facilities involves substantial expense to the cooperatives,

and since this expense inures to the benefit of all producers it is equitable that those who bear this expense should be recompensed through the cooperatives (Ex. 3 to stip. R. 269, Tr. 5597, Ex. 22 to stip. R. 273, 482).

Cooperatives also perform a service for the market by using their efforts during the flush period of production to secure the utilization in fluid form of milk near to the market and the utilization in manufactured form of milk produced at the edge of the milkshed, thereby reducing the transportation charges which must be shared by all producers.

The performance of the services outlined in the foregoing paragraphs results in substantial expense to the cooperatives. Since such expense must be reflected in the return to its producers it would be difficult, if not impossible, for a cooperative to continue to perform these services without compensation. Since these services are necessary to insure the efficient operation of Order No. 27 it follows that the payments to cooperatives are not only necessary "equitably to apportion" (Section 8c (5) (B) of the Act) the total value of milk among all producers but are also "necessary to effectuate the other provisions of such order." (Section 8c (7) (D) of the Act.)

There is no evidence that the payments authorized by Section 5 of Article VII are unduly high. It would seem evident that they are not from the fact that the League has received such payments (Dfts. Ex. 46 R. 360, 674) but has nevertheless been unable to return the full uniform price to its producers each

month (Dfts. Ex. 11, 12 R. 331, 654–655; Dfts. Ex. 54 R. 364, 677). There was substantial evidence before the Secretary to support his determination as to the necessity for such payments.

The market service payments which are authorized by Section 6 of Article VII are likewise necessary to insure the efficient operation of Order No. 27 and are therefore "necessary to effectuate the other provisions of such order" and there was substantial evidence before the Secretary to support his determination as to the necessity for such payments (Ex. 3 to stip. R. 269, Tr. 5174).

Since the prices fixed in the various manufacturing classes represent the approximate value of milk utilized in such classes (Pl. fg. 13 (A) R. 173, 174) there is no reason to suppose that a handler could ever dispose of his surplus milk to another handler having manufacturing facilities at a price sufficiently greater than the class prices announced by the Market Administrator to cover the expense of the transfer. Since the handler who receives the milk from producers must account to the pool for the milk at the class price, he could not be expected to handle the milk and transfer it to a manufacturing plant unless the Order contained some method whereby he could be reimbursed for the expenses so incurred.[56]

[56] Let it be assumed, for example, that during the month of September, handler "A" received large quantities of milk in excess of the amounts necessary to meet his own requirements. Handler "B" operates a plant equipped for handling milk in Class III–D, 10 miles from handler "A's" plant. The Class III–D price for September was $1.01 (Dfts. Ex. 39 R. 359, 669). If handler "A" sold his milk to handler "B" at the

The market service payments merely provide such reimbursement. The only witness who testified as to the price received for milk on which he collected market service payments testified that he sold the milk at 5¢ over the class price and that this was his profit on the transaction (R. 355). It should be noted also that market service payments can be earned only on milk manufactured in the higher classifications so that these payments tend to increase the net return to producers.

B. THERE WAS SUBSTANTIAL EVIDENCE BEFORE THE SECRETARY SUPPORTING ALL THE FINDINGS OF THE SECRETARY AND ALL THE TERMS AND PROVISIONS OF ORDER NO. 27

1. The Determination of the Secretary as to Producer Approval of Order No. 27

To determine whether Order No. 27 was approved or favored by at least two-thirds of the producers producing milk for sale in the marketing area during the month of May 1938, which period he had determined to be a representative period, the Secretary

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class price or a few cents over the class price he has incurred a substantial loss on the operation unless he can be reimbursed for the expenses incurred in diverting the milk. The average cost of handling milk at a country plant is 15¢ to 30¢ per cwt. (R. 401). If we assume that handler "A" operates with average efficiency, his handling cost is 23¢ per cwt. The trucking allowances contained in Section 6 represent the average cost of trucking milk (Dfts. Ex. 78, R. 395, 741). Therefore, the net cost of the milk per cwt. to handler "A" would be 23¢ for handling plus 5¼¢ for trucking, plus $1.01, the price at which he must account to the pool for the milk, or a total of $1.29¼¢. If he sold the milk to handler "B" at the class price, his net loss would be 28¼¢. To avoid this loss he has no alternative but to refuse to accept the milk from producers unless he can obtain reimbursement (R. 358).

conducted a referendum pursuant to Section 8c (19) of the Act. The results of this referendum were as follows: 45,644 votes cast, of which 7,017 were rejected as invalid. Of the 38,627 votes counted as valid, 33,663 votes or 87.1% were in favor of the issuance of Order No. 27, and 4,964 votes or 12.9% were opposed thereto. Of the 7,017 votes which were rejected, 6,547 were rejected either because the voters were members of cooperative associations which had cast ballots for all of their members, or because the voters were not qualified to vote, not having delivered milk to an approved plant during the month of May 1938. Of the votes rejected for these reasons, 5,110 were in favor of the issuance of the order, and 1,437 were opposed thereto. 470 votes were rejected because the voters had failed to mark the ballot, or because it was not possible to determine whether the ballot was marked for or against the Order (R. 253, 269).

Copies of the Order and of pamphlets explaining the Order were sent to all producers in the milkshed who might be eligible to vote (R. 253). The full text of the Order was published in the Dairymen's League News (Ex 24E to stip., R. 274, 574), and The Dairy Farmers Union (Ex. 27 to stip., R. 274, Tr. 9420). The order also received wide discussion, both favorable and unfavorable, among papers having a wide circulation among dairy farmers (Exs. 23 to 23H to stip. R. 274, 511–555, Exs. 24 to 24G to stip R. 274, 555–593, Ex. 27 to stip. R. 274, Tr. 9415–9422). There was every opportunity for producers

to acquaint themselves with the provisions of the Order. The principles underlying the Order were familiar to producers as similar plans had been utilized by the League and Sheffield Producer Co-operative as a means of making distribution to their own members (*supra* p. 45), and a classified-price plan had been in effect in the State of New York under New York State Milk Control (Gov. Ex. 3 to stip. R. 269-7515). Section 8c (19) of the Act specifically provides that "the requirement of approval or favor shall be held to be complied with if the percentage of the total number of the producers represented in the referendum approving or favoring is equal to or in excess of the percentage required under the applicable provisions of the Act." Certainly, in these circumstances, the favorable vote of producers constituted substantial evidence before the Secretary to support his determination that the issuance of the Order was approved or favored by at least two-thirds of the producers who during the month of May 1938, were engaged in the production of milk for sale in the marketing area.

2. *The Findings of the Secretary as to the Reasonableness of the Terms and Conditions of Order No. 27*

As stated by this Court in *Thompson v. Consolidated Gas Co.*, 300 U. S. 55, 69:

> It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise.

In the present case, it is not necessary to rely on this presumption. There was substantial evidence before the Secretary to support all the terms and conditions of Order No. 27, and the District Court so found (R. 171). A summary of much of the relevant evidence is contained in appellant's proposed findings 12 and 13 (R. 171–177). These findings are discussed, *supra*, at pp. 64–65.

C. THE DISTRICT COURT EXCEEDED ITS POWERS WITH RESPECT TO ITS JURISDICTION TO REVIEW ADMINISTRATIVE FINDINGS AND DETERMINATIONS MADE BY THE SECRETARY

The Determination of the Secretary as to Producer-Approval of Order No. 27

The District Court found that, of the valid votes cast by producers in the referendum conducted by the Secretary on the proposed Order No. 27, approximately 87 percent were in favor of the Order (R. 253, 269). If the rejected votes had been counted this would not have changed the result materially (R. 253, 269). Nevertheless, the District Court set aside the determination of the Secretary that Order No. 27 was approved by at least two-thirds of the producers, on the ground that such finding "is unsupported by substantial probative evidence and amounts merely to an expression of opinion by the Secretary" (R. 165). The court also found as a fact that the finding of the Secretary that the order was approved or favored by at least two-thirds of the producers who voted in the referendum "was unsupported by any substantial evidence, and said referendum determined only that many of the producers voting therein favored an

Order which required equal payments to all producers, and payment of the same price for milk by all handlers. The inference to be drawn from such vote was that such producers did not favor or approve an order which exempted large handlers from payment of the uniform price to their producers, and which did not require equal prices to be paid by all handlers but, on the contrary, permitted certain large handlers to pay reduced prices for their milk supply" (R. 150).

Clearly, the court arbitrarily substituted its judgment for that of the Secretary. There is not a shred of evidence showing that any producer misunderstood the Order, and it is conceded that prior to the referendum a copy of the Order was sent to every producer who might be eligible to vote (R. 253).

The requirement that the Secretary determine that the issuance of an order is approved or favored by at least two-thirds of the producers is not a constitutional guarantee, but was imposed by Congress, and Congress, having imposed the requirement, could specify what would satisfy it.[57] This, Congress has done in Section 8c (19) of the Act, by providing that:

> * * * The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. * * *

[57] *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 184.

By this section Congress has instructed the Secretary that, if he elects to conduct a referendum and if the producer vote is favorable he need make no other investigation as to whether producers actually approve or favor the order, but may accept as final the approval expressed in the referendum. The requirements of the statute were fully satisfied in the case. (See *supra* pp. 34–39.) Appellees assert that the Secretary should have disregarded the express directions of Congress because of alleged misrepresentation as to the terms of the Order.

In every election or referendum statements are made by those favoring and opposing the particular candidates or issues involved, and the suggestion is novel that the court should investigate the utterances of every partisan to determine whether there has been any misrepresentation as to the issues involved. (See *Denton* v. *Pulaski County*, 185 S. W. 481; *Applegate* v. *Eagan*, 74 Mo. 258.)

The evidence supporting the Secretary's determination is outlined *supra*, pp. 164 to 166. There is no evidence that this determination was not correct. The evidence upon which appellees rely is that the Secretary sent out a pamphlet to all producers stating that the marketing program is designed, among other things,

> * * * to assure uniform returns to producers for milk sold in the marketing area regardless of the handler to whom the milk was sold or the use made of the milk by the individual handler.

Similar statements were made by the Bargaining Agency and the League. As pointed out, *supra*, p. 46, the alleged falsity of this statement is based on a fine-spun legal argument which, in turn, is based on a wholly fallacious premise. This argument presupposes that the interests of a cooperative association are adverse to the interests of its producers; that it is to the interests of a cooperative association to return a lower price to its producer-members, and that the relationship of a cooperative association to its producers is identical with the relationship of a proprietary handler. Cooperatives are owned by and composed of producers. As participants in the cooperative they share both the returns it realizes from milk sold and the costs it incurs in handling and selling the milk. Accordingly the amount they ultimately receive from the enterprise is neither the gross receipts for the milk nor, as would be the case if they sold to a proprietary handler, merely a price for their milk, but the net income of the cooperative enterprise after the costs of its services have been prorated among them. This method of operation was widely known. Obviously the quoted statement in the pamphlets did not refer to the division of the net proceeds of cooperative operations.[58] Furthermore, even if there were any reasonable likelihood that this description might have been construed by producers to refer to cooperatives, the

[58] It cannot be supposed that producers would have understood this statement as meaning that cooperatives must return the uniform price each month, and there is no evidence that a single producer so understood it.

practical effect of the order in operation as has been pointed out above, pp. 144–148, is to require the cooperatives as well as the proprietary handlers to return to the producers the equivalent of the uniform price.

Since the finding of the Secretary as to producer-approval of the Order was a finding of fact, the Secretary's determination is final, if supported by substantial evidence.[59] That such finding was supported by substantial evidence is established, *supra*, pp. 164–166. But, even though the court below were not in error in passing on the weight of the evidence, we submit that the foregoing discussion demonstrates that its finding that the Order was not approved or favored by the requisite percentage of producers not only completely disregards the presumption of validity which attaches to the Secretary's determination[60] but has no support in the evidence.

2. The Findings of the Secretary as to the Reasonableness of the Terms and Conditions of Order No. 27

Before promulgating Order No. 27, the Secretary conducted hearings at c nveniently located places throughout the milkshed. These hearings were attended by producers, representatives of producers, handlers and consumers of milk sold in the marketing

[59] *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479; *Johnson* v. *Drew*, 171 U. S. 93; *Douglas* v. *Noble*, 261 U. S. 165; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Shields* v. *Utah Idaho Central R. Co.* 305 U. S. 177; 187.

[60] *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304.

area, and all interested parties were afforded an opportunity to be heard concerning the provisions of the proposed marketing agreement and the proposed Order. All of the appellees knew of the hearings, but none of the appellees appeared or were represented at any hearing (R. 251, 269). At these hearings substantial evidence was introduced in support of all the terms and conditions of Order No. 27, and in support of the reasonableness of such terms and conditions. The District Court so found (R. 171, 191), but refused to find that all the terms and conditions of the Order were reasonable. The court found that a number of the terms and conditions of the Order were discriminatory as against the appellees and, substituting its judgment for the judgment of the Secretary, held that these alleged discriminations render the Order invalid.

An administrative remedy being provided by Section 8c (15) of the Act, appellees have no standing to attack the reasonableness of the terms and conditions of the Order without having first exhausted that remedy. Appellees knew of, and had an opportunity to be present at, the hearing before the Secretary (R. 251, 269), but did not avail themselves of this opportunity. Having failed to do so, they should be required to comply with the Order until such time as they choose to use their administrative remedy and present their grievances to the Secretary.[61] The purpose of administrative review is to provide an opportunity for administrative correction

[61] *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163.

of errors.[62] To permit appellees to secure a review of the reasonableness of the terms and conditions of the Order without first having exhausted their administrative remedy would, as stated by this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (at p. 50):

> * * * in effect substitute the District Court for the Board [Secretary] as the tribunal to hear and determine what Congress declared the Board [Secretary] exclusively should hear and determine in the first instance.

The Secretary found on the evidence introduced at the hearings that the minimum prices computed as provided in Order No. 27 are prices which will reflect such economic factors as affect the supply and demand for milk and insure a sufficient quantity of pure and wholesome milk. The Secretary also found that the issuance of the Order and all its terms and conditions will tend to effectuate the declared policy of the Act. The District Court found that there was substantial evidence to support all the terms and conditions of the Act. Since the findings of the Secretary are supported by substantial evidence, they were binding upon the District Court and not subject to review.[63]

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[62] *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 F. (2d) 399.

[63] *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *Virginian R. Co.* v. *United States*, 272 U. S. 658; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Assigned Car Cases*, 274 U. S. 564; *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261.

The formulation of an Order regulating the handling of milk in the New York metropolitan marketing area involves the exercise of sound administrative discretion guided by special skill and knowledge to determine whether the various provisions of the Order, taken not individually but as a whole, will tend to effectuate the declared policy of the Act. The Secretary is peculiarly qualified to make these determinations, and if his determinations are supported by substantial evidence, they are binding upon the courts.

A similar question was before this Court in *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, which was a suit brought to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies subject to the Act. In sustaining the action of the Commission, this Court said (pp. 236–237):

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be "so entirely at odds with fundamental principles of correct accounting" (*Kansas City Southern Ry. Co.* v. *United States*, 231 U. S.

> 423, 444) as to be the expression of a whim rather than an exercise of judgment. *Norfolk and Western Ry. Co.* v. *United States*, 287 U. S. 134, 141; * * *.

The cases in which this Court has expressed the same view are numerous.[64]

A similar expression of this principle is found in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, in which this Court said (p. 304):

> * * * Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. * * *[65]

D. IN ITS OPERATION AND EFFECT, ORDER NO. 27 DOES NOT DEPRIVE APPELLEES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

1. The terms of Order No. 27 are not discriminatory as against appellees

It has been pointed out *supra* at pp. 132 to 150 that an appropriate difference of treatment between different classes of handlers in a regulation of inter-

[64] *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *Virginian R. Co.* v. *United States*, 272 U. S. 658; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Assigned Car Cases*, 274 U. S. 564; *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261.

[65] Furthermore, the determination of the Secretary is quasi-legislative in nature. In such cases the discretion of the administrative officer is much broader and the scope of review is narrower than in cases where the determination is quasi-judicial. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186; dissenting opinion of Mr. Justice Cardozo, *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 448.

state commerce is entirely proper, and that, e
though such difference of treatment may result in
crimination against one group of handlers and
favor of another group, such discrimination is not
lative of the Fifth Amendment. Moreover,
analysis of the facts will show that the discriminati
alleged to be inherent in Order No. 27 do not in
exist. As pointed out *supra* at pp. 47 to 48 appel
contend that Order No. 27 contains no less than 7
arate and distinct discriminatory provisions. Th
contentions together with the evidence whic
claimed by appellees to support them and the
dence which demonstrates that no such discrim
tions exist, are discussed *supra* at pp. 48 to 60. T
the District Court exceeded its powers in substitu
ts judgment for that of the Secretary, as to
reasonableness of these provisions, is shown *supr*
pp. 171 to 175.

*2. Appellees Have Sustained No Losses by Re
of the Operation of Order No. 27*

There is no evidence in the record directly es
lishing the cost of operations of any of appelle
the prices which they have received for milk sol
them; there is no evidence in the record which es
lishes that the business of appellees during the pe
that Order No. 27 was in effect has been unprofit
or would have been unprofitable had appellees n
the payments which they were required to mak
the Producer Settlement Fund, and there is no
dence in the record that appellees conduct

businesses with reasonable efficiency. The District Court made no finding that any of the appellees had conducted its business at a loss during this period or that any of them would have conducted its business at a loss had it made its payments to the Producer Settlement Fund. The court did state in its opinion that the appellee Jetter Dairy Company, Inc., was losing from 1¢ to 1½¢ per quart on all milk sold in the marketing area, or an aggregate of $400 to $600 per day, but there is no evidence to support this statement. The District Court found that the reasonable wholesale delivered cost of milk upon the basis of the Class I price was 9¢ to 9¾¢ per quart (R. 187). The court also found that the average minimum delivered cost is 9¾¢ per quart (R. 145). The two findings are inconsistent, and it is submitted that the evidence in the record supports the figure of 9¢ to 9¾¢ per quart, and not the higher figure (R. 324). There is evidence in the record that milk has been sold generally in some sections of the City of New York at prices ranging from 8¢ to 9¢ per quart, but it has not been proved that these prices exist in the areas in which the appellees Central New York Cooperative Association, Inc., and Jetter Dairy Company, Inc., do business. Although the other appellees are handlers as defined in Order No. 27 and handle milk which is sold in the marketing area, the record does not disclose that these appellees sell their milk in the marketing area, and there is no evidence that they are unable to sell milk at a profitable price. Samuel Rootstein testified that a company

having the same stockholders as the appellee Jett Dairy Company, Inc., sold milk in the marketing area at 9¢ per quart (R. 391, 400), but there is no evidence as to the prices at which the appellee Jett Dairy Company, Inc., sold milk. While the evidence might be held to establish that milk has been sold in some areas in New York City at prices which would result in a loss to the average handler, there is no evidence that the operations of the appellees have resulted in a loss. Appellees cannot successfully attack the Order without establishing injury to themselves."[66]

But even if such a loss could be established we submit that the record discloses that it could not be ascribed to the operation of Order No. 27. The theory of appellees is that Order No. 27 contains various discriminatory provisions which make it possible for large cooperatives and those with whom they do business, particularly the Borden Company and the Sheffield Company, to cut prices in the wholesale market in New York City, and that the cutting of prices makes it impossible for the appellees to do business at a profit. The evidence with reference to alleged price-cutting is discussed *supra*, pp. 49–51, 60–61. This evidence establishes that price cutting has been general in certain sections of New York City (R. 320); that it was initiated by some of the so-called independent operators and has been carried on almost exclusively by such independents (R. 320); and that of the three handlers which appel-

[66] *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440.

assert were responsible for the price-cutting, namely, the League, the Borden Company, and the Sheffield Company, only the Sheffield Company has engaged in price-cutting (R. 290); that this handler opposed the Order; that under the Order this company has been required to pay large sums to the Producer Settlement Fund, *supra*, p. 61; and that the League has actually lost a substantial part of its wholesale business because of its unwillingness to engage in price-cutting (R. 400).

No attack has been made upon the reasonableness of the Class I price which has prevailed under Order No. 27, and it has not even been suggested that the Class I price could be lowered without serious hardship to producers. There is no constitutional right to purchase milk at a price which does not represent a reasonable return to the producer.

There is no showing that the price which a handler must receive in order to conduct his business profitably and pay the full class prices is unreasonably high, but the evidence shows that fierce competition among the independent operators has been responsible for the breakdown in prices in New York City (R. 320, 356).

The complaint of appellees is that they are forced to pay the class prices and cannot, in order to assure themselves a substantial profit in their fluid operations, reduce the price to the producer below the level of prices which the Act declares it to be the policy of Congress to establish. Clearly the Secretary would not have been justified in establishing a

fluid price below such level, and clearly also, Order No. 27 is necessary to prevent the price to the producer from falling below such level (Ex. 26A to stip. R. 274, 607).

The only witnesses who testified as to the cause of the breakdown in the market ascribed this breakdown not to competition from handlers who had been granted discriminatory advantages by Order No. 27, and not an unreasonably high order price for fluid milk, but solely to the willingness of certain of the independent handlers to gamble on the possibility that Order No. 27 would not be enforced and that by the simple expedient of reducing the return to the producer they would be able to retain profitably the business acquired by cutting prices (R. 324, 356). It has always been possible in the past for these handlers to pass back to the producer any competitive losses incurred and it could not be expected that a long-standing habit of reckless competition at the expense of the producers would be broken over night.

During the year 1938, milk sold in New York City for as low as 2 quarts for 7 cents (R. 321) and appellees' witness Rootstein testified that the Tribor Milk and Cream Company sold milk at 5 cents per quart (about $2.30 per cwt.) during August 193 (R. 390). Sales of bottled milk to stores at such prices make it impossible to return a reasonable price to the producer. The competitive situation in New York City has undoubtedly become acute because of the conditions above mentioned, but i

lies within the power of the handlers to correct such conditions while the producers are powerless to do so. Order No. 27 is designed to insure a reasonable price to the producer by fixing the minimum cost of milk to all handlers and providing for an equitable distribution of the burden of the surplus. It was not designed to correct competitive conditions in New York City. But we submit that, if Order No. 27 is rigidly enforced, handlers will eventually realize that competitive losses can no longer be passed back to the producer and competitive conditions in the marketing area will right themselves (R. 359).

The appellee Central New York Co-operative Association, Inc., asserts that the operation of the Order deprives it of its property without due process of law because it would be able to return a higher price to its producers if not required to contribute to the Producer Settlement Fund. This argument is based on the fallacious premise that if Order No. 27 had not been in effect during the months of September, October, and November this appellee would have been able to secure for its milk the prices which it actually secured during those months. The evidence in the record does not support such an assumption. As pointed out *supra*, p. 180, milk was sold in New York City for as low as 2 quarts for 7 cents during the year 1938 (R. 321), whereas the lowest price at which milk was shown to have been sold since September 1, 1938, was 8 cents per quart (R. 317, Fg. 63, R. 145). The record discloses that the League was able to return to its producers only $1.27 per cwt. for the month of

August 1938 (Dfts. Ex. 11, R. 331, 654). The record does not disclose the price returned to producers by Central New York Co-operative Association, Inc., during the month of August 1938, but there is no reason to infer that the price returned was substantially higher than the price returned by the League. If all other handlers are required to comply with Order No. 27 while appellee Central New York Co-operative Association, Inc., is exempted so that it can derive the benefits which result from the Order and at the same time avoid the obligations which are imposed thereby, it naturally follows that this appellee can return to its producers a sum higher than the uniform price but there is no basis for the assumption that if the Order had not been in effect it could have done so.

III. The District Court Should Have Granted the Relief Demanded in the Complaints

A. Appellant Should Not Have Been Denied Relief Because of the Alleged Improper Motives of the Proponents of Order No. 27

1. If the Act is constitutional and the Order otherwise valid, the motives of the proponents of the Order are immaterial

The answer of the appellee Jetter Dairy Company, Inc., contains certain affirmative defenses which allege in substance that the Bargaining Agency caused a proposed marketing agreement and order to be presented to the Secretary as part of a conspiracy among the Bargaining Agency, the League, and others, to use the statutes and agencies of the United

States as instruments of "coercion, monopoly, restraint of trade, unfair dealing, and other illegal acts" (R. 91–103). It is asserted that, as part of this conspiracy, the Bargaining Agency and the League issued false propaganda and procured the adoption of Order No. 27 by fraud; coerced handlers into complying with the Order, and persuaded the Secretary to issue an order containing provisions which are discriminatory in favor of the League and other cooperatives belonging to the Bargaining Agency and proprietary handlers which purchase their milk from such cooperatives. Similar allegations are contained in the answers of the appellees Rock Royal Co-operative, Inc., and Schuyler Junction New York Milk Shed Co-operative, Inc. (R. 63–76).

Appellant moved to dismiss the affirmative defenses (R. 83, 103, 104), but the District Court overruled appellant's motion (R. 104), and its action in so doing is assigned as error (R. 778). The District Court, over objection of appellant, permitted the introduction of evidence which was intended to establish the alleged conspiracy. It is submitted that the appellant's motion to strike should have been granted, and that the court erred in admitting such evidence.

We have already established that the Act under which Order No. 27 was issued is constitutional in all respects, *supra*, pp. 92–154; that Order No. 27 was issued by the Secretary in strict compliance with the terms of the Act, *supra*, pp. 34–39; that all the terms and provisions of Order No. 27 are authorized by the

Act, *supra*, pp. 158–164; and that the operation of th Act does not deprive the appellees of their propert without due process of law, *supra*, pp. 176–182. I the Act is constitutional and the Order otherwis valid, it follows that the motive of the Bargainin Agency in presenting a proposed order and marketin agreement to the Secretary in no way affects th validity of Order No. 27, and that the evidenc relating to the alleged conspiracy should have be excluded in accordance with the principle stated *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 13 145, that "if the order is justified by a lawful purpos it is not rendered illegal by some other motive in th mind of the officer ~~using~~ issuing it."

That case involved an order issued by the Secr tary of Commerce which was attacked on the grou that despite its statements of legitimate purpose "sprang from illegal motives, namely, to regula and stabilize freight rates for the benefit of carri belonging to steamship conferences, to compel ap lant to join a conference, and to create a monopo in transoceanic shipping"—a claim almost identi with that advanced by appellees in this case. an illegal motive on the part of the Secretary wo not render the Order illegal it follows *a fortiori* th illegal or improper motives on the part of the p ponents of the Order would not have that effect.

The principle enunciated in the *Isbrandts Moller Co.* case, *supra*, that if the power exists and exercised in accordance with law, the courts cann go behind the exercise of that power to determine

motive which prompted its exercise, has been frequently applied by this Court.[67]

2. The evidence does not establish that the proponents of the Order acted from any improper motive

In support of the allegations that the League and the Bargaining Agency proposed Order No. 27 and procured its adoption as part of a conspiracy to secure an order containing provisions which discriminated in their favor, appellees introduced evidence showing that the Dairymen's League actively sponsored and supported the passage of the Rogers-Allen Law (N. Y. Laws of 1937, chap. 383), pursuant to which Official Order No. 126 was issued (R. 374); that the Bargaining Agency presented proposed Order No. 27 to the Secretary (R. 263, 273), and that the Bargaining Agency and the League urged producers to vote for Order No. 27. As the representatives of a majority of the producers in the milkshed, it was natural that they would support any order which they believed to be for the benefit of the producers and no inference as to improper motives can be drawn from this evidence. It is asserted that the articles in the Dairymen's League News and the Milk Producers' Market News were false and misleading. An examination of these articles will disclose that the Order was treated with great fairness by the League and

[67] *Fletcher* v. *Peck*, 6 Cranch 87; *United States* v. *Des Moines & Co.*, 142 U. S. 510; *United States* v. *Old Settlers*, 148 U. S. 427; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163; *Water Service Co.* v. *Redding*, 304 U. S. 252.

the Bargaining Agency, and the temperateness of these articles contrasts favorably with the treatment of the Order in the Dairy Farmers' Union, which opposed the Order (Ex. 27 to stip., R. 274, Tr. 9421–9423). As pointed out *supra*, p. 46, the claim as to the alleged falsity of the articles published in the Dairymen's League News and the Milk Producers Market News is based upon a failure to appreciate that a fine-spun legal argument might be made distinguishing between payment to producers and payment to co-operative associations of producers. No inference of wrongful intent can be drawn from the failure to anticipate such an argument.

There is some evidence in the record which might support a finding that the Bargaining Agency exerted pressure on handlers by withholding milk until they signed marketing agreements (R. 276), but the evidence on this point is far from conclusive (R. 368). Even if we accept as an established fact that the Bargaining Agency did withhold milk from one or more handlers, this in no way tends to prove any improper motive or conspiracy. The inference to be drawn from this action would seem to be that the Bargaining Agency believed that Order No. 27 was for the benefit of producers and intended to see to it that handlers complied with this Order, by agreeing with the Secretary to do so—the signing of the marketing agreements being an expression of compliance. Moreover, any coercion or duress on the part of the Bargaining Agency, if it did take place, took place after the issuance of the Order and after its effective

date and could in no way affect its validity since the Order was issued pursuant to the provisions of Section 8c (9) of the Act. The section expressly provides that orders shall be valid even if 50% of the handlers do not sign a marketing agreement, providing the required determination is made by the Secretary and approved by the President. Such determination was made and such approval secured. Hence, the signing of the marketing agreement whether voluntarily or because of economic coercion could not affect the validity of the Order.

The whole theory of the alleged conspiracy which is asserted by appellees is that the Bargaining Agency and the League conspired to procure the adoption of an order containing discriminatory provisions. The discussion of the provisions of Order No. 27, *supra*, pp. 48–60, demonstrates that the provisions of the Order are not discriminatory. Since the objective sought by the Bargaining Agency and the League is shown to have been legitimate, it follows that there is no basis for any inference that the activities outlined above proceeded from any improper motive.

B. THE ACT AUTHORIZES THE GRANTING OF THE RELIEF DEMANDED

The power of the District Court to issue an injunction enjoining the appellees from violating Order No. 27 and commanding the appellees to comply with the provisions of said Order No. 27 as demanded in the bills of complaint in this cause has not been questioned. Section 8a (6) of the Act, which vests

the several district courts of the United States with jurisdiction "specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts," clearly vests the District Court with jurisdiction to grant the relief demanded.

Even though the Act contained no such specific provision, the interest of the United States in the enforcement of the Order gives appellant the right to apply to the District Court for equitable relief.[68]

C. THE APPELLEES ARE SUBJECT TO ORDER NO. 27

The appellees are all handlers as defined in Order No. 27. Each of the appellees is engaged in the handling of milk received by it at one or more plants operated by it and approved by the New York City Health Department for the receiving of milk to be sold in the marketing area. Milk received by the appellee Jetter Dairy Company, Inc., at its receiving plant, located at Bridgewater, New York, is shipped to the marketing area by rail through the State of New Jersey. Some of the milk received by the appellee Central New York Co-operative Association, Inc., at its receiving plant is shipped to the marketing area through the State of New Jersey. All milk handled by the appellees is sold in the marketing

[68] *In re Debs*, 158 U. S. 564. *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 367. *Missouri* v. *Holland*, 252 U. S. 416, 431.

area in competition with milk which travels to the marketing area through the current of interstate commerce. Unless the milk produced for sale in the marketing area which does not travel directly in the current of interstate commerce is subject to the same regulation as the milk which travels directly in the current of interstate commerce, the result will be discrimination against the milk which travels directly in the current of interstate commerce, and the district court found that the handling of milk by the appellees is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce (Pl. Fig. 33, R. 183–184).

This finding is supported by the evidence. The attempted regulation of the State of New York of milk produced in the State of New York, which is solely intrastate in character, failed largely because of the inability of the state to regulate the interstate milk. Since approximately 50% of the milk travels in the current of interstate commerce it follows that no attempt of the Federal Government to regulate the interstate milk can be successful unless the intrastate milk is subject to the same regulation. The power of Congress to regulate the price of milk sold in interstate commerce carries with it the power to regulate intrastate sales of milk so as to protect interstate commerce in milk from injury caused by burdensome discrimination. The principle of constitutional law which permits such regulation has been long established and was expressed by this Court in

National Labor Relations Board v. *Jones and Laughlin* 301 U. S. 1, as follows (p. 36):

> The congressional authority to protect inte state commerce from burdens and obstructio is not limited to transactions which can b deemed to be an essential part of a "flow" interstate or foreign commerce. Burdens an obstructions may be due to injurious actio springing from other sources. The fund mental principle is that the power to regula commerce is the power to enact "all appr priate legislation" for "its protection and a vancement" (*The Daniel Ball*, 10 Wall. 5 564); to adopt measures "to promote i growth and insure its safety" (*Mobile Cou* v. *Kimball*, 102 U. S. 691, 696, 697); " foster, protect, control, and restrain." *Seco Employers' Liability Cases, supra*, p. 47. S *Texas & N. O. R. Co.* v. *Railway Clerks, sup* That power is plenary and may be exerted protect interstate commerce "no matter wh the source of the dangers which threaten it *Second Employers' Liability Cases*, p. 5 *Schechter Corp.* v. *United States, supra.* though activities may be intrastate in ch acter when separately considered, if they ha such a close and substantial relation to int state commerce that their control is essent or appropriate to protect that commerce fr burdens and obstructions, Congress cann be denied the power to exercise that contro

* * * * *

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588. It is manifest that intrastate rates deal *primarily* with a local activity. But in rate-making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. *Id.* Under the Transportation Act, 1920, Congress went so far as to authorize the Interstate Commerce Commission to establish a state-wide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co., supra; Florida* v. *United States*, 282 U. S. 194, 210, 211. Other illustrations are found in the broad requirements of the Safety Appliance Act and the Hours of Service Act. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n*, 221 U. S. 612. It is said that this exercise of federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The

protective power extends to the former because it exists as to the latter.

This principle was again reiterated by this Court in the case of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

The Congressional power to regulate prices in intrastate sales to protect prices fixed in interstate sales is precisely the same power as the power to regulate rates in intrastate transportation to protect the rates fixed in interstate transportation. Familiar decisions of this Court leave no doubt as to the existence of that power. *Houston, East & West Texas R. Co.* v. *United States* (Shreveport Case), 234 U. S. 342; *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; *Colorado* v. *United States*, 271 U. S. 153; and see *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 328–329.

D. THE APPELLEES HAVE VIOLATED ORDER NO. 27

It is conceded that the appellee Jetter Dairy Company, Inc., has failed to pay its obligation to the Producer Settlement Fund for the months of October and November, 1938, and that the other appellees have failed to make their payments to the Producer Settlement Fund for the months of September, October, and November, 1938. The amounts due from each of the appellees are stated in paragraph 62 of the "Stipulation of Facts and Evidence" (R. 265, 269). The appellees other than the appellee Central New York Cooperative Association, Inc., concede that they have violated the Order, if the Order is valid.

The appellee Central New York Cooperative Association, Inc., while apparently conceding that it is a handler as defined in Order No. 27, asserts that it has not violated the Order because it claims that, even though the Order is valid, it is exempted from the equalization provisions of the Order by its terms. This claim for exemption is founded upon Article VI, section 1, paragraph 3, which permits a handler in computing his net pool obligation to "subtract pro rata out of each class the quantity of milk received from the handler's own farm." Reports filed by the appellee Central New York Cooperative Association, Inc., for the months of September, October, and November, 1938, purport to show that all milk handled by said appellees is produced on its own farms (Exs. 38–40 to stip. R. 269, Tr. 9494–9534). However, the appellee Central New York Cooperative Association, Inc., does not own any farms (R. 265, 269). It handles milk produced by its members upon their own farms and also the milk of approximately seventy-five producers who are not members of and have no written contract with said appellee (R. 265, 269). The contention that the milk is produced upon this appellee's "own farms" is based on the theory that this appellee is the agent of its producers in the distribution of milk. However, even though an agency relationship exists, it does not follow that Central New York Cooperative Association, Inc., is exempted from the operation of the equalization provisions of the Order. The language of the Order appears to be too clear to require any extensive

argument on this point. While a cooperative association is treated under the Order as the representative of producers, it is expressly included within the definition of a handler contained in section 1 of Order No. 27. To exempt a cooperative association from the equalization provisions of the Order would defeat the whole purpose of the Order. A cooperative association which has a fluid market at all times for all the milk of its members, and which meets its requirements during the short season by purchasing from other producers or from other handlers is not carrying its share of the burden of surplus milk, and to exempt such a cooperative from the equalization provisions of the Order would permit it to continue to evade its responsibility in this regard.[69]

The appellees claim that the Order contains certain nebulous and imaginary discriminations in favor of cooperative associations. The appellee Central New York Cooperative Association, Inc., is claiming a right to preferential treatment, which would constitute a real discrimination.

[69] The appellee Central New York Cooperative Association, Inc., is a completely dealer-controlled cooperative which was organized by a New York dealer for the purpose of evading the provisions of the New York Milk Control Law. The details of the organization are revealed in Ex. 231I to stip. (introduced by appellees), R. 274, 508-511.

CONCLUSION

For the foregoing reasons the decree of the court below dismissing the bill should be reversed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

THURMAN ARNOLD,
Assistant Attorney General.

JOHN S. L. YOST,
CHARLES J. McCARTHY,
ROBERT K. McCONNAUGHEY,
Special Assistants to the Attorney General.

MARTIN G. WHITE,
Solicitor.

E. O. MATHER,
Principal Attorney,
Department of Agriculture.

APRIL 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

Appendix-A

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION

OF

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1937

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

ANNOTATED COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED [1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy);

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such *orderly marketing conditions for agricultural commodities in interstate commerce as will establish* [3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect

[1] For annotations to the Agricultural Adjustment Act, as amended: for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

[3] The italicized words were substituted, by sec. 2, (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement);

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating [4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secreta of Agriculture shall issue an order if he finds, and sets forth in s order, upon the evidence introduced at such hearing (in addition such other findings as may be specifically required by this sectio that the issuance of such order and all of the terms and conditi thereof will tend to effectuate the declared policy of this title w respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursu to this section shall contain one or more of the following terms a conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or t purpose for which it is used, and fixing, or providing a method f fixing, minimum prices for each such use classification which handlers shall pay, and the time when payments shall be made. F milk purchased from producers or associations of producers. Su prices shall be uniform as to all handlers, subject only to adju ments for (1) volume, market, and production differentials c tomarily applied by the handlers subject to such order, (2) the gr or quality of the milk purchased, and (3) the locations at whi delivery of such milk, or any use classification thereof, is made such handlers.

(B) Providing:

(i) for the payment to all producers and associations of pr ducers delivering milk to the same handler of uniform pric for all milk delivered by them: Provided, That, except in t case of orders covering milk products only, such provision approved or favored by at least three-fourths of the produce who, during a representative period determined by the Secreta of Agriculture, have been engaged in the production for mark of milk covered in such order or by producers who, during su representative period, have produced at least three-fourths the volume of such milk produced for market during such p riod; the approval required hereunder shall be separate a apart from any other approval or disapproval provided for h this section; or

(ii) for the payment to all producers and associations of pr ducers delivering milk to all handlers of uniform prices for a milk so delivered, irrespective of the uses made of such milk b the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, marke and production differentials customarily applied by the handlers su ject to such order, (b) the grade or quality of the milk delivere (c) the locations at which delivery of such milk is made, and (d a further adjustment, equitably to apportion the total value of t milk purchased by any handler, or by all handlers, among produce and associations of producers, on the basis of their *marketings*[1] milk during a representative period of time.

[1] The word "production" was deleted and the word "marketings" was substituted section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or pe
which may be marketed in or transported to any or all markets i
current of interstate or foreign commerce or so as directly to bu
obstruct, or affect interstate or foreign commerce in such comm
or product thereof, during any specified period or periods b
handlers thereof.

(B) Allotting, or providing methods for allotting, the amou
such commodity or product, or any grade, size, or quality the
which each handler may purchase from or handle on behalf o
and all producers thereof, during any specified period or pe
under a uniform rule based upon the amounts[6] sold by such prod
in such prior period as the Secretary determines to be repres
tive, or upon the current *quantities available for sale by*[7] such
ducers, or both, to the end that the total quantity thereof to be
chased or handled during any specified period or periods sha
apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amou
any such commodity or product, or any grade, size, or quality the
which each handler may market in or transport to any or all ma
in the current of interstate or foreign commerce or so as dir
to burden, obstruct, or affect interstate or foreign commerce in
commodity or product thereof, under a uniform rule based
the amounts which each such handler has available for cu
shipment, or upon the amounts shipped by each such handler in
prior period as the Secretary determines to be representative, or
to the end that the total quantity of such commodity or produc
any grade, size, or quality thereof, to be marketed in or transport
any or all markets in the current of interstate or foreign commer
so as directly to burden, obstruct, or affect interstate or foreign
merce in such commodity or product thereof, during any spec
period or periods shall be equitably apportioned among all o
handlers thereof.

(D) Determining, or providing methods for determining, the e
ence and extent of the surplus of any such commodity or produc
of any grade, size, or quality thereof, and providing for the co
and disposition of such surplus, and for equalizing the burden of
surplus elimination or control among the producers and han
thereof.

(E) Establishing, or providing for the establishment of, re
pools of any such commodity or product, or of any grade, siz
quality thereof, and providing for the equitable distribution of
net return derived from the sale thereof among the persons benefic
interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the prod
thereof specified in subsection (2) orders shall contain one or
of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair t
practices in the handling thereof.

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[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Mark
Agreement Act of 1937.

[7] The italicized words were substituted, by section 2 (e) of the Agricultural Mark
Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith ~~and not~~ for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

MILK PRICES

(18) *The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated mar-*

keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[8]

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[9]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

[8] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

[9] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD.

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam: except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

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[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within*

the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions [14] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[14] Sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

under such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[15]

Sec. 2. The following provisions are enacted in section 1 of this act, are amended as follows:[16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title", wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended."; and by deleting the words "an adjustment", wherever they appeared, and inserting in lieu thereof the word "any".

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in footnotes 2 to 9 inclusive and 11 to 24 inclusive, supra.

by him, upon written application of any cooperative association incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

Appendix-B.

8-27

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

WASHINGTON, D. C.

ORDER SERIES—ORDER NO. 27

(Issued by the Secretary of Agriculture, August 5, 1938)

ORDER OF THE SECRETARY OF AGRICULTURE ISSUED PURSUANT TO PUBLIC ACT NO. 10, 73D CONGRESS, AS AMENDED AND AS REENACTED AND AMENDED BY THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, REGULATING SUCH HANDLING OF MILK IN THE NEW YORK METROPOLITAN MARKETING AREA AS IS IN INTERSTATE COMMERCE, AND AS DIRECTLY BURDENS, OBSTRUCTS OR AFFECTS INTERSTATE COMMERCE

Whereas, under the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, under the terms and provisions of said act, the Secretary of Agriculture is empowered to issue orders applicable to processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of section 8c, such orders to regulate only such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the New York metropolitan marketing area, would tend to effectuate the declared policy of said act, gave, on the 29th day of April 1938, notice of public hearings to be held on a proposed marketing agreement and a proposed order, said hearings being held jointly with the Commissioner of Agriculture and Markets of the State of New York at Albany, New York, May 16, 1938; Malone, New York, May 17, 1938; Syracuse, New York, May 18, 1938; Elmira, New York, May 19, 1938; New York City, May 20, 24, 25, and 26, 1938; and Albany, New York, June 3, 4, and 7, 1938, and at said times and places all interested parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order; and

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Whereas, the Secretary of Agriculture has found and proclaimed the period August 1921–July 1929 to be the base period to be used in connection with ascertaining the purchasing power of milk produced for sale in the New York metropolitan marketing area; and

Whereas, the Secretary of Agriculture finds that a pro rata assessment on handlers at a rate not to exceed 2 cents per hundredweight of Class I, II–A, and II–B milk handled will provide funds necessary for the proper administration of this order; and

Whereas, the Secretary of Agriculture finds, upon the evidence introduced at the said public hearings:

1. That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing area; and that all milk which is produced for sale in the marketing area is handled in the current of interstate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and its products, except as such milk is regulated by an order of the Commissioner of Agriculture and Markets of the State of New York, to which this order is complementary;

2. That the prices calculated to give milk handled in the marketing area a purchasing power equivalent to the purchasing power of such milk as determined pursuant to section 2 and section 8e of the act are not reasonable in view of the available supplies of feeds, the price of feeds, and other economic conditions which affect the supply and demand for such milk, and that the minimum prices fixed in accordance with the method set forth in this order are such prices as will reflect such factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;

3. That this order regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement upon which hearings have been held;

4. That orderly marketing conditions for milk flowing into the New York metropolitan marketing area are so disrupted as to result in impairment of the purchasing power of such milk, and that the issuance of this order and all of its terms and conditions will tend to effectuate the declared policy of the act.

Now, therefore, the Secretary of Agriculture, pursuant to the authority vested in him by said act, hereby orders that such handling of milk produced for sale in the New York metropolitan marketing area as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof according to article X, be in conformity to and in compliance with the terms and conditions hereinafter set forth.

Article I—Definitions

Section 1. **Definitions.**—The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which reenacts and further amends certain provisions of Public No. 10, 73rd Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "New York metropolitan milk marketing area" means the city of New York, and the counties of Nassau, Suffolk, and Westchester, all in the State of New York, and is hereinafter called the "marketing area."

4. "Person" means any individual, partnership, corporation, association, or any other business unit.

5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

6. "Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce. This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment. This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area.

7. "Market administrator" means the agency, which is described in article II, for the administration of this order.

Article II—Market Administrator

Section 1. **Selection, Removal and Bond.**—The agency for the administration of this order shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

Sec. 2. **Compensation.**—The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

Sec. 3. **Powers.**—The market administrator shall have power:

1. To administer the terms and provisions hereof;

2. To receive, investigate and report to the Secretary complaints of violations of this order.

SEC. 4. **Duties.**—The market administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Secretary at any and all times;

3. Furnish such information and such verified reports as the Secretary may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

5. Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 15 days after the date upon which he is required to perform such acts, has not

(a) Made reports pursuant to section 3 of article V or

(b) Made payments required by sections 1 and 8 of article VII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof;

7. Pay out of the funds received pursuant to article VIII

(a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, (b) his own compensation, and (c) all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties;

8. Maintain a main office and such branch offices as may be necessary.

SEC. 5. **Announcement of Prices.**—The market administrator shall publicly announce prices as follows:

1. Not later than the 25th day of each month, the Class I and Class II–A prices to be in effect for the following month, pursuant to section 1 of article IV.

2. Not later than the 5th day of each month, the prices effective for the preceding month for Classes II-B, III-A, III-B, III-C, III-D, IV-A and IV-B, pursuant to section 1 of article IV.

3. Not later than the 14th day of each month, the uniform price computed pursuant to section 2 of article VI.

ARTICLE III—CLASSIFICATION OF MILK

SECTION 1. **Basis of Classification.**—All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or movement from, the plant where received from producers, including members of any cooperative association; *Provided*, That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant; and provided further that, if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant, classification of such milk at the first plant may be in accordance with its utiliza-

Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the market administrator to verify such statement by an audit of such person's records.

Any milk or cream which is on hand at any plant at the end of any month shall be classified in accordance with the form in which it leaves, or is utilized at, such plant not later than the 8th day of the following month.

SEC. 2. **Classes of Utilization.**—The classes of utilization of milk shall be as follows:

1. Class I milk shall be all milk which leaves a plant as milk, chocolate milk, or any whole milk drink, and all milk the utilization of which is not established for classification in some other class named in this section, except that loss or waste of milk in the plant where received from producers, not to exceed 2 percent of the total quantity of milk received from producers, may be prorated to each class in the proportion which the milk in such class is of the total quantity of milk classified.

2. Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs 5 and 7 of this section.

3. Class II–B milk shall be all milk the butterfat from which leaves, or is on hand at, a plant in the form of plain condensed milk or, except as set forth in paragraph 6 of this section, frozen desserts or homogenized mixtures.

4. Class III–A milk shall be all milk the butterfat from which leaves, or is on hand at, a plant in the form of evaporated milk in hermetically-sealed cans, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than American Cheddar and cream cheese.

5. Class III–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is subsequently held in a licensed cold storage warehouse for more than seven days at a temperature below zero degrees Fahrenheit.

6. Class III–C milk shall be all milk the butterfat from which leaves a plant in the form of frozen desserts or homogenized mixtures which were sold outside of New York City.

7. Class III–D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese.

8. Class IV–A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of butter.

9. Class IV–B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of American Cheddar cheese.

Article IV—Minimum Prices

Section 1. Class Prices.—For milk containing 3.5 percent of butterfat received, during each month from producers or cooperative associations of producers at plants in the 201–210 mile zone, each handler shall pay per hundredweight not less than the prices set forth in this section. For milk containing more or less than 3.5 percent of butterfat or received from producers or cooperative associations of producers at plants in other zones, each handler shall pay per hundredweight not less than the prices set forth in this section plus or minus the differentials set forth in sections 2 and 3 of this article.

The minimum prices for Class I and Class II–A milk shall apply to all Class I and Class II–A milk which is sold in the marketing area or which passes through a plant in the marketing area. The minimum prices for milk in Classes II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B shall apply to all milk of any handler in these classes unless such handler has milk in Class I to which the minimum price is not applicable, in which event the minimum III–A, III–B, III–C, III–D, IV–A, and IV–B prices shall not apply to the percent of his milk, if any, in each of the said classes which is equal to the percent of his total milk received from producers to which the Class I price is not applicable.

Payment of the minimum prices for milk received direct from producers shall be in accordance with article VII. Any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum prices applicable pursuant to this article.

1. For Class I milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 60 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range	Class I price	
	April thru July	August thru March
Cents per pound	*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.80	2.05
20–24.9	2.00	2.25
25–29.9	2.20	2.45
30–34.9	2.20	2.65
35–39.9	2.40	2.65
40–44.9	2.60	2.85
45–49.9	2.80	3.05
Over 49.9	3.00	3.25

2. For Class II-A milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 30 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range	Class II-A price		
	March thru July	August thru October	November thru February
Cents per pound	*Dollars per cwt.*	*Dollars per cwt.*	*Dollars per cwt.*
Under 20	1.30	1.35	1.50
20-24.9	1.50	1.55	1.70
25-29.9	1.70	1.75	1.90
30-34.9	1.85	1.90	2.05
35-39.9	2.00	2.05	2.20
40-44.9	2.15	2.20	2.35
45-49.9	2.30	2.35	2.50
Over 49.9	2.45	2.50	2.65

3. For Class II-B milk the price during each month shall be 10 cents higher than the Class III-A price.

4. For Class III-A milk the price during each month shall be 10 cents higher than the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such month to farmers by each of the evaporated milk plants which are located at places listed in this paragraph and for which prices are reported: *Provided*, That in no event shall the Class III-A price be less than a price computed by the market administrator as follows: To the average price of 92-score butter at wholesale in the Chicago market for such month, as reported by the United States Department of Agriculture, add 30 percent, multiply by 3.5, and add 7 cents.

LOCATIONS OF EVAPORATED MILK PLANTS

Mt. Pleasant, Mich.	Black Creek, Wis.	Jefferson, Wis.
Sparta, Mich.	Orfordville, Wis.	New Glarus, Wis.
Hudson, Mich.	Chilton, Wis.	Belleville, Wis.
Wayland, Mich.	Berlin, Wis.	New London, Wis.
Coopersville, Mich.	Richland Center, Wis.	Coldwater, Ohio
Greenville, Wis.	Oconomowoc, Wis.	Delta, Ohio

5. For Class III-B milk the price during each month shall be 20 cents higher than the Class IV-A price.

6. For Class III-C milk the price during each month shall be 10 cents higher than the Class IV-A price.

7. For Class III-D milk the price during each month shall be 7½ cents higher than the Class IV-A price.

3. For Class IV-A milk the price during each month shall be a price computed by the market administrator as follows: From the average of the highest prices reported daily during such month by the United States Department of Agriculture for 92-score butter at wholesale in the New York market, deduct 4 cents, add 20 percent, and multiply by 3.5.

9. For Class IV-B milk the price during each month shall be a price computed by the market administrator as follows: Take the average of the weekly quotations, with differentials as indicated, from such of these markets as may issue quotations during such month; Single Daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York; deduct 3 cents, and multiply by 9.45. In the absence of any such quotation the price for the preceding month shall be effective.

SEC. 2. **Butterfat Differentials.**—The minimum prices for Classes I, II-A, II-B, III-B, III-C, and III-D milk set forth in section 1 of this article shall be subject to payment of butterfat differentials pursuant to section 8 of article VII. The minimum prices for Classes III-A and IV-A milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the respective prices set forth in paragraphs 4 and 8 of section 1 of this article, divided by 35. The minimum price for Class IV-B milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the price set forth in paragraph 9 of section 1 of this article divided by 3.45 and multiplied by 0.23.

SEC. 3. **Transportation Differentials.**—The market administrator shall from time to time publicly announce for each plant operated by each handler the freight zone set forth in the schedule below in this section according to the railway mileage distance from New York City of its nearest railway shipping point, or its highway mileage distance from New York City, if the latter is less than the former by more than 15 miles. Any such mileage distance shall be that recognized for rate-making purposes by the Interstate Commerce Commission. The minimum prices set forth in section 1 of this article shall be plus or minus the amounts as set forth in the following schedule:

A	B	C	D
Freight zone miles	Class I, Cents per cwt.	Classes II-A, II-B, III-B, and III-C, Cents per cwt.	Class III-A, Cents per cwt.
1-10	+15	+8	+4
11-20	+14	+8	+4
21-25	+13	+8	+4
26-30	+13	+7	+4
31-40	+13	+7	+4

A	B	C	D
Freight zone miles.	Class I. Cents per cwt.	Classes II-A, II-B, III-B, and III-C. Cents per cwt.	Class III-A. Cents per cwt.
61-65	+10.5	+6	+3
66-70	+9.5	+6	+3
71-75	+8	+6	+3
76-80	+8	+5	+3
81-90	+8	+5	+3
91-100	+7	+5	+3
101-110	+7	+4	+2
111-120	+6	+4	+2
121-125	+5	+4	+2
126-130	+5	+3	+2
131-140	+5	+3	+2
141-150	+3.5	+3	+2
151-160	+2.5	+2	+1
161-170	+2.5	+2	+1
171-175	+1.5	+2	+1
176-180	+1.5	+1	+1
181-190	+1.5	+1	+1
191-200	0.0	+1	+1
201-210	0.0	0	0
211-220	−1	0	0
221-225	−1	0	0
226-230	−1	−1	0
231-240	−2	−1	0
241-250	−2	−1	0
251-260	−3.5	−2	−1
261-270	−3.5	−2	−1
271-275	−3.5	−2	−1
276-280	−3.5	−3	−1
281-290	−4.5	−3	−1
291-300	−5.5	−3	−1
301-310	−5.5	−4	−2
311-320	−5.5	−4	−2
321-325	−7	−4	−2
326-330	−7	−5	−2
331-340	−7	−5	−2
341-350	−8	−5	−2
351-360	−8	−6	−3
361-370	−8	−6	−3
371-375	−9	−6	−3
376-380	−9	−7	−3
381-390	−9	−7	−3
391-400	−9	−7	−3
401-410	−10.5	−8	−4
411-420	−10.5	−8	−4
421-425	−10.5	−8	−4
426-430	−10.5	−9	−4
431-440	−11.5	−9	−4
441-450	−11.5	−9	−4
451-460	−11.5	−10	−5
461-470	−12.5	−10	−5
471-475	−12.5	−10	−5
476-480	−12.5	−11	−5
481-490	−14	−11	−5
491-500	−14	−11	−5

Article V—Reports of Handlers

Section 1. **Preliminary Monthly Reports.**—On or before the 23rd day of each month each handler shall, when requested by the market administrator, report to the market administrator in the manner and form prescribed by him: (a) The total quantity of milk received during the first twenty days of such month from producers, and (b) the utilization of such milk in the several classes set forth in article III.

Sec. 2. **Reports of Deliveries Per Day Per Producer.**—Each handler shall, upon request of the market administrator given not less than two weeks in advance, report the average deliveries of milk per day per producer during a specified period of time.

Sec. 3. **Final Monthly Reports.**—On or before the 10th day of each month each handler shall report to the market administrator, in the manner and on forms prescribed by the market administrator, with respect to milk received at each plant during the preceding month:

1. The total quantity of milk, with the average butterfat content thereof, received from producers, from other plants, from such handler's own farm, and from other handlers;

2. The total quantity of milk and of each product of milk moved out of such plant during such month or on hand at such plant at the end of such month, the butterfat content of each product; and the destination of any milk which moved out of such plant;

3. If classification of any milk is claimed by such handler on the basis of utilization at some other plant, the utilization of such milk, together with written consent for verification by audit thereof signed by the operator, if not a handler, of the other plant, and

4. The computation, pursuant to section 1 of article VI of such handler's net pool obligation.

Sec. 4. **Verification of Reports and Payments.**—The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records. Each handler shall, during the usual hours of business, make available to the market administrator or his representative such of his records and facilities as will enable the market administrator to:

1. Verify the receipts and utilization of all milk required to be reported pursuant to this article, and, in case of errors or omissions, ascertain the correct figures;

2. Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

3. Verify the payments to producers prescribed in article VII.

Article VI—Determination of Uniform Price

Section 1. **Net Pool Obligation of Handlers.**—The net pool obligation of any handler for milk received from producers during each month shall be a sum of money computed for such month as follows:

1. Determine the total quantity of milk in each class at each plant;

2. Subtract from the quantity of milk in each class the quantity of such milk received from other plants or from other handlers;

3. Subtract pro rata out of each class the quantity of milk received om the handler's own farm;

4. Subtract from the remaining quantity of milk in each class, the antity of each to which the prices in section 1 of article IV do not ply, which result shall be known as the "net pooled milk" in each ss;

5. Multiply the total quantity of net pooled milk in each class, at plants of the handler combined, by the respective class prices set th in section 1 of article IV and add together the resulting sums;

6. Deduct, in the case of each plant where the average butterfat ntent of all milk received from producers is in excess of 3.5 percent d add in the case of each plant where the average butterfat content all milk received from producers is less than 3.5 percent, an amount ual to the difference between the total value of the butterfat differtials on net pooled milk in Classes III–A, IV–A, and IV–B at the tes set forth in section 2 of article IV for such milk and the total lue of the butterfat differentials on such milk as set forth in section of article VII;

7. Deduct, in the case of each plant nearer New York City than e 201–210 mile zone, and add, in the case of each plant farther from w York City than the 201–210 mile zone, an amount equal to the fference between the sum of the respective transportation differtials, as set forth in section 3 of article IV, on all net pooled milk Classes II–A, II–B, III–A, III–B, and III–C and the sum obtained by applying the appropriate zone differential set forth in lumn B of the schedule in section 3 of article IV to the total net oled milk at each plant in Classes II–A, II–B, III–A, III–B, III–C, I–D, IV–A, and IV–B.

8. Deduct 20 cents per hundredweight for all net pooled milk ceived from producers at plants in the counties or portions of unties listed below in this section. The result thus obtained shall known as the "handler's net pool obligation."

New Jersey counties

Hunterdon	Union	Sussex
Somerset	Morris	Passaic
Essex	Warren	

New York counties

Columbia	Orange	Westchester
Dutchess	Putnam	
Nassau	Suffolk	

Towns in Ulster County, New York

Marbletown	Rosendale	Gardiner
Hurley	Esopus	Plattekill
Kingstown	New Paltz	Marlborough
Ulster	Lloyd	Shawangunk

Connecticut	Massachusetts
Litchfield County	Berkshire County

SEC. 2. **Computation of the Uniform Price.**—The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the final report submitted for the preceding month by each handler and, on the 14th day of such month, compute from all of such corrected reports the uniform price in the following manner:

1. Combine into one total the net pool obligations of all handlers;
2. Subtract the total of payments required to be made for such month by section 5 of article VII and the total of payments claimed pursuant to section 6 of article VII;
3. Add the amount of cash in the producer settlement fund;
4. Divide the result by the total quantity of milk represented in the sum obtained pursuant to paragraph 1 of this section; and
5. Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 201–210 mile zone.

ARTICLE VII—PAYMENTS TO PRODUCERS

SECTION 1. **Time of Payment.**—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from producers and he does not pay the uniform price for all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such producer's milk which was paid for at the uniform price and furnish a copy of such statement to the market administrator at the time payment is made.

SEC. 2. **Transportation and Location Differentials.**—The uniform price shall be plus or minus the differential shown in column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties listed in paragraph 8 of section 1 of article VI.

SEC. 3. **Butterfat Differential.**—The uniform price shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of one percent above or below 3.5 percent of average butterfat content of milk delivered by any producer during any month.

SEC. 4. **Grade A Premiums.**—In addition to the uniform price and all other payments required pursuant to this article, each handler shall pay for milk which is qualified under the New York City Department of Health requirements for sale as Grade A milk and which is delivered to a plant similarly qualified, an amount per hundredweight equivalent to the following differentials on that Class I milk which such handler sold in the marketing area as Grade A milk;

Butterfat content	Bacteria colonies per c. c.		
	10,000 or less	10,000 to 25,000	Over 25,000
Percent	Cents per cwt.	Cents per cwt.	Cents per cwt.
3.7	60	42	5
3.8	66	48	7.5
3.9	72	54	10
4.0 and above	78	60	12

SEC. 5. **Payments to Cooperative Associations.**—Any cooperative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members. After such determination, the cooperative association of producers shall be entitled to continue to receive such payment until it has been disqualified by the Secretary, after hearing, for failure to exercise the authority and to perform the functions upon which such determination was based.

The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members by such association and on which such handler has made the reports and payments required by this order.

2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association.

SEC. 6. **Market Service Payment.**—The market administrator shall pay out of the producer settlement fund to any handler immediately after audit of claim for such payment made on forms supplied by the market administrator:

1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area, which was, during any month except Novem-

ber or December, moved to a plant where it was utilized in Classes II–A, II–B, III–A, III–B, III–C, III–D, or, during the month of October, IV–A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles, and plus $\frac{1}{10}$th of 1 cent per hundredweight per additional mile, of the shortest highway distance between the two plants; and

2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equipped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area.

SEC. 7. **Producer Settlement Fund.**—The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments made by handlers pursuant to sections 8 and 10 of this article and out of which he shall make all payments to handlers pursuant to sections 6, 9, and 10 of this article, and to cooperative association of producers pursuant to section 5 of this article.

SEC. 8. **Payments to the Producer Settlement Fund.**—Each handler shall on or before the 18th day of each month pay to the market administrator for payment to producers through the producer settlement fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price.

SEC. 9. **Payments Out of Producer Settlement Fund.**—On or before the 20th day of each month the market administrator shall remit to each handler for payment to producers the amount, if any, by which such handler's net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. If at such time the balance in the producer settlement fund is insufficient to make all payments due to such handler, the market administrator shall reduce uniformly the payments made to each handler and shall complete such payments as soon as the necessary funds are available. No handler who, on the 25th day of the month, has not received the balance of such reduced payment from the market administrator shall be deemed to be in violation of section 1 of this article if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer settlement fund.

SEC. 10. **Adjustments of Errors in Payments.**—Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall, within five days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within five days, make such payment to such handler. When-

ror verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of less than is required by this article, the handler shall make up such payment to the producer not later than the time of making payment next following such disclosure.

ARTICLE VIII—EXPENSE OF ADMINISTRATION

SECTION 1. **Payment by Handlers.**—As his pro rata share of the expense of administration hereof, each handler shall, on or before the 20th day of each month, pay to the market administrator a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handler, directly or at the instance of a cooperative association of producers, and which was utilized in Classes I, II-A, and II-B, the exact amount to be determined by the market administrator subject to review by the Secretary. This section shall not be deemed to duplicate any similar payment by any handler under any order issued by the Commissioner of Agriculture and Markets of the State of New York to which this order is complementary.

ARTICLE IX—SUSPENSION, TERMINATION AND LIQUIDATION

SECTION 1. **Continuing Obligation of Handlers.**—Unless otherwise provided by the Secretary in any notice of amendment, termination or suspension of any or all of the provisions hereof, such amendment, termination or suspension shall not (a) affect, waive, or terminate any right, duty, obligation, or liability which shall have arisen or may thereafter arise in connection with any provision of this order; (b) release or waive any violation of this order occurring prior to the effective date of such amendment, termination or suspension; or (c) affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violations.

SEC. 2. **Continuing Power and Duty.**—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The market administrator shall (a) continue in such capacity until discharged by the Secretary; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator, to such person as the Secretary shall direct; and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property and claims vested in the market administrator pursuant to this order.

SEC. 3. **Liquidation.**—Upon the termination or suspension of this order, the market administrator shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control,

together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator in liquidating the business of the market administrator's office shall be distributed by the market administrator to handlers in an equitable manner.

Article X—Effective Time

Section 1. **Effective Time.**—This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 percent of the milk sold in the marketing area, or, his determination approved by the President that the failure or refusal of handlers to sign tends to prevent the effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of producers pursuant to such declared policy of the act.

In witness whereof, I, H. A. Wallace, Secretary of Agriculture of the United States, have executed in duplicate and issued this order to become effective in accordance with article X hereof, and caused the official seal of the Department of Agriculture to be affixed hereto in the city of Washington District of Columbia, this 5th day of August 1938.

H A Wallace

Secretary of Agriculture.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 826.

HOLTON V. NOYES, as Commissioner of Agriculture and Markets of the State of New York,
Appellant,

against

ROCK ROYAL CO-OPERATIVE, INC., *et al.*,
Appellees.

BRIEF FOR APPELLANT AND MEMORANDUM OF THE ECONOMIC AND HISTORIC BACKGROUND OF THE MILK PROBLEM IN NEW YORK STATE.

MILO R. KNIFFEN,
Counsel for New York State Department of Agriculture and Markets,

LOUIS S. WALLACH,
Associate Attorney,

Attorneys for Commissioner of Agriculture and Markets of the State of New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Table of Contents.

	PAGE
Opinions below	1
Jurisdiction	2
Statement of the Case	2
Assignment of Errors	4
Economic and Historic Memorandum:	
A. History of Milk Regulation in the State of New York	5
B. Need for Regulation of Milk Producers' Prices	9

Table of Cases Cited.

Baldwin v. Seelig, 294 U. S. 511	5, 7, 8
Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251	5
Hegeman Farms Corporation v. Baldwin, 293 U. S. 163	5
Nebbia v. New York, 291 U. S. 502	5, 6, 11, 14, 16
United States of America v. Krechting (unreported)	16
United States of America v. H. P. Hood & Sons, 21 Fed. 321	16

Statutes.

Act of August 24, 1937, section 2 (50 Stat. 752)	2
Agricultural Adjustment Act of 1933 (48 Stat. 31)	2
Agricultural Adjustment Act of 1935 (49 Stat. 750)	2
Agricultural Marketing Agreement Act of 1937 (50 Stat. 246)	2, 3, 9, 16

PAGE

Article 21-A of Agriculture and Markets Law of the State of New York (Emergency Milk Control Law) 6, 11, 13
Chapter 383 of the Laws of 1937 of the State of New York (Rogers-Allen Law) 3, 4, 8
Rules of Federal Procedure—Rule 24B 3

MISCELLANEOUS REFERENCES.

Order No. 27 ..... 2, 3, 4, 9, 12, 15, 16
Official Order No. 126 ..... 3, 4, 8
Pitcher Report (New York Legislative Document No. 114 of 1933) 5, 6, 11
Report of Attorney General 1910 5
Report of Wicks Committee, 1917 6
Report of Council of Farms and Markets 1919 ... 6
Petition of Seven States to Secretary of Agriculture 1935, Appendix A 8
Reports—Bureau of Agricultural Economics of the United States Department of Agriculture 9

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No. 826.

HOLTON V. NOYES, as Commissioner of Agriculture and Markets of the State of New York,
Appellant,

against

ROCK ROYAL CO-OPERATIVE, INC., *et al.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT AND MEMORANDUM OF THE ECONOMIC AND HISTORIC BACKGROUND OF THE MILK PROBLEM IN NEW YORK STATE.

Opinions Below.

The District Court rendered two opinions. One denied the motion of the appellant to strike certain portions of the answers of the appellees (R. 105), and the second opinion was rendered after the trial of the actions. (R. 743.) Neither opinion is as yet reported.

Jurisdiction.

The jurisdiction of this court is invoked under Section 2 of the Act of August 24, 1937, 50 Stat. 752 (28 U. S. C., Sec. 349 a).

The decree of the District Court was entered March 21, 1939, and the petition for appeal was allowed March 21, 1939. The case was docketed in this court March 23, 1939, and the court entered an order noting probable jurisdiction on April 3, 1939.

Statement of the Case.

The statute involved is the Agriculture Marketing Agreement Act of 1937 (Public No. 137, 75th Congress, 50 Stat. 246), which reenacted and amended certain provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), which had been added to the original Agricultural Adjustment Act by an amendment enacted August 24, 1935. (49 Stat. 750.) The regulation involved is order No. 27 issued thereunder by the Secretary of Agriculture, regulating the handling of milk in the New York Milk Marketing Area which is in the current of interstate commerce, or directly burdens, obstructs, or affects interstate commerce. The New York Metropolitan Milk Marketing Area is defined in said order to include the City of New York, and the Counties of Nassau, Suffolk and Westchester, all in the State of New York. (R. 13.)

The defendants having failed to pay their indebtedness to the Market Administrator, the United States of America on October 27, 1938, as plaintiff, commenced

an action against the defendants Rock Royal Co-Operative, Inc., Schuyler Junction New York Milk Shed Co-Operative, Inc., and Central New York Co-Operative Association, Inc. (R. 11), and another action against Jetter Dairy Company, Inc. on November 23, 1938 (R. 40). By an order of the Court below, these actions were consolidated. (R. 61.) These complaints in effect were for mandatory injunctions to compel the defendants to comply with Order No. 27 issued by the Secretary of Agriculture. In the action against the defendants Rock Royal Co-Operative, Inc., Schuyler Junction New York Milk Shed Co-Operative, Inc., and the Central New York Co-Operative Association, Inc., the complaint prayed in the alternative that the defendants comply with Official Order No. 126 issued by the Commissioner of Agriculture and Markets of the State of New York under Chapter 383 of the Laws of 1937 of the State of New York.

Thereafter, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, the appellant herein, moved for an order under Rule 24-B of the Rules of Federal Procedure, permitting him to intervene as party plaintiff, on the ground that his claim is ancillary to the claims as set forth in the complaints of the plaintiff, the United States of America; that official order No. 126, issued by him under Chapter 383 of the Laws of 1937 of the State of New York, was complementary to Order No. 27 issued by the Secretary of Agriculture; and that the question of whether the defendants are subject to the federal order or the state order presents a single controversy, and that his claim is ancillary to the claim set forth in the original complaints. (R. 47.) The said

motion permitting Holton V. Noyes, as Commissioner of Agriculture and Markets to intervene as a party plaintiff was granted by consent of all the parties. (R. 61.) The complaints of the said intervening plaintiff against the defendants asked for the same relief as the original plaintiff, the United States of America. Upon motion, the Dairymen's League Co-Operative Association, Inc., and the Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., were permitted to intervene as party plaintiffs.

These actions as consolidated came to trial, and on February 23, 1939, the court below decided among other things, that all of the appellees were handlers subject to order No. 27 issued by the Secretary of Agriculture if such order is valid, and therefore it was unnecessary to decide whether Chapter 383 of the Laws of 1937 was constitutional, and whether official order No. 126, issued by the Commissioner of Agriculture and Markets of the State of New York under the said law was valid, (R. 745) and further dismissed the complaints of the appellant. The appellant appeals from the final order and decree dismissing his bills of complaint.

Assignment of Errors.

The appellant herein specifies the same errors as the appellant, the United States of America, in its appeal No. 771, intended to be argued simultaneously herewith, and this appellant hereby adopts as his brief, the brief filed by the appellant United States of America in case No. 771 aforementioned. In addition, this

appellant files this memorandum concerning the economic and historic background of the milk problem in New York State. In discussing this phase of the case, we will approach it along the following lines:

A. History of Milk Regulation in the State of New York.

B. Need for Regulation of Milk Producers' Prices.

A.

History of Milk Regulation in the State of New York.

This Court is already familiar with the problems of the milk industry in the State of New York, having had before it many and varied discussions of the different phases of the problem, principally in the cases of

Nebbia v. New York, 291 U. S. 502;
Baldwin v. Seelig, 294 U. S. 511;
Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251.
Hegeman Farms Corporation v. Baldwin, 293 U. S. 163,

to which records and the briefs submitted in connection therewith we hereby respectfully refer.

The dairy problem of the State has been a matter of concern to the legislature for many years. As far back as 1910, the Attorney-General of the State of New York reported to the legislature the results of the investigation made by him, in which he set forth that apparently unlawful means were used in the fixing of prices to producers, and that such prices were unreasonable and unprofitable. See 1938 Legislative Document No. 114, p. 299 (commonly known as Pitcher

Report). In 1916 and 1917, a joint committee of the Senate and Assembly, commonly referred to as the Wicks Committee, made an exhaustive study of the industry. Among the conclusions reached by that committee was that the State was threatened with the possible decay of the dairy industry, and that the distribution of milk should be a regulated public service. (See Pitcher Report, p. 303.) In 1919 the Council of Farms and Markets submitted a report to the legislature (see Pitcher Report, p. 325) covering an investigation of the New York State milk situation, and concluded, among other things, that the surplus problem was acute. Many other investigations and attempts were made at frequent intervals to find a solution for the price problems of the dairy industry. The reports of these various committees were considered in connection with a comprehensive and exhaustive investigation made in 1932-1933 by a joint legislative committee, and the report of that committee (Pitcher Report) to the legislature resulted in the creation, in April 1933, of a Milk Control Board, which was given broad powers to regulate the entire dairy industry of the state, which included the power to fix prices to be paid to producers by the dealers or handlers, as well as to fix prices to be charged to consumers for milk. This power of the Board to fix prices was upheld in *Nebbia v. New York, supra.*

The Milk Control Board thus formed was replaced in 1934 by the Division of Milk Control in the Department of Agriculture and Markets, to which division the powers and duties of the Milk Control Board were transferred. This legislation was commonly known as the "Emergency Milk Control Law." (Article 21-A

of the Agriculture and Markets Law.) This law was extended by acts of three successive legislatures, but was permitted to expire on April 1, 1937. This program failed to produce all of the beneficial results expected, largely because of the State's inability to regulate prices to be paid to producers in other states. *Baldwin v. Seelig, supra.* By reason of such inability to control the price of milk produced in other states, the New York City market was demoralized with milk purchased from out of state producers at prices lower than those paid in New York, and the New York producers not only suffered loss in many instances, but were threatened with the total loss of their market, for in order to protect it the New York producers were forced to meet this competition by selling their milk at disastrously low prices.

About one-third of the milk produced for sale in the Metropolitan marketing area is produced in states other than the State of New York. Approximately one-third of the milk produced in the State of New York for sale in the said marketing area is handled in the current of interstate commerce. A large part of the milk produced in the State of New York for sale in the marketing area which does not pass through other states on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside of the State of New York for sale in the marketing area, or which is produced in the State of New York for sale in the marketing area, but which passes through other states on its way to be sold in the marketing area. Certain plants located in the State of New York receive some milk which has crossed state lines, and some which has not. The milk from both sources is mixed together at such plants, and

each loses its separate identity, so that it is impossible to distinguish between the milk which has crossed state lines and that which has not crossed state lines in transit to the marketing area. At least 75% of the milk sold in the marketing area either crosses state lines or has become co-mingled with milk which has crossed state lines in transit to the marketing area. (R. 6.)

The need for federal price regulation was impressed upon the entire nation by the consequences which followed the decision of *Baldwin v. Seelig, supra.* A petition* was addressed to the Secretary of Agriculture by representatives of seven state governments a few days after the Seelig decision was handed down, requesting federal price regulation to take the place of state price control.

In an attempt to alleviate hardships to producers resulting from the continued sale of milk below cost, the legislature in 1937 passed what is generally known as the Rogers-Allen Law, Chapter 383 of the Laws of 1937, Section 258-k to 258-n inclusive of the Agriculture and Markets Law, which, in part, authorized the Commissioner of Agriculture and Markets of the State of New York to cooperate with the federal government to effectuate a joint program to insure regulation of all milk handled in the marketing area, regardless of whether the milk was produced in the State of New York, or in other states, and to issue orders setting prices to be paid by handlers to producers. This program was inaugurated with the issuance of official order No. 126 by the Commissioner of Agriculture and Markets, under the Rogers-Allen Law, simultaneously

* See Appendix "A."

th order No. 27 by the Secretary of Agriculture, sued under the Agricultural Marketing Agreement ct of 1937 (Public No. 137, 75th Congress, 50 Stat. 6).

These two orders are complementary, and represent cooperative effort to put such a joint program into fective operation. Both orders operate exactly as ough one joint order had been issued. The same arket Administrator administers both orders, and th orders create one market-wide pool of milk. Un- r the operation of these orders, it is immaterial, erefore, whether a handler complies with the state der or the federal order, so far as the obligation the individual handler is concerned, and also so far concerns the interest of the United States and of e State of New York in insuring the successful opera- n of the joint regulation of the milk supply for the ew York Metropolitan Area.

B.

Need for Regulation of Milk Producers' Prices.

New York State is the richest and most populous ate in the nation. The production and distribution of lk in the State of New York is a paramount industry, d affects in a large measure the health and prosperi- of the people of the state. Dairying is by far the ost important branch of agriculture in the state, elding fully one-half of the total income derived from rm products. According to a statement released on ay 21, 1938, by the Bureau of Agricultural Economics the United States Department of Agriculture, the oss cash income for milk in the State of New York

for the year 1937 was $155,199,000. According to an earlier report of the same agency, the gross cash income for milk in the State of New York for the year 1929 was $201,520,000. The size of this income measures the purchasing power of the dairy farmer for the goods and services offered by all other lines of business and professions. Investments in land, buildings, equipment, and live stock on the dairy farms of the State amount to upwards of $1,000,000,000. A large part of the income which is required to support town and county government is derived from taxes levied against dairy farm property.

The furnishing of an adequate and reliable supply of fresh, wholesome milk to a large and populous metropolitan area in the State of New York presents problems peculiar to the milk industry. Pure, wholesome milk is a very important element of diet. It is a highly perishable commodity, and an ideal disease carrier, and, unless handled promptly, and under proper sanitary conditions, it deteriorates very rapidly, and becomes unfit for use as fluid milk. For this reason the various health authorities in the marketing area require that all milk that is sold in the marketing area in fluid form be produced on farms and handled at plants approved by them, and operated in accordance with rigid sanitary regulations. In August 1938 there were 54,111 producers whose dairies had been approved for Grade B milk for sale in the City of New York, which is part of the Metropolitan Marketing area, and 6109 producers of Grade A milk, or a total of 60,220, located in the states of New York, Pennsylvania, New Jersey, Massachusetts, Connecticut and Vermont, known as the production area. Approxi-

mately 420 country milk receiving stations for Grade B milk and approximately 86 for Grade A milk, or a total of approximately 506 milk receiving stations in the said production area (Findings 27, 28, 29—R. 133, 134). Milk produced on unapproved farms or delivered to unapproved plants is not permitted to be sold in the marketing area. Compliance with such stringent sanitary regulations as imposed by the various health authorities greatly increases the cost of producing milk. While milk which is produced on farms and handled at plants which do not comply with these sanitary regulations cannot be sold as fluid milk in the marketing area, it is suitable for use in the manufacture of dairy products, such as ice cream, butter, and cheese. Since milk can be produced on unapproved farms which are under less exacting sanitary conditions at a substantially lower cost, the producer whose milk is approved for sale in the marketing area cannot compete in the general market for milk and its products, and he cannot, therefore, afford to produce milk in compliance with the sanitary regulations unless he can market a reasonable proportion of his milk in fluid form, at prices higher than the prices paid for milk used for manufacturing purposes.

This Court, in the Nebbia case, had before it the report of the Pitcher Committee *supra,* which drafted the Emergency Milk Control Law, and which devoted considerable attention to the health aspects of milk. The facts found in that report at pages 70-73 are of interest here.*

If the farms approved by the various Health Departments of the New York Metropolitan Milk Marketing

* See Appendix "B."

Area produce just enough milk at all seasons of the year to satisfy the demand of the consumers for fluid milk, or if milk could be stored for a considerable period of time, the problems with which order No. 27 issued by the Secretary of Agriculture deals would not exist, but the facts involved in the production of milk prevent an exact correlation between supply and demand, and the physical nature of milk makes its storage in fluid form impossible. The demand for fluid milk fluctuates to some extent from day to day. The production of milk, on the other hand, is subject to wide seasonal fluctuations. The amount of milk produced by a cow depends upon climatic conditions, the feed supplied to the cow, and the cow's stage of lactation, as well as her condition of health. The peak of production is reached during the spring and early summer. Because feeds are less plentiful and more expensive during the fall and winter, the supply of milk in the spring will be normally greatly in excess of the supply during the fall and winter, and also greatly in excess of the demand. In order to insure an adequate supply of milk at all times, it is necessary for the health authorities in the marketing area to approve sufficient producers to supply adequately the market demand for milk during the winter months or short season, including a surplus sufficient to take care of daily fluctuations in demand. For that reason, at the seasons of the year when production of milk exceeds the demand for milk in fluid form, it is necessary that milk in excess of that used in fluid form be converted into manufactured products, the prices of which are lower than milk sold in fluid form. Therefore, a price plan which allows a handler to pay a price for fluid milk commensurate with its value when used in fluid form and a lower price for

hat which is converted into manufactured products be-
omes necessary if all of the milk which is produced
luring such seasons is to find a market. A classified
rice plan which allows handlers to pay for milk ac-
ording to the use they make of such milk provides a
levice which allows handlers to purchase milk in such
manner that they can utilize all of the production at
ll times of the year, and thereby affords producers
market for their milk during the whole year. Unless
andlers are afforded such a pricing method, they will
ither take only a portion of a producer's milk, or will
efuse to purchase milk from some producers during
ush periods.

Pricing methods whereby milk is purchased and paid
or according to the use to which such milk is put, have
een termed "classification" or "class-use" pricing
lans, and such class-use pricing plan was adopted in
933 with the institution of the Emergency Milk Con-
rol Law in New York. To a large extent, the success
f any class-use pricing plan depends upon its gen-
ral acceptance and universal use in the market. Un-
ss the system is universally applied, conditions of
nstability must arise because of the favorable posi-
on which the handler who does not pay for milk un-
er the class-use method (known as flat price buyer)
able to maintain in the market. The flat price buyer
nds that he can purchase all of his milk from produc-
rs at a price equal to or only slightly higher than the
verage price paid by the handler who does purchase
n a class-use basis, but who has a smaller percentage
f his sales in the higher-priced classifications, and
hose price to producers is an average derived from
he value of milk in the various uses. The flat-price

buyer, having secured the milk which he uses for sale in fluid form at prices materially lower than the price paid for milk in the same use by his competitor who purchases under a class-use system, is then able to cut prices at wholesale and retail. This fact causes the class-use buyer either to cut prices in retaliation, or to lose his fluid milk sales. Although the fluid milk purchased by both types of buyers has been produced in conformity with the strict health standards applicable to fluid milk (with resulting higher costs of production), this downward price spiral once set in motion may continue until prices for fluid milk are reduced to the level paid for milk used solely for manufacturing purposes.

As shown above, the nature of the milk industry makes a surplus of milk inevitable, and the only manner in which prices for fluid milk can be stabilized is to require that the burden of the surplus milk be shared equally by all the handlers and all the producers.

In *Nebbia v. New York, supra,* at pp. 516, 517, this Court said:

> "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus * * * because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable, and cannot be stored. * * * Thus surplus milk presents a serious problem, as the prices which can be realized for it for other

uses are much less than those obtainable for milk sold for consumption in fluid form, or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed."

So long as the surplus burden is unequally distributed, the desire to market surplus milk in fluid form will be a serious disturbing factor in the marketing area. The fact that some distributors find its necessary to carry large quantities of surplus milk, while others do not, leads to price-cutting and other forms of destructive competition. Those distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (*i. e.*, an average between the price paid the producer for milk for sale as fluid milk and the lower surplus milk price paid by those who assume responsibility for surplus) can undersell the others. Indulgence in this practice naturally results in a lower price to the producer.

Order No. 27 contains provisions for a classified price plan in order to place all handlers of milk in the same position with regard to their purchases.

If handlers are to be placed on an equal footing in their purchases of milk and pay for it according to its ultimate utilization, then producers should likewise share equally the burden of surplus.

The lack of any plan for an equitable distribution of the fluid milk sales among all the producers, and the sharing equally of the burden of surplus, was an-

other cause for price cutting and demoralization in the marketing area. There was always a constant effort on the part of producers to get a high proportion of their milk into the fluid market. By cutting prices, a group of producers could induce a handler to purchase its milk for use in the fluid class. This resulted in placing such handler in a position to further increase his fluid milk sales by cutting resale prices with the milk he purchased from producers at cut prices.

Order No. 27, however, also cures this situation, by providing for a market wide equalization pool which, in effect, gives to each producer a uniform price subject to freight and butterfat differentials. This results in each producer having an equal share in the fluid market and makes each producer share the burden of surplus.

The question of equalization was before the United States District Court for the Southern District of Ohio, Western Division, in the case of *United States of America v. Krechting,* (unreported), and in the United States District Court of the District of Massachusetts in the case of *United States of America, et al. v. H. P. Hood & Sons, et al.,* 21 Fed. Supp. 321. The defendants in these cases attacked as unconstitutional the Agricultural Marketing Agreement Act as well as the provisions of equalization contained in the orders issued under that act. The courts in each case sustained the validity of the equalization provisions, citing the case of *Nebbia v. New York, supra.*

CONCLUSION.

It is respectfully submitted that the lower court erred in dismissing the bills of complaint of the appellant herein, and the decree of the court below should be reversed.

MILO R. KNIFFEN,
Counsel for New York State Department of Agriculture and Markets.

LOUIS S. WALLACH,
Associate Attorney.

APPENDIX A.

(Petition of Seven States: See Page 8)

TO Hon. Henry A. Wallace,
Secretary of Agriculture,
Washington, D. C.

The States of New York, New Jersey, Pennsylvania, Maryland, Massachusetts, Vermont, and Connecticut, constituting a natural production and marketing area, acting through duly designated representatives appointed by the Governors of the States in conference assembled, respectfully and urgently petition you as Secretary of Agriculture to exercise the authority conferred under the Act of Congress known as the Agricultural Adjustment Act, amendments thereto and otherwise, to the end that the power therein delegated to the Secretary of Agriculture may be exercised immediately and effectively in cooperation with the exercise of the police power vested in the said sovereign

States, in order to correct a condition that threatens the dairy industry and which affects adversely the health and welfare of a large portion of the population of the United States; and

Whereas the production and distribution of milk is a paramount industry in said States; and

Whereas the necessity of assuring an adequate, constant supply of pure and wholesome milk to this large and concentrated part of the population of the country, together with the existence of an economic emergency which has temporarily disturbed the orderly processes of production and distribution of milk, have led to the enactment of milk control laws in the States of this area; and

Whereas it is a matter of grave concern to the welfare of the nation that these producers living under conditions that make it difficult to develop cohesion and to bargain effectively, be protected in their marketing operations; and

Whereas recent decisions of the Supreme Court of the United States have recognized that the respective States, through their milk control laws, have exclusive jurisdiction over intrastate commerce in milk and one decision has held in substance that a state is without power to fix the price of milk to be paid a producer outside the state when such milk moves into the state in the channels of interstate commerce; and

Whereas the regulation of the interstate commerce aspect of the milk problem is regarded as emergent

and vitally essential to the regulation of the milk industry within this area;

Now, therefore, the signatories hereto representing the several States within the area respectfully request that you forthwith place such area under federal license so as to include and regulate the operations of all persons trafficking in or transporting milk in the channels of interstate commerce within such area, all to the purpose of securing for all producers an adequate, equitable and reasonable price for the milk sold or used in such area, and that such purpose be achieved, among other ways, by making the prices and price conditions established by the Control Boards of the respective states applicable to milk moving in interstate commerce into such states.

March 26, 1935.

PETER G. TEN EYCK
For the State of New York

WILLIAM B. DURYEE
For the State of New Jersey

HARRY POLIKOFF
For the Commonwealth of Penna.

DAVID G. HARRY
For the State of Maryland

JOSEPH C. CORT
For the Commonwealth of Mass.

EDWARD H. JONES
For the State of Vermont

CHARLES G. MORRIS
For the State of Connecticut.

APPENDIX B.

Extract from New York Legislative Document 1933, No. 114, pages 70-73 (Pitcher Report). (See page 11.)

"The consequences of very inadequate returns to the producers of milk are likely to manifest themselves (1) in a lowering of quality because of enforced relaxation of safeguards in the production and distribution of milk; (2) in a gradual curtailment of the supply of milk produced in the milk shed which meets the special requirements for New York and other cities; (3) in possible interruptions of the milk supply due to strikes and disorders.

"The price of milk has a very definite relation to its quality. Strict supervision and control of milk supplies are necessary for the protection of public health, and to encourage generous use of this important food. At the same time, these sanitary regulations add much to the cost of producing and handling market milk. Regulations in respect to the examination and health of cattle tend to increase the investment which the farmer has to make in livestock, and the annual depreciation thereon. The regulations in respect to stables —floors, light, ventilation, whitewashing, separation of horses—and milk house separated from the stable, likewise add to the producer's investment and the overhead costs of producing milk.

"The requirement that milk be cooled to 60 degrees or lower immediately after milking usually means putting up a supply of natural ice, or providing electrical

refrigeration. A recent survey in Rhode Island showed the cost of electric cooling on the farm to be from 12 to 14 cents per 100 pounds of milk compared to 10 cents per 100 pounds for cooling with ice. If the price received for milk were such as to justify the purchase of electrical coolers, they soon would be generally used on the dairy farms and the quality of milk would be much improved. Special care in the handling of milk both on the farm and in the process of transportation and distribution is necessary to keep the bacteria count below the prescribed maximum, and this further increases the expense. Market milk must be delivered to the plant every day, usually at an early hour, while cream for buttermaking need be delivered only from once to three times a week.

* * * * *

"The effect of modern sanitary control upon the costs of producing and handling milk explains in part the wide spread between the price paid for milk by the consumer and the price received by the producer. It also clearly indicates the necessity for a premium to the producer for market milk over the price ordinarily received for milk which is produced for butter or cheese factories. Unless such a premium were paid, the producers obviously would not continue to go to the expense of meeting the special requirements for market milk. They would find it more profitable to deliver milk to cheese factories or cream to butter factories. Of course, quality standards for market milk will be maintained during short periods when prices do not fully compensate producers or dealers for the necessary costs. However, an extended period of prices much below the costs of producing milk in accordance with these standards would inevitably have

an unfavorable effect upon the quality of the m
supply. Eventually there would be a shortage of m
which fully met the requirements. Further, it m
be realized that the sanitary requirements imposed
the cities and the state are minimum standards. Si
a large part of the milk supply normally is well abo
these minimum standards, a considerable decline
quality may occur without violating the official
quirements.

"This view of the probable effect of inadequate pri
returns upon the quality of the milk supply was
fectively expressed by Dr. Paul B. Brooks, Depu
Commissioner of Health of the State of New York,
a letter to the Committee. 'In my opinion', said D
Brooks, 'there is no doubt but that the low price
ceived by the producer for milk and the general di
turbed conditions in the milk industry are bound
have an unfavorable effect on the safety and gener
quality of milk sold in the state.'

"The statement of Dr. Russell (Chairman of t
Milk Committee of the Department of Health, Sta
of New Jersey) also emphasizes this point. 'In th
long run,' he said, 'the public will get what it pay
for. If sanitary regulations break down and becom
unenforceable, the public may get a cheap article, b
it will not be either safe or wholesome.'

"A similar view of the effect of low prices upon th
quality of milk was expressed by Mr. Floyd Shime
producer, and President of the Farm Bureau of Je
ferson County, in his testimony before the Committe
'* * * Cheap milk will have its effect on quality. La

of funds will mean that many of those improvements which tend towards better quality will not be had. Present continued low prices are bound to discourage the producer and there will be among some a feeling that quality, under present conditions, is not to them an important factor.' "

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No. 827

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
APPELLANT

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT, DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

SEWARD A. MILLER,
Counsel for Appellant.

EDWARD SCHOENECK,
PAUL J. MCCAULEY,
LYLE HORNBECK,
Of Counsel.

INDEX

	PAGE
Opinions below	1
Jurisdiction	1
The statute and the regulation thereunder involved	1
Questions presented	2
Statement	3
I. The proceedings below	3
A. Proceedings prior to intervention by the League	3
B. Intervention by the League	6
Specifications of assigned errors intended to be urged	7
Summary of the argument	8
Argument:	
I. Preliminary statement as to the position of Dairymen's League Cooperative Association, Inc.	12
A. The purpose for which the League was allowed to intervene in the action	12
B. The nature of the League	13
C. The development by the League of facilities for the care of surplus milk	15
D. The position of the League and other cooperative associations as shown by legislative and administrative investigations of the milk industry	16
II. The findings and conclusions of the trial court relative to the conspiracy in which the League was alleged to have been engaged to destroy proprietary milk handlers and to monopolize the New York milk market are unsupported by the evidence, are immaterial and are contrary to statute	18
A. The findings of fact #86 and 97 (a) and conclusions of law numbered 20 and 21 are unsupported by the evidence	18

B. The findings of fact #86 and 97 (a) and conclusions of law numbered 20 and 21 are immaterial 38
C. The findings and conclusions that the League was engaged in a conspiracy to monopolize the New York Metropolitan milk industry in violation of the Federal Anti-trust laws are contrary to statutes which exempt cooperative associations from the operation of so-called Anti-trust legislation 39
III. The statutory provision authorizing cooperatives to pay their members a blended price rather than the uniform price does not deprive the defendants of their property without due process of law 57
A. Legislative and judicial history of exemption of cooperatives from regulations imposed upon ordinary business corporations..... 58
B. Practical differences between cooperatives and ordinary business enterprises which justify an exemption of the former from a regulation imposed upon the latter..... 65
IV. The cooperative differentials provided for in Article VII, Section 5 of the Order are authorized by the Act and do not deprive the defendants of their property without due process of law.... 69
A. The defendants are not entitled to question the legality of these payments..... 69
B. The evidence before the Secretary shows an economic need for these payments..... 70
C. Article VII, Section 5 of the Order is authorized by the provisions of the Act..... 76
V. The decree appealed from should be reversed as to all appellants 79
Conclusion 80

ases:——
dair v. U. S., 208 U. S. 161 53
mer. Fur Manufacturers Association Inc. v. Associated F. C. & T. Manufacturers, et al. 161; aff'd 251 A. D. 708 44
pex v. Leader, 90 Fed. (2d) 155 54
ppalachian Coals, Inc. v. United States, 288 U. S. 344 56
ain Peanut Co. v. Pinson, 282 U. S. 499 48
arnes v. Dairymen's League Co-op. Asso., Inc., 220 A. D. (N. Y.) 624 ..... 44, 47
oard of Trade of Chicago, 67 Fed. (2d) 204, 408; certiorari denied 291 U. S. 680 46
oard of Trade - City of Chicago v. Olsen, 262 U. S. 1 60
orden v. Ten Eyck, 297 U. S. 251 61
rown v. Staple Cotton Growers Co-op. Asso., 132 Miss. 859; 96 So. 849 47
rushaber v. Union Pac. RR. Co., 240 U. S. 1, 21 60
arroll Building v. Greenberg P. Supplies, Inc., 216 A. D. 268 54
lear Lake Co-op. Live Stock Asso. v. Weir, 200 Iowa, 1293; 206 N. W. 297 47
onn. Milk Prod. Asso. v. Brock-Hill Dairy Co., 122 Con. 482 49
ark Tobacco Growers Co-op. Asso. v. Dunn, 150 Tenn. 612; 266 S. W. 308 47
ark Tobacco Growers Co-op. Asso. v. Robertson, 84 Ind. App. 51; 150 N. E. 106 47
isenberg Farms Inc. v. Baldwin, 265 N. Y. 662 ..... 61, 62
ederal Trade Comm. v. Clark, 263 U. S. 565 53
ederal Trade Comm. v. Gratz, 253 U. S. 421 53
lint v. Stone-Tracy Co., 220 U. S. 107; 173 60
rost v. Corporation Commission, 278 U. S. 515; 49 Sup. Ct. 235; 73 Law Ed. 483 ..... 46, 60
arrell v. Cane Growers Co-op. Asso., 160 Ga. 30; 126 S. E. 531 ..... 47, 60
art v. B. F. Keith Vaudeville Exchange, 12 Fed. (2d) 341, 345 ..... 53, 56
egeman Farms Corporation v. Baldwin, 293 U. S. 163; 55 Sup. Ct. 7 ..... 39, 61
ollingsworth v. Texas Hay Asso., 246 S. W. 1068 47
ollis v. Drew Theological Seminary, 95 N. Y. 166, 172 49
sbrandsten-Moller Co., Inc., v. United States, 300 U. S. 139 39
ansas Wheat Growers Asso. v. Schulte, 113 Kan. 672; 216 Pac. 311 47
Liberty Warehouse v. Burley Tobacco Growers Co-operative Marketing Association, 276 U. S. 71 ..... 44, 46, 47, 48, 62
iggett v. Lee, 288 U. S. 517 50
incoln Park Coal & Buck Co. v. Wabash Ry. Co., 338 Ill. 82 49
ist v. Burley Tobacco Growers Co-op. Asso. 114 Ohio St. 361 47
anchester Dairy System v. Hayward, 132 Atl. 12; 82 N. H. 193 47
atter of Mayflower Farms Inc., 267 N. Y. 9 62
essersmith v. Am. Fid. Co., 232 N. Y. 161, 163 49
ilk Control Board v. Crescent Creamery, 14 N. E. (2d) 588——Ind.—— 61
ilk Producers' Marketing Co. v. Bell, 234 Ill. App. 222 47
innesota Wheat Growers Co-op. Mkt. Asso. v. Huggins, 162 Minn. 471; 203 N. W. 420 ..... 47, 60
ld Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U. S. 183, 192 53
regon Growers Co-op. Asso. v. Lentz, 107 Ore. 561; 212 Pac. 811 ..... 47, 60
ann v. Raimist, 255 N. Y. 307, 314 54
National Association of Window Glass Manufacturers v. United States, 263 U. S. 403 56
Nebraska Wheat Growers Asso. v. Norquest, 113 Neb. 731; 204 N. W. 798 47
New York Lunber Trade Asso. v. Lacey, 245 A. D. 262; aff'd 269 N. Y. 595 and certiorari denied 298 U. S. 684 52
Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, 182 Wis. 571; 197 N. W. 936 47
Pacific States Box & Basket Co. v. White, 296 U. S. 176, 184 48
People v. Nebbia, 291 U. S. 502, 517, 518 61

Potter v. Dark Tobacco Growers Co-op. Asso. 201 Ky. 441; 257 S. W. 33 ....47, 61
Poultry Producers of Southern California Inc. v. Barlow, 189 Cal. 278; 208 Pac. 93 47
A. B. Small Co. v. Lamborn and Company, 267, U. S. 248 56
South Carolina Cotton Growers Co-op. Asso. v. English, 134 S. C. 19; 133 S. E. 542 47
Standard Oil Co. v. United States, 221 U. S. 1, 50 49
Terminal Warehouse v. Penn R. R., 297 U. S. 500 52
Tobacco Growers Co-op. Asso. v. Jones, 185 N. C. 265 47
Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353..... 49
United States Navigation Co. v. Cunnard S. S. Co., 284 U. S. 474 52
United States v. DesMoines Nav. & Ry. Co., 142 U. S., 510 38
United States v. Trans. Missouri Freight Asso., 166 U. S. 290 49
United States v. United States Steel Corp., 251 U. S. 417 49
Warren v. Alabama Farm B. Cotton Asso., 213 Ala. 61; 104 So. 264 47
Washington Cranberry Growers Asso. v. Moore, 117 Wash. 430; 201 Pac. 772.... 47
West Coast Hotel Co. v. Parrish, 300 U. S. 379 39
Whitwell v. Continental Tobacco Co., 125 Fed. 454 53
Williams v. Quill, 277 N. Y. 1, 10 44

Statutes:—

Act of August 24, 1937, c. 754, sec. 2, 50 Stat 752; 28 U. S. C. Sec. 349a 1
Capper-Volstead Act, c. 57, 42 Stat. 388; 7 U. S. C. A. Sec. 291 .....13, 62
Clayton Act, c. 323, 38 Stat. 730; 15 U. S. C. A. 12-27, 44 .....59, 62
Commodity Exchange Act (formerly Grain Futures Act, c. 360, 42 Stat. 998, 7 U. S. C. A. 1-17) c. 545, 49 Stat. 1491-1501; 7 U. S. C. A. Secs. 1-17a....59, 60
Federal Income Tax Law of 1913; c. 16, 38 Stat. 172 60
Income Tax Laws, 1934, 1936 and 1938, 48 Stat. 700, c. 690, 49 Stat. 1673, c. 289, 52 Stat. 480 (26 U. S. C. A. Sec. 103 (12)) 60
McKinley Tariff Act, c. 27, 44 Stat. 91; 26 U. S. C. A. Sec. 750 (b) 59
Robinson-Patman Act of June 19, 1936, c. 592, Sec. 4, 49 Stat. 1528; 15 U. S. C. A. Sec. 13 (a) 56
Rogers-Allen Act. (New York, Laws of 1937, c. 383) 18, 19

Appendix:—

A. Agricultural Marketing Agreement Act of 1937 81
B. Regulation Order No. 27. 115
C. Rogers-Allen Law—Laws of 1937, Chapter 383 141
D. Capper-Volstead Act—7 U. S. C. A., Sections 291-292 153
E. Clayton Act.—15 U. S. C. A., Section 17 156

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT, DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

Two opinions were rendered by the District Court. The first (R. 105) was rendered upon the denial of certain motions made by the United States to strike designated portions of the answers of three of the defendants. The second opinion (R. 743) was rendered after the trial on the merits. Neither opinion is as yet reported.

Jurisdiction

Jurisdiction of the Court rests on Section 2 of the Act of August 24, 1937, Chapter 754, Sec. 2, 50 Stat. 752 (28 U.S.C. Sec. 349-a). The decree of the District Court was entered March 21, 1939. The appeal of the appellant, Dairymen's League Co-operative Association, Inc., was allowed March 21, 1939. The case was docketed in this Court on March 28th, 1939, and the Court noted probable jurisdiction on April 3rd, 1939.

The Statute and the Regulation Thereunder Involved

The statute involved is the Act of May 12, 1933, (48 Stat.

31) as amended August 24, 1935, (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246). Title 7, U. S. C. A., Sections 601 etc., hereinafter referred to as the Act. An annotated compilation of the Act is attached to this brief as Appendix "A".

The Regulation involved is Order No. 27, issued by the Secretary of Agriculture August 5, 1938. According to its title, the order is one "regulating such handling of milk in the New York Metropolitan area as is in interstate commerce and as directly burdens, obstructs or affects interstate commerce." A copy of order No. 27 is attached to this brief as Appendix "B".

Questions Presented

1. Whether the provisions of the Act authorizing and directing the issuance by the Secretary of Agriculture of orders regulating such handling of milk and its products as is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects interstate or foreign commerce, are a constintional exercise by Congress of the power to regulate interstate and foreign commerce.

2. Whether Section 8c (5) (B) (ii) of the Act, authorizing provisions, in orders regulating the handling of milk, for a market-wide equalization pool, as applied in Order No. 27, deprives the appellees of liberty or property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

3. Whether Section 8c (5) (F) of the Act, that a cooperative marketing association engaged in making collective sales or marketing of milk or its products for the producers thereof, shall not be prevented from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers, deprives the appellees of liberty or property with-

out due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

4. Whether the Act provides for an unlawful delegation of legislative power.

5. Whether the District Court erred in substituting its judgment for the judgment of the Secretary of Agriculture as to the reasonableness of the terms and conditions of Order No. 27, in view of its finding that substantial evidence supporting all of the findings of the Secretary of Agriculture and all the terms and conditions contained in Order No. 27, and the reasonableness thereof, was introduced at the hearing held by the Secretary of Agriculture prior to the promulgation of Order No. 27.

6. Whether the District Court erred in setting aside the determination of the Secretary of Agriculture, approved by the President, that Order No. 27 was approved by the President, that Order No. 27 was approved or favored by at least two-thirds of the producers who, during the month of May, 1938, which had been determined by the Secretary to be a representative period, had been engaged in the production of milk for sale in the marketing area specified in Order No. 27.

7. Whether all of the terms and conditions of Order No. 27 are authorized by the Act, and whether Order No. 27 is valid and enforceable.

Statement

I Proceedings Below

The position in this litigation of the appellant, Dairymen's League Cooperative Association, Inc., is explained in the history of the proceedings below.

A. Proceedings prior to intervention by the League

On October 27, 1938, the United States, pursuant to the provisions of Section 8-a (6) of the Act (Appendix "A", p. 2) commenced this action in the District Court of the

United States for the Northern District of New York, against the appellees, Rock Royal Cooperative, Inc., Central New York Cooperative Association, Inc., and Schuyler Junction Milk Shed Cooperative, Inc.

The complaint set forth that Order No. 27 was issued in accordance with the provisions of the Act, that the appellees are handlers of milk subject to Order No. 27, and refuse to comply with its provisions. The complaint sought an injunction restraining the appellees from continuing to handle milk in violation of the order and a mandatory injunction requiring them to comply with the provisions of the order (R. 9).

On November 19, 1938, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, was petitioned for leave to intervene as a party plaintiff and filed a complaint substantially identical with the complaint of the United States, and sought the same relief (R. 48).

On November 23, 1938, the United States commenced an action against the appellee Jetter Dairy Company, Inc., in the same Court, making similar allegations and seeking similar relief.

On December 2, 1938, the two cases were consolidated, with the consent of all parties (R. 61).

On December 15, 1938, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, having been granted leave to intervene as a party plaintiff, filed a complaint as intervening plaintiff in the consolidated cause against the defendant Jetter Dairy Company, Inc. (R. 55).

All of the appellees filed answers (R. 63). The answers of the defendants Rock Royal Cooperative, Inc., Schuyler Junction Milk Shed Cooperative, Inc., and Jetter Dairy Company, Inc., were substantially alike. In substance, these answers admitted that the order on its face complied with the provisions of the Act. The validity of the Order was

challenged on the ground that the producer-referendum was illegal and ineffective to put the order into operation; that the order and statute under which it was issued violated the Fifth Amendment. The answer of the appellee Central New York Cooperative Association, Inc., denied knowledge as to most of the allegations of the complaint challenging the validity of the Order, and the statute pursuant to which it was issued, and set up the additional defense that by reason of its form of organization it was in effect a producer and not subject to the provisions of the Order. The answers of Rock Royal Cooperative, Inc., Schuyler Junction Milk Shed Cooperative, Inc., and Jetter Dairy Company, Inc., also set up certain affirmative defenses. For convenience these will be referred to as the Jetter answer.

THE AFFIRMATIVE DEFENSES ALLEGED, IN SUBSTANCE:

1. That Order No. 27 was part of a conspiracy entered into by an organization of producer-cooperatives known as the Metropolitan Cooperative Milk Producers Bargaining Agency Inc., hereinafter called the Bargaining Agency, and the Dairymen's League Cooperative Association, Inc., and others, to destroy competitors and secure a monopoly in the fluid milk business in New York City.

2. That Order No. 27 was invalid because, prior to the referendum, the Bargaining Agency and the League carried on a campaign of false and misleading propaganda to induce producers to vote in favor of the Order.

3. That Order No. 27 is invalid because it may be used as a means of destroying competitors of the League and thereby creating a monopoly.

4. That Order No. 27 is invalid because the League and other handlers have attempted to use it as a means of destroying competitors and creating a monopoly.

The United States moved to strike these affirmative defenses on the grounds that the matters alleged and the

issues raised therein (a) failed to state a legal defense to plaintiff's claim, and (b) were redundant, immaterial, impertinent and scandalous (R. 83). Meanwhile, the Jetter Dairy Company had amended its complaint, modifying in some details the allegations contained in its affirmative defenses, and the United States moved to strike designated portions of the affirmative defenses from the amended answer on the same grounds as its motion to strike the affirmative defenses in the original answer (R. 103). The District Court denied the motion and rendered an opinion (R. 105).

B. INTERVENTION BY THE LEAGUE.

In its brief filed in support of the motion to strike, the United States had urged the need for a speedy trial and pointed out that if the affirmative defenses were allowed to stand, it would delay the trial, because the defenses related to activities of private parties the facts of which were unknown to the United States.

The Trial Judge in his opinion denying the motion, stated (R. 109) that the League and the Bargaining Agency could be made parties to the action if they desired to present any evidence but that they could only do so with the consent of the Government.

The action came to trial on the merits on December 27, 1938. At that time the League moved to intervene as a party-plaintiff and the Government stated that it welcomed the intervention. The Court granted leave to intervene and pointed out that intervention was not granted as to any financial interest in the controversy, but only upon the ground that the answers attacked the conduct of the Dairymen's League. The attorneys for the defendants did not object to the intervention. The discussion of this subject appears in the original transcript of testimony at page 4 to 11 inclusive.

During the trial a question was raised as to the proof

which the League was required to make in support of its complaint, (original transcript pages 1517-1525). The Court stated that the only occasion for the intervening plaintiffs to offer any proof was simply to aid the Government in the rebuttal of any proof the defendants introduced in support of their affirmative defenses. It was agreed by all of the parties to the action that there was nothing for the Dairymen's League or the Bargaining Agency to prove except their legal status as alleged in their complaints and that those allegations in the complaints were admitted.

The opinion of the Court (R. 776) directed costs against the Dairymen's League and the Bargaining Agency. The final decree (R. 743) carries out that direction. The final decree was entered May 21, 1939. The order allowing the appeal was entered May 21, 1939.

Specifications of Assigned Errors Intended to be Urged

The appellant's assignment of errors is identical with the assignment of errors filed by the United States. In the brief of the United States, all of these errors are urged. We see no reason to repeat the arguments therein presented.

As pointed out above, the League was brought into this lawsuit to assist the plaintiff in controverting any proof of charges of misconduct. In addition, two features of the Order are claimed to be discriminatory in favor of the League to the point of rendering the Order and Act unconstitutional. We will, therefore, limit our argument to the assigned errors relative to these three subjects.

The Court below erred:

(1). In finding without qualification, change or omission the facts stated in Findings of Fact #62, #86, #87, #96 and #97(a) (Assignment #5).

2. In making its conclusions of law numbered 1, 2, 6, 7, 9, 12, 16, 20, 21 and 31. (Assignments 6, 7 and 8).

3. In holding that the provisions of Section 8C (5) (F) of the Act which permit a co-operative association of producers to blend the net proceeds of all sales of milk in all markets and to make distribution thereof to its producers in accordance with its contract with such producers, as applied in Order No. 27, unlawfully discriminate against the appellees and operate to take the property of appellees without due process of law (Assignments 17, 28, 29, 30, 31, 32 and 33).

4. In holding that the payments out of the Producer Settlement Fund to Cooperative Association as provided for in Article VII Section 5 of Order No. 27, as invalid (Assignments 37, 38 and 39).

5. In awarding costs against the appellant (Assignment #6).

Summary of Argument

I. The findings of the Trial Court relative to the alleged conspiracy in which the League was alleged to have been engaged for the purpose of destroying proprietary milk handlers and to monopolize the New York milk market are unsupported by the evidence, are immaterial and are contrary to statute.

(a). The evidence upon which the findings were made fails to show any unlawful acts committed by the League in its efforts to have Order #27 issued. No plan to monopolize the milk industry was shown and none can be inferred from the fact that the League advocated the adoption of Order #27 and supported the order after it was issued. If the independent milk dealers are selling milk to stores in New York City at a loss, it is the result of their own competitive practices and not the result of any practices of the League.

(b). The findings and conclusions relative to conspiracy and monopoly are immaterial. It is a well-settled principle

that the courts will not inquire into the motives of an administrative officer in the issuance of an order. Order #27 was issued by the Secretary of Agriculture, a cabinet officer. If the Secretary's motives are immaterial in a proceeding to enforce the order, it follows that the motives of the League in advocating the adoption of the Order are likewise immaterial.

The statute under which the Order was issued contains a provision whereby a handler may apply to the Secretary to have the Order modified or rescinded. The defendants have confused the issues which might be raised in such a proceeding with the issues which can be raised in a proceeding to enforce the Order. The evidence that handlers of milk were attempting to use the Order as a means to effectuate a monopoly and drive competitors out of business might be material in a proceeding before the Secretary to modify or rescind the Order but not material in an action to enforce the Order.

(c). The findings and conclusions relative to conspiracy and monopoly are contrary to statutes which exempt co-operative associations from the operation of so-called Anti-trust Legislation. The findings charge the League with an attempt to create a monopoly in violation of the Clayton Act. The provisions of the Clayton Act are not constitutional guaranties; they are statutory. The League as a co-operative association is exempt from the provisions of the Clayton Act, as well as provisions of similar acts in force in the several states.

II. The statutory provisions authorizing co-operatives to pay their members a blended price rather than the uniform price provided for in the Order does not deprive the defendants of their property without due process of law. For many years it has been the policy of Congress and the

States to exempt co-operative associations from various regulations imposed upon ordinary business enterprises. Such legislation has been sustained by the Courts. The practical differences between co-operative associations and ordinary business enterprises justify the difference in treatment. The ordinary business enterprise selling milk is interested in the spread between the cost of the milk and the sales price. It is not interested in the price to producers except insofar as the price to producers affects the profit. The interests of the ordinary business enterprise are, therefore, frequently antagonistic to the interests of producers. The primary interest of a co-operative marketing association is in securing the highest possible return to producers. In doing this, incidental benefits result.

III. The co-operative differentials provided for in Article VII, Section 5 of the Order are authorized by the Act and do not deprive the defendants of their property without due process of law.

(a). The defendants are not entitled to question the legality of these payments. The payments come out of the producers' settlement fund and therefore come out of producers. The defendant Jetter is not a producer and therefore is not entitled to complain. The defendant co-operative associations are within the class entitled to the payments and likewise cannot complain.

(b). The evidence before the Secretary shows that these payments to co-operatives are necessary to maintain our system of co-operative marketing and to control surplus. Business enterprises can and do refuse to take any more milk from producers when the business enterprise has filled its requirements or when it can no longer buy and handle the milk at a profit to itself. Co-operative associations by their very nature and by their contracts with their members

continue to handle all the milk their members produce. This means an expenditure of funds to maintain facilities for the disposition of surplus milk and a willingness to handle surplus at a loss. It also means a willingness to shut down these facilities when the milk going into surplus channels is needed to balance the fluid market. The co-operative association prevents milk which has been refused by a dealer from being wasted or dumped blindly on the market to the detriment of all producers. Improved prices and conditions for the sale of milk which result from the efforts of co-operative associations improve the conditions under which all producers can sell milk. The orderly market which results from the ability and willingness of co-operative associations to take care of surplus, when there is a surplus, and to shut down manufacturing plants when the milk is needed to balance the fluid market, promote an orderly market which helps all producers. A co-operative cannot continue to perform these services unless it is reimbursed for the cost of performing them. The payments represent the reasonable cost of these services.

(c). The terms of the order providing for these payments are authorized by the Act. The payments are necessary to equalize the value of milk produced by members of co-operatives with that produced by non-members. The terms are necessary to effectuate the other provisions of the Order, the primary purpose of which is the equalization of the burden of surplus.

I

Preliminary statement as to the position of Dairymen's League Co-operative Association, Inc., in this action.

A. THE PURPOSE FOR WHICH THE LEAGUE WAS ALLOWED TO INTERVENE IN THE ACTION.

The League did not commence the action, and it did not force itself into the action. The Jetter answer attacked the validity of the Order by accusing the League of improper activities and inferentially accusing the Government of issuing the Order to let the League destroy its competitors and monopolize the market. In the motion to strike these affirmative defenses from the answer, the United States pointed out that an immediate trial was essential and that it could not readily go to trial if one of the principal issues was to be the conduct of the League, a third party. To meet this objection by the Government, the Court stated that the League could intervene as a party. Accordingly, the League moved to intervene. The Government welcomed the intervention, the defendants did not object to it and the Court granted it. It was apparent upon the trial, and the record is clear on the point, that no one claimed that the League had an independent right of action against these defendants but that intervention was solely for the purpose of facilitating proof.

The statement of the trial court on page 1525 of the original transcript to which all counsel agreed, to the effect that the League and the Bargaining Agency, had to prove nothing except their legal status and that that was admitted, was agreed to by all parties. The intervention on the part of the League, therefore, cannot be viewed as though the defendants were contesting the right to intervene. That

question has never been raised because the purpose of the intervention was to facilitate proof.

B. THE NATURE OF THE DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC.

Since the affirmative defenses in the answers largely centered around the activities and the conduct of the League, it may be well to point out briefly what the League is and its position in the milk industry.

Dairymen's League Cooperative Association, Inc., is a non-stock, non-profit cooperative association organized in 1919 under Article 13-a of the Membership Corporation Law of New York. In 1926, Article 13-a was incorporated in and made a part of the Cooperative Corporation Law of said State and the association is now subject to the provisions of Articles 4 and 6 of said law, as well as the general provisions in Articles 1 to 3 thereof. The principal office of the association is at Utica, N. Y. (R. 184).

The League now is and has been for a number of years engaged in making collective sales of milk and its products as agent for the producers thereof in interstate and also in intrastate commerce and is duly qualified to act under and is now operating under the provisions of the Act of Congress of February 18, 1922, 41 Stat. 388, (Tit. 7 U. S. C. 291-293 known as the Capper Volstead Act) (R. 185).

In August, 1938, the League operated 109 milk receiving stations in the New York Shed which were approved for shipping milk to the New York City market and 11,391 producer members of the League delivered to their plants. In addition, 8404 producer members of the League delivered milk to 65 aprpoved milk receiving stations operated by the Borden Company, a dealer purchasing milk from the League.

The League has acted as marketing agent for producers under a contract which constitutes the League the sole marketing agent of the producers. Under the contract the League has the power to process, manufacture and market the milk in fluid or manufactured form, distributing to the producers the proceeds of sale of the milk, after deducting all of its expenses. The League is authorized to blend the milk of all of its producers sold in all markets, and to pay each producer his proportional share of the net proceeds from its blend or pool fund (Ex. 42-4 of Ex. A-3).

A summary of the operations of the League is set forth at Page 2 of the Report of the Federal Trade Commission on the sale and distribution of milk and milk products in the New York Milk Sales Area, House Document No. 95 of the 75th Congress, First Session.[2]

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[2] "2. Dairymen's League Cooperative Association, Inc., the largest cooperative association of milk producers in the New York milkshed, represents about 37,500 active producers and may be termed a processing-marketing association. It has three methods of disposing of milk: (1) By selling whole milk to distributors in liquid form; (2) by distributing fluid milk at wholesale and retail directly and through its own branches and distributing subsidiaries; (3) by separating and processing milk into cream and other dairy products and selling such products.

By the terms of the membership agreement the League is appointed exclusive agent for sale or other disposition of the milk produced by its members. Producers are required to deliver milk to plants owned by the Association or to distributors' plants as directed. The Association has broad powers to sell the milk in fluid form or to process it and sell the products. Approximately 50 per cent of the milk produced by the members is handled through plants owned and operated by the Association, the balance being delivered to distributors. The proceeds of all sales, whether of fluid milk or of manufactured products, are blended into one fund and the net amount, after deducting such amounts as are needed for necessary expenses and capital investment, is distributed to the members on the basis of the quantity of milk delivered by each member to the League."

The same report at Page 29 states:

"* * * It is practically impossible, however, to evaluate all the advantages provided members through the operation of the League. For example, members are guaranteed a continuous market for all milk delivered to the Association and are not limited in the quantity they may deliver.

Obviously, it is not only the principal aim of any true co-operative association to procure for its members the highest possible price for their milk production, but it is also equally important for the co-operative to provide a market for all the milk of its members. Both these factors must be considered in measuring the success or failure of any given co-operative association."

With relation to the League's own distribution systems, the report of the "Pitcher Committee" stated at page 119: "The purchase of city business by the association was a business necessity. It is also very advantageous to the League and the consuming public."

C. THE DEVELOPMENT BY THE LEAGUE OF FACILITIES FOR THE CARE OF SURPLUS MILK.

The League maintains facilities throughout the New York Milkshed sufficient to care for the milk of its producers, but also available to other producers. At the hearings before the Secretary (Ex. A-3) a map showing the location of these facilities was introduced in evidence.

The development by the League of facilities to meet surplus requirements is a matter of interest, and was a subject of evidence at the hearing (Ex. A-3, pp. 1268, foll.). That evidence justifies the following statement: After the World War, there was an unusual surplus of milk on the market. The League invested large sums in manufacturing plants to take care of surplus so that producers would have some market. The members of the League were willing to make this expenditure of their funds, to provide a market for milk at a time when no ordinary business corporation would have dared to make the investment. A producers' organization had to make the investment or the milk of many producers would have been wasted, or the market would have been glutted with distress milk.

By 1925 marginal producers had been compelled to discontinue dairying and there was a great decrease in the number of farms producing milk in the territory. Meanwhile the League had invested hundreds of thousands of dollars not only in the manufacture, but also in the sale of

evaporated milk. The demands of the fluid milk market had come into closer alignment with production. Accordingly, arrangements were made for the discontinuance of this operation which had been a major factor in surplus disposition during the years that there had been a surplus.

By 1927 and 1928, milk production had again increased, and the problem of surplus again became troublesome. Again, at considerable expense, the League carried out an expansion in the surplus field to enable producers to market their milk.

Beginning in 1930, there was a drop in the consumption of fluid milk. Surplus increased rapidly. The League again provided facilities for the disposition of surplus.

D. THE POSITION OF THE LEAGUE AND OTHER COOPERATIVE ASSOCIATIONS AS SHOWN BY LEGISLATIVE AND ADMINISTRATIVE INVESTIGATIONS OF THE MILK INDUSTRY.

Numerous legislative and administrative investigations of the New York milk industry have been conducted.[3]

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[3] Some of these investigations are as follows:
The Joint Committee of Dairy Products, Livestock and Poultry (Wicks Committee) in 1916-17;
The Committee of Eleven in 1924:
The Ten Eyck Committee in 1926-27;
The Emergency Committee of the New York Milkshed in 1932;
The Joint Legislative Committee to Investigate the Milk Industry (Pitcher Committee) in 1933;
A series of committees culminating in the Milk Shed Conference in 1934-35;
The Conference of Farm Organizations of Four States in 1936;
The Federal Trade Commission in 1936;
The Ernst and Ernst Audit of Milk Dealers and Co-operative Associations, (1938) and
The Attorney-General of the State of New York (1938).

In the reports of all of these investigations, we find vigorous recommendation of the development of the cooperative movement of which the Dairymen's League is a leading exponent.[4]

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[4] The Wicks Committee in its report in 1917 stated at Page 887:

"For example we believe that the milk industry at the present moment needs to be handled through cooperative effort. Sometime ago, conditions reached a point on the farms, where the milk producer felt compelled to cooperate."

The Pitcher Committee Report stated at Page 17:

"Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization appears to offer the best prospect for permanent stabilization of the dairy industry in the New York Milk Shed."

The Federal Trade Commission, in its report on the Sale and Distribution of milk and milk products, January, 1934, stated at Page 8:

"Usually it was not until producers cooperative became strong enough numerically to command the attention of distributors that price negotiations and price and production agreements became significant. Disturbed economic conditions, especially among dairy farmers were instrumental in bringing about effective cooperative groups and also in impressing upon distributors the necessity of working with such groups in an effort to bring about stable market conditions."

In its report on the New York Metropolitan Area (1936) the Federal Trade Commission stated at Page 32:

"It is practically impossible, however to evaluate all the advantages provided through the operation of the League. For example, members are guaranteed a continuous market for all milk delivered to the association and are not limited in the quantity that was delivered."

"Obviously it is not only the aim of any true cooperative association to procure for its members the higest possible price for their milk production, but is also equally important for the cooperative to provide a market for all the milk of its members. Both these factors may be considered in measuring the success or failure of any given cooperative association."

Again at Page 15 the same report states:

"Dairymen's League Cooperative Association, Inc. is a good example of non-stock, non-profit cooperative marketing association with a large investment in plants and equipment used in processing and marketing milk."

Attorney-General Bennett in his Report on the Milk Industry of the State of New York with Particular Reference to the New York Metropolitan Area, Page 55 notes:

"Only effective organization of the farmers can eliminate distributor domination of farm prices. Furthermore, affective organization of farmers of States other than New York supplying milk to the metropolitan area can stop undercelling of interstate milk with its resultant effect upon New York State prices. And finally, a producers' organization is definitely necessary in order to stop the purchase of surplus milk at surplus milk prices by distributors and its subsequent use in fluid form. * * *"

Going back to the Pitcher Committee Report, we find on Page 19 that it recommends cooperation, such as has been attacked by the defendants in this case. The recommendation is:

"Section 8. Definite action should be taken without delay, conferring upon either a joint legislative committee or a commission appointed by the Governor, the requisite authority: To further investigate and study the operation of cooperative organization; to initiate and perfect a plan and recommend remedial legislation by which a more perfect union of all milk producers both within the state and within the milk shed may be attained, and by which the States of New York, New Jersey, Pennsylvania, Maryland, Massachusetts, Vermont and Connecticut, or any two or more of them,

II.

The findings and conclusions of the Trial Court relative to the conspiracy in which the League was alleged to have been engaged for the purpose of destroying proprietary milk handlers and to monopolize the New York milk market (a) are unsupported by the evidence; (b) are immaterial, and (c) are contrary to statute.

Findings of fact numbered 86 (R. 153) and 97a (R. 160) and conclusions of law numbered 20 (R. 165) and 21 (R. 166) relate to this alleged conspiracy.

The substance of these findings is that the League planned to destroy competitors and monopolize the fluid milk business in the New York Marketing Area; that the League and the Bargaining Agency conspired to use the provisions of the act (Tit. 7 U.S.C. 608 C) and the N. Y. Rogers Allen Law (Chap. 383 of the Laws of 1937 as amended) as instruments to further the alleged monopoly, and that the purpose of Order No. 27 was to give the League and the Bargaining Agency, and handlers buying milk from them, control of the milk business in the Metropolitan Area.

The amended answers of the defendants Jetter, Rock Royal and Schuyler Junction contained affirmative defenses which tendered this issue.

A. FINDINGS OF FACT NUMBERED 86 AND 97-A AND CONCLUSIONS OF LAW NUMBERED 20 AND 21 ARE UNSUPPORTED BY THE EVIDENCE.

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constituting what is commonly known as the New York Milk Shed, may cooperate and to that end coordinate their laws and rules and regulations adopted thereunder so as to effect a fair, just, equitable and legal relation between the producer, distributor and consumer of milk and milk products, and to have power to apply to the Congress of the United States for requisite legislation to legalize such plan or for any legislation that may be necessary to be enacted by Congress under the Constitution of the United States, in order to define, adjust and make fair and equitable the relation between producers, distributors and consumers in the New York Milk Shed."

Upon the trial the proof introduced in support of these allegations in the answers seemed to be directed toward six items of conduct as follows:

1. The League sponsored and supported the Rogers-Allen Law in the New York Legislature. (Chap. 383, Laws of 1937.)

2. The League was active in the formation of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., a corporation organized pursuant to the provisions of the Rogers-Allen Law.

3. The Bargaining Agency submitted to the Secretary of Agriculture a proposed order to regulate the handling of milk in the New York Metropolitan area. The Secretary of Agriculture held hearings on the proposed order and the League appeared at the hearings and presented "elaborately prepared evidence in book form."

4. The League and Bargaining Agency campaigned for the approval of Order 27 with false and misleading propoganda.

5. After the order was issued, the League and Bargaining Agency coerced dealers into signing an agreement to comply with Order 27. The coercion took the form of threatening to and actually withholding the milk supply of dealers who refused to sign an agreement to comply with the order.

6. The League and Bargaining Agency conspired to create a competitive situation in the sale of milk which the League and other members of the Bargaining Agency and their buying dealers could alone survive, thus leaving the League and the other members of the Bargaining Agency in control of the New York Metropolitan Market.

We submit that the proof which was introduced was insufficient to support the findings and conclusions relative to conspiracy and monopoly (findings Nos. 86 (R. 153) and

97-a (R. 160) conclusions Nos. 20 (R. 165) and 21 (R. 166).

We, therefore, discuss the proof upon which these findings and conclusions were made.

1. Sponsoring and Supporting Legislation.

The charge that the League sponsored and supported the Rogers-Allen Law in the New York State Legislature (Chap. 383, Laws of 1937) is true and was so stipulated at the trial. Finding of fact No. 69 (R. 146) States:

> "Intervening plaintiff Dairymen's League is a member of a so-called 'Farm Conference Board' being the only member of the Board engaged in the purchase and sale of milk. Said Farm Conference Board proposed and the Dairymen's League actively sponsored and supported in the New York State Legislature, a proposed Act known as the Rogers-Allen Bill, which was enacted as Chapter 383 of the 1937 Laws of the State of New York."

The "Farm Conference Board" is a Board composed of farm organizations representing substantially every type of farm activity. Dairying yields fully one-half of the total income of all farm products of New York State. It would seem to be one of the primary duties of such a Board to propose legislation which would improve the price of milk to producers. The Dairymen's League, being the largest Cooperative of milk producers in New York State, could properly be criticized if it did not actively sponsor and support milk legislation which it believed would improve the status of farmers. There is not a shred of evidence that the League or the Farm Conference Board committed a single illegal or improper act in proposing, sponsoring and supporting this legislation.

The first amendment to the United States Constitution insures the right to petition to legislative bodies for relief.

2. Organization of Bargaining Agency.

The charge that the League was active in the formation of Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. is also true. Finding of fact No. 69 states:

> "Pursuant to the provisions or purported provisions of said Act, hereinafter referred to as the 'Rogers-Allen Law', the intervening plaintiff, Bargaining Agency was formed. Several Directors of the Dairymen's League acted as incorporators of said corporation and were active in the creation and organization thereof."

The Rogers-Allen Law was enacted by the New York Legislature following the breakdown of the New York Milk Control Law, due in part to the inability of New York State to control the price of milk shipped into the New York Metropolitan Market from outside the State.

The Rogers-Allen Law was a new approach to milk control. It had two main purposes; First: the Union of Cooperatives into a Producers Bargaining Agency to bargain for prices on behalf of producers, the Union of distributors into a Distributors Bargaining Agency to bargain for prices on behalf of distributors (Sec. 258-d) and the making of agreements (Sec. 258-m); Second: The creation of administrative machinery for the issuance of an order regulating prices. The members of a producers bargaining agency were to be cooperatives supplying a given market. The members of a distributors agency were to be distributors handling the distribution of milk in that market.

The intervening plaintiff Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. was organized by cooperative associations pursuant to this statute. In effect, it was created by virtue of this statute. The League being a large cooperative assumed a corresponding responsibility

in the formation of the Agency. The statute contemplated such action. The League's conduct therefore was lawful.

The Producers Bargaining Agency and the Distributors Bargaining Agency were able to agree upon prices for a period of time. However, there came a time when the agencies were unable to agree on prices, and this collapse of negotiations brought into action the second purpose of the Rogers-Allen Law. That purpose was the control of prices pursuant to an order of the Commissioner of Agriculture and Markets of the State of New York. Under the State statute (Section 258-m), it was the express function of the Producers Agency to apply to the Commissioner for an order controlling prices.

The statute was broad enough to permit the Commissioner to issue an order of like character to that of Order #27. However by the express terms of the statute, (Section 258-m-6), such an order could not be promulgated for the New York Metropolitan Market until the Federal Government promulgated a like order affecting all milk moving into that market.

3. Proposal of order to regulate milk industry.

We, therefore, come to the third charge, namely, that that Bargaining Agency submitted to the Secretary of Agriculture a proposed order to regulate the handling of milk in the New York Metropolitan area; that the Secretary of Agriculture held hearings on the proposed order, and that the League appeared at the hearings and presented "elaborately prepared evidence in book form."

The charge is likewise true.

The Bargaining Agency, representing most of the producers of the State through cooperatives which were members of the Agency, was created by statute to look after the

interests of producers in bargaining for milk prices and in proposing an order for price control when bargaining efforts were frustrated.

Under the Act pursuant to which Order #27 was issued, the Secretary of Agriculture was required to have before him a proposed order before he could even call a hearing (Title 7, U.S.C., 608-c-3). The policy of the Act was to increase the price producers received for their milk. The preparation of such a proposed order required a knowledge of the milk business, particularly from the viewpoint of protection for producers. By reason of the interest of its large membership, the Bargaining Agency naturally took the lead in procuring the consideration of a solution of this problem by the Secretary of Agriculture. The Bargaining Agency, therefore, committed no unlawful act in preparing and presenting to the Secretary of Agriculture a proposed order Ex. 22, R. 476).

In all of the foregoing acts, the League and the Bargaining Agency acted in accordance with the spirit of the statute, and the recommendations of the Pitcher Committee.

Hearings were called by the Secretary on the proposed order and were held throughout the State of New York. The public hearings were exhaustive (see Ex. A-3), and no one was denied the right to present evidence against the proposed order (Finding 8, R. 129). At the close of the hearings, the hearing officer invited all interested parties to file briefs. Thereafter the Secretary promulgated Order #27. It is in principle the same as that proposed by the Agency, but there are differences in several sections, thus indicating that the Secretary of Agriculture did not adopt the proposed order. He gave heed to the evidence introduced in opposition to the proposed order. For example, Article 10, Section 5 of the proposed order contained a pro-

vision with reference to fair trade practices. Witnesses from the consumer's point of view vigorously protested against this section, and Order #27 contains no such provision. Article 4, Section 1 of the proposed order contained minimum prices for Class 1 milk of $2.20 per cwt. during the spring and early summer months, and $2.67 per cwt. during the balance of the year. Dealers introduced evidence in opposition to these proposed minimum prices, and Order #27 made material changes.

There is no claim that the League presented any false evidence at any of the hearings conducted by the Secretary of Agriculture. The charge is that it presented "elaborately prepared evidence." That was what the hearings were called for.

4. Campaigning for and advocating approval of Order No. 27.

The charge that the League and the Bargaining Agency campaigned for the approval of Order #27 with false and misleading propaganda is not true.

Before this order could become effective, the Secretary of Agriculture had to determine that it was approved by two-thirds of the producers (Title 7, U.S.C., 608-c-9). The Secretary called a referendum pursuant to 608-c-19 to aid him in making that determination.

It is a fact that the League and the Bargaining Agency openly and actively urged the approval of the order, the League in the Dairymen's League News, and the Bargaining Agency in the Bargaining Agency News, in letters, and in radio speeches.

(a) The alleged misstatement.

It is charged that these publications falsely represented the order to the producers who were to vote on it, in the following particulars:

(1) That all handlers had to pay the uniform price for milk.

(2) That all handlers had the same cost for milk sold in the marketing area.

Finding #74 (R. 149) states that the League published the following statement in the Dairymen's League News on August 16, 1938:

> "The order requires handlers to pay the uniform pool, or blended price, calculated by the market administrator, to all producers delivering milk during month unless the handler has received milk and sold it as Class 1 milk outside of the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable.
>
> "Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and assures for that milk payments to all producers at a uniform rate except for the transportation and other differentials provided."

Prior to the referendum, the Secretary of Agriculture sent to each known eligible producer a copy of the order, miscellaneous pamphlets explaining the order, and listing the polling places where producers could vote. It appears from an examination of the Dairymen's League News issued August 16, 1938, that the above statement is copied from one of these pamphlets.

It is claimed that this publication by the League was a misstatement. This statement and similar ones of like import are labeled in the findings as false and misleading propoganda. The publication is claimed to be false, in that it did not contain a statement that cooperatives could blend

the proceeds of their sales and return to their producer members a blended price which might be different from the uniform price There are several answers to this claim.

(b) The publication by the League does not attempt to describe every business practice that may be carried on under the order.

There are other things about the operation of Order #27 which are not stated in Finding #74. The publication as set forth in the finding does not state that a handler pays less for his milk if he uses it in the lower use classification. It does not state that if a handler transports his milk by his own vehicle at a lower cost than railroad rates, his cost may be lower. It does not state that a handler who sells fluid milk with a lower butter fat content than another handler has a lower cost per quart of milk.

These publications were not going to a field unfamiliar with the milk business. The position of cooperatives in the industry, the nature of classified prices based on the use to which the milk was put, and the nature of transportation and butter fat differentials were part of the knowledge of every producer. That knowledge was the setting in which any statement relative to market control must be viewed. The failure to include in a publication in the Dairymen's League News (copied verbatim from the Government pamphlets) a discussion of every item of the order and every business practice that may be carried on under it cannot be held to be a misstatement, particularly when it is noted that every producer had a copy of the order mailed by the Secretary, and knew from its language, as well as from years of experience, that cooperative expenses had to come out of the prices received by a member of a cooperative for his milk.

The right of cooperatives to pay their members the net proceeds of the sales of their milk rather then the uniform price is not a right granted by the order. It is a statutory right to which the order had to conform.

(c) The publication of Ex. 22 by the Bargaining Agency did not misrepresent the proposed order.

In this same finding #74 (R. 148) there is a quotation from a pamphlet issued by the Bargaining Agency about April 28, 1938. The booklet was entitled "Mr. Dairyman, Save this Booklet. The Plan It Explains May Save Your Farm." Although the booklet is in evidence (Ex. 22, R. 176), Finding #74 (R. 148) quotes only *two* provisions from a paragraph entitled "The fundamental requirements of the industry which this Order seeks to establish are *five* in number, viz:

> "1. An equal purchase price to be paid by all dealers for milk for the same use."
>
> "2. An equal share to each producer of the benefit of the fluid market."

The finding fails to state the other three requirements which are set forth in the booklet, namely:

> "3. An equal share by each producer in the burden of the surplus and the expenses of controlling it."
>
> "4. Reasonable contribution to those having surplus facilities for the use of them seasonally for market protection."
>
> "5. Effectuation of the foregoing principles in such a manner as will perpetuate and encourage farmers' co-operative organizations."

The finding also fails to state the following sentences on Page 6 of the booklet where attention was called to the well

known fact that the expenses of operation of a cooperative were to be deducted by each cooperative association from the price which members received. These are:

> "Each co-operative pays the expenses of the operation of its own organization. There is no charge against any producer for losses incurred, inefficiency or mismanagement in any co-operative except his one."

Reading the publications in their entirety, instead of isolating sentences from their context and background, shows that the Order was not misrepresented to producers.

(d) Every producer had a copy of the Order.

A copy of the Order was sent to each known eligible producer voter by the Secretary of Agriculture (finding 73, R. 147). A copy of the proposed order was contained in the booklet above referred to (Exhibit 22, R. 476). A copy of Order #27 was published in the Dairymen's League News a week prior to the publication of August 16th, upon which the defendants rely. The provision of the Order which recognizes the statutory right of cooperatives to pay their producer members a blended price is not obscure but is contained in Article 7, entitled "Payment to Producers",— a provision that every producer would read if he read anything on the subject.

(e) There was no evidence that anyone was misled by the publications of the League and Bargaining Agency.

Even if there were a misstatement, it could not have affected the result. Milk is not sold by a member to a cooperative. It is sold through the cooperative as agent for the producers. Members of cooperatives, who would be the only producers damaged by any such misstatement, would not be misled. Producers who were not members of

cooperatives would not be damaged and could not complain. The defendants in this case are not producers and have no ground for complaint.

It is significant that with the mass of irrelevant testimony offered by the defendants upon the trial, no attempt was made to prove that any producer was misled by any statement that was made. Not a single one of over sixty thousand producers was sworn as a witness to so testify. No attempt was made to prove that any producer would have voted otherwise. The contrary findings of the court (No. 77, R. 150) is not sustained by any evidence in this case.

(f) A misstatement would not affect the validity of the Order.

A misstatement as to the meaning of the order in the publications of the League and Bargaining Agency would have no effect upon the validity of the Order. Under Section 608 c-9 of the Act, before an order could be issued, the Secretary, with the approval of the President, was required to determine that the order was approved or favored by two-thirds of the producers. Under Section 608 c-19 of the Act, the Secretary was empowered to conduct a referendum to aid him in making that determination. He made that determination with the approval of the President. He had before him the fact that copies of the Order had been sent to every known eligible producer. He had before him the result of the referendum in which 38,627 valid votes were cast of which 33,663 were in favor of the order (finding No. 78, R. 150). This evidence upon which the Secretary made the determination that the order was favored by two-thirds of the producers was clearly sufficient to support that determination, regardless of any misstatement that might have influenced the vote. The finding of the Trial Judge (finding No. 79, R. 150) to the contrary is erroneous

5. Withholding milk to compel handlers to agree to comply with Order No. 27.

The fifth charge is that the Bargaining Agency and the League coerced distributors into signing an agreement to comply with the order. The form of coercion was withholding milk from dealers who would not comply.

Order No. 27 became effective September 1st, 1938. It was a matter of common knowledge that non-compliance by a large number of dealers would make the order unworkable until its validity had been settled by judicial decision. The Secretary of Agriculture, therefore, proposed that dealers sign an agreement to voluntarily comply with the order with the right on the part of the dealer to withdraw upon thirty days' notice. Most of the dealers readily agreed to comply. Some refused. Cooperatives delivering their milk to noncomplying dealers withheld their milk until these dealers signed an agreement to comply with the order. The Bargaining Agency encouraged this action and supplied its member cooperatives with information furnished by the Market Administrator as to whether or not their respective dealers were complying with the order.

Finding No. 92 states that milk which was so withheld was chiefly diverted to the League, which acted in concert and in cooperation with E. Manning Gaynor, an employee of the Department of Agriculture and Markets of the State of New York. There is no evidence to sustain such a finding. The evidence merely was that the League was willing to receive such milk.

Order No. 27 has the effect of law. It was adopted for the benefit of producers. Producers' organizations exerted economic pressure upon dealers to make them comply with the order. Neither the United States of America nor any person for whose acts the United States might be respon-

sible, put any pressure, economic or otherwise, upon dealers to make them comply with the order. The only activity of the United States of America in forcing compliance with the order has been the prosecution of this action.

It is inconceivable that the action of private parties in applying economic pressure upon violators can detract from the validity of an otherwise valid administrative order, especially when there is no evidence that economic pressure was put upon the defendants.

6. The competitive situation in New York City after September 1, 1938, the effective date of the order.

The sixth charge is that the League conspired to create a competitive situation which it and its buying dealers alone could survive, thus leaving it in control of the New York Metropolitan Market. It is claimed that the League attempted to drive the defendants out of business by cutting prices of milk in the Metropolitan Market.

(a) The business defendant Jetter claims was lost to the League.

Defendants' finding of fact No. 62 (R. 145) relates to one Weintraub, a grocery store owner located at 744 Fox Street, New York. The finding states:

> "64. On September 1, 1938, the Jetter Dairy Co. had been selling to one Weintraub, 30 cases of milk daily, at 9¾¢ per quart. On September 4, 1938, intervening plaintiff, Dairymen's League solicited said account, and by selling at 9¢ per quart, acquired 10 cases of said trade. Gold Medal Farms, Inc., by same price cutting, as the League, on same day also acquired 10 cases of said trade. In order to retain the balance of 10 cases of such trade, Jetter Dairy Company was compelled to, and did, reduce its price to 9¢ per quart on September 5, 1938."

The finding is totally unsupported by any evidence insofar as it relates to alleged price cutting by the League.

The testimony as to the Weintraub business was given by one Samuel Rootstein, an employee of the defendant Jetter (R. 388). It appeared that about July 1st, 1938, the League bought the milk routes of Lincoln Farms, Inc. Weintraub was a customer of Lincoln Farms and bought eight cases of milk a day. During the forepart of August, 1938, Triborough Milk & Cream Company was selling Weintraub about fifteen cases of milk a day. About August 15th, 1938, Triborough took all of the Weintraub business, amounting to about thirty cases per day. *It was selling milk for five to seven cents per quart, at that time.* On September 4th, 1938, Weintraub bought ten cases from Triborough, ten cases from Gold Medal Farms, and ten cases from the League. There is not a shred of evidence that the League reacquired, by price-cutting, the business it had lost to Triborough three weeks before; there is no evidence as to the price the League charged Weintraub for this milk. While it appears that the stockholders of Triborough and Jetter were the same, the reference in the finding to the Jetter Company as the loser of the Weintraub business is erroneous.

It was obvious at the trial, as it is now from reading the record, that the chief witness of the defendants called to support the monopolistic charges was witness Rootstein. Before taking the stand, he had prepared a list of the customers in writing, at the request of Jetter (Exhibit G, R. 651), whose business Jetter and the Triborough Companies had lost. Notwithstanding this fact, on direct examination his testimony was clothed in generalities and founded upon his recollection. During the noon recess, the appellant's counsel learned of the prepared statement and upon cross-

examination, the witness was compelled to produce the statement by the appellant's counsel, even at the hazard of damaging consequences. When the statement was produced in evidence and read, it showed conclusively that neither the Jetter nor the Triborough Companies lost a single customer to the Dairymen's League by reason of the order or by reason of the competitive practices which prevailed after the order went into effect, or for any other reason.

It will be noted that the Weintraub transaction was not listed among the storekeepers to whom the defendants claim business was lost, and, therefore, the right of the League to take that business back was not interpreted as lost business, but the business which the League bought and paid for, which had been taken away from them and which they regained.

While there is a suggestion in the Rootstein testimony (R. 394) that Jetter or Triborough lost five or six cases of trade a day to the League at 452 E. 146th Street, the evidence is so vague as to be valueless.

(b) The League has not engaged in unfair trade practices.

There is a feature of the Rootstein testimony which has an important bearing on the charge that the League sought to destroy its competitors, including the defendants, and to monopolize the milk business.

Rootstein testified that his relations with the League had been such that he would not solicit League customers, although he would have solicited the customers of many independents. *This was because he had always been able to satisfactorily settle any situation where he lost business to the League, or where the League had lost business to one of his companies* (R. 392).

Coming from an employee of the defendant, this evidence

shows conclusively that the League made no attempt to monopolize the market or destroy its competitors.

Finding No. 65 deals with the testimony of Rose Paley, a grocery store owner. She stated that the League gave her thirty-five cases of free milk about five months prior to the date she testified, which would be about August 1st, 1938. She had been buying milk from the League for over a year, and when the League gave her the free milk, she increased her purchases from two cases a day to three cases a day. There is ample evidence to show that the giving of free milk is a recognized practice to use in retaining one's customers. The defendant Jetter engaged in that practice (R. 391).

The figures set forth in finding No. 35 (R. 135) show that the sales of Class I milk of the League increased in October and November, 1938, over September, 1938. However, it was conceded by the defendants that sales of fluid milk increase after the New York City schools open and that the schools did not open until after September 10.

(c) The League lost business of the type engaged in by defendants.

It appears that the League lost fourteen per cent of its sales of milk in bottles in New York City in the three months succeeding September 1, 1938 (R. 400). This decrease in sales shows that the League did not hold its own in sales to stores, since store sales are bottle sales. The only evidence in this case related to a competitive situation in the sale of milk to stores, and, since the League's store sales decreased, it is apparent that the Order has not aided the League in taking this type of business away from the so-called independents whose main business is in sales to stores.

(d) The League was not responsible for the drop in prices in sales to stores.

The evidence clearly shows that the metropolitan wholesale market, that is, sale of milk to stores, restaurants, etc., was a highly competitive one and had been in a chaotic condition prior to September 1, 1938, the date Order No. 27 became effective; that on that day there was an effort made by various handlers, including Dairymen's League Co-operative Association, Inc. to obtain 9¾ cents for the milk in this trade (R. 319).

This situation continued for about two or three weeks. Price-cutting was started by Manchester Dairy, an independent dealer in the Borough of Bronx (R. 320). Within a few days other dealers followed suit and as a result there were successive declines in price throughout the marketing area; the keenest competition exists in the milk marketing area in New York between companies (R. 320).

Prior to September 1st, prices had been as low as three and one-half cents a quart, a figure obviously insufficient to pay the handling and delivery charges. After September 1st the lowest price was eight to eight and one-half cents a quart (R. 321). The defendants' witness, Rubenfeld, testified that information given him by his wholesale routemen was to the effect that the Dairymen's League Co-operative Association, Inc. was not responsible for the break down in prices. He stated that the League was naturally attempting, as every other distributor was, to protect its own business (R. 356).

The affidavit of George [illegible]itts, who has charge of the sales of the League in New York, was received in evidence (R. 398). This also gives the history of the price situation in New York in September, October and November, 1938, and specifically declares that the League did not engage

in price-cutting in New York City to increase its sales. Gradually prices were cut down in order to meet competition, from 9¾ cents during to most of September to little over nine cents by the fourth Friday in November. It shows that the policy of the organization has been to obtain as high a price in its sales to stores as was possible under current marketing conditions and which would allow the highest returns to the producers for whom the Association is acting as marketing agent (R. 399). He also stated that if the League sold at cut prices it would have an adverse action on the distributors who bought from the League and whose milk was sold in competition with that of the League.

7. Conclusions relative to evidence on conspiracy and monopoly

Strange as it may seem, this is the evidence which was before the Court when it made its findings that the League and Bargaining Agency had engaged in a conspiracy to establish in the League, the Bargaining Agency, and the dealers purchasing milk from Bargaining Agency members, a monopoly in the sale of milk to the exclusion of all others.

It is the evidence upon which the Court made its finding 97-a (R. 160) that the League conspired to convert the provisions of Title 7, Section 608-c, U.S.C.A., and of the Rogers-Allen Law, as instruments of coercion, restraint of trade and monopoly.

It is the evidence upon which the Court made its conclusions of law (Nos. 20 and 21, R. 165, 166) that the League and the Bargaining Agency were engaged in a conspiracy in restraint of trade for the purpose of controlling the milk industry and destroying the competitors of the League and its customers.

This evidence, however, supports no such findings or conclusions.

The conduct of the League in sponsoring and supporting legislation is free from a suggestion of an illegal or improper act. Its participation in the formation of the Bargaining Agency is granted by statute. It was within the contemplation of the statute that such participation was the approach to the solution of the problem. The Bargaining Agency's proposal of an order to regulate the milk industry is the recognized method of bringing administrative machinery into action. That also is authorized by statute. The League advocated the adoption of the order because it believed in the order. In fact, the Trial Court stated (R. 761):

> "It may be assumed that the Bargaining Agency and Dairymen's League Co-operative believe that these orders would solve the milk problem when they prepared and put forward their proposed order. or orders."

The members of the Bargaining Agency withheld their milk from dealers who violated the order and the record is devoid of evidence suggesting that the League attempted to destroy its competitors. Nevertheless, the Court, in making these findings, saw fit to apply to these facts the label—"Conspiracy to monopolize the milk business and destroy competitors." At most, the findings and conclusions are based upon three transactions: One, with Weintraub, involving ten cases a day; one with Rose Paley involving one case of milk a day; and one with an unidentified buyer involving five or six cases of milk a day in the market where the total daily sales of milk exceed 6¾ million pounds, and where 40,000 storekeepers are engaged in the sale of milk at retail.

We submit that it is apparent that all of the facts show a consistent effort on the part of the League to bring about

legislation and administrative action to better the prices farmers receive for their milk. That is one reason why the League is in existence. That is the reason the Rogers-Allen Law was passed. This is the declared policy of the Federal Act. That is the purpose of Order #27.

B. FINDINGS NO. *86* AND *97*-A, AND CONCLUSIONS OF LAW NOS. *20* AND *21* ARE IMMATERIAL.

As pointed out above, the Government's motion to strike these allegations from the answers of the three defendants was denied. It is apparent from the Trial Court's opinion that these charges affected the result.

Even if the charges of conspiracy and attempted monopolization were true, they would not affect the validity of the order.

1. The motives of the League and Bargaining Agency in advocating the adoption of legislation and Order 27, are immaterial.

The argument that legislation may be set aside by the Courts because private persons had improper motives in proposing, sponsoring and supporting such legislation, was answered by this Court many years ago in the case of U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510. There the Court held that it could not go behind the action of the legislature, and quoted with approval from Cooley's Constitutional Limitations, as follows:

> "And although it has sometimes been urged at the bar that the Courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the Judiciary, and they have never allowed the inquiry to be entered upon."

The policy behind such a decision is obviously sound. The same principle likewise precludes inquiry into the motives of the Secretary of Agriculture, an officer.

Isbrandsten-Moller Co., Inc., vs. United States, 300 U. S. 139.

If the motives of the Legislature or cabinet officer cannot be inquired into by the Courts, it follows *a fortiori* that the motives of private persons who have requested the Legislature or the cabinet officer to act, are immaterial.

2. The charge of monopoly would be material only in an application to the Secretary to modify the order.

It is obvious that no monopoly has resulted from the operation of the order. The statute under which this order was promulgated contains a provision whereby a person aggrieved may apply to the Secretary to have the order modified or rescinded. (608-c sd. 15). From the denial of such an application, an application for review may be made to a United States Court. If the order gave the League an advantage and it was attempting to use that advantage to monopolize the market, these defendants should have pursued the remedy provided in the statute before resorting to a suit.

Hegeman Farms Corporation v. Baldwin, 293 U. S. 163, 55 S. Ct. 7.

C. THE FINDINGS AND CONCLUSIONS THAT THE LEAGUE WAS ENGAGED IN A CONSPIRACY TO MONOPOLIZE THE NEW YORK METROPOLITAN MILK INDUSTRY ARE CONTRARY TO STATUTES WHICH EXEMPT CO-OPERATIVE ASSOCIATIONS FROM THE OPERATION OF SO-CALLED "ANTI-TRUST LEGISLATION."

1. Federal and State Legislation.

As a foreword to this discussion, counsel for appellant,

Dairymen's League, do not contend in this appeal that the various statutes cited under this point are applicable to overt acts not normal to nor connected with co-operative marketing and which aside from the anti-trust laws would be considered as unlawful, including acts of violence, unlawful threats and similar activities. It is, however, contended that the evidence in this cause does not warrant any Finding of Fact or Conclusions of Law that any such acts were found to have existed in this cause. The defendants in this cause, as well as the appellants, Dairymen's League and the Bargaining Agency, are New York State Corporations. As such they are regulated by and subject to the laws of the State of New York, which State has the power to amend the charters of corporations subject to its laws.

Section 340 of the General Business Law of the State of New York (Chapter 20 of the Consolidated Laws) contains a codification of the law of that state relating to monopolies, restraint of trade and restriction of competition. Such sections, as amended, contain the following subdivision:

> "2. The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions."

Section 582 of the Penal Law of said state (Chapter 40 of the Consolidated Laws) which relates to criminal conspiracies, contains the following provision:

> "* * * Associations, corporate or otherwise, of farmers, gardeners or dairymen, including livestock farmers and fruit growers, engaged in making collective sales or marketing for its members or shareholders of farm, orchard or dairy products pro-

duced by its members or shareholders are not conspiracies. Contracts, agreements, arrangements or combinations heretofore or hereafter made by such associations or the members, officers or directors thereof in making such collective sales and marketing and prescribing the terms and conditions thereof are not conspiracies and they shall not be construed to be injurious to trade or commerce."

Subdivision (f) of Section 258-c of the Agriculture and Markets Law of the State of New York (Chapter 69 of the Consolidated Laws) is as follows:

"(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A co-operative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law."

Section 258-k of said Agriculture and Markets Law, which sets forth the declaration of policy of the recent Rogers-Allen Law, declares:

"* * * that it is the policy of this state to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled cooperative associations; * * *"

Section 258-l of said Agriculture and Markets Law provides for the incorporation of producers' bargaining agencies which shall be organized by co-operative corporations.

The same section of the act authorizes a producers' bargaining agency to negotiate agreements with dealers or the basis of orders with the Commissioner of Agriculture of the State and authorizes such agency to appear before and negotiate with the Commissioner in regard to marketing agreements and orders; also for such an agency to act as a common marketing agency for its various co-operative association members and to make contracts and agreements not only under the state act but also pursuant to the Act of Congress of February 18, 1922, entitled "An Act to authorize association of producers of agricultural products", which is now Chapter 12 of Title 7 of the United States Code. Said section also contains the foll wing specific provisions:

"Producers' bargaining agencies and distributors' bargaining agencies may also meet and negotiate in order to carry out the purposes of this act and subject to the approval of the commissioner, as provided in section two hundred and fifty-eight-m, may make marketing agreements with each other and with cooperative associations in relation to the marketing of milk which may be handled or distributed in more than one marketing area. Such agencies may also meet and negotiate and take such reasonable measures as are necessary and advisable to cooperate with the commissioner and legally con-

stituted authorities of other states and of the United States with respect to the handling and control of milk handled in interstate commerce and carry out and effectuate the provisions of section two hundred and fifty-eight-m.

"Except as specifically provided in section two hundred and fifty-eight-m, the activities and operations of producers' bargaining agencies and distributors' bargaining agencies and of the constituent members thereof, and contracts, agreements or arrangements made by them, pursuant to the provisions of this subdivision, and of section two hundred and fifty-eight-m hereof, shall not be deemed or construed to be conspiracies, combinations, contracts or agreements in restraint of trade or commerce or an illegal monopoly."

Co-operative associations, such as the appellants, Dairymen's League and the Bargaining Agency, are given broad powers under the provisions of Articles 1, 2, 3, 4 and 6 of the Co-operative Corporations Law of the State of New York (Chapter 77 of the Consolidated Laws). Among such powers are not only the activities in the handling and marketing of the products of its members, the power to do everything necessary, suitable or proper for the accomplishment of any of the purposes or attainment of any one or more objects of the corporations and to contract accordingly, as provided in subdivision (j) of Section 19 of this act, but also, as provided in Section 25 of said act, to make contracts and agreements with other associations.

In connection with the provisions of the Agriculture and Markets Law, above cited, and powers of co-operative associations and bargaining agencies to confer and negotiate with the Commissioner in regard to orders, it should be

noted that Section 258-n of said act authorizes the Commissioner to confer with state and federal authorities and to join with federal authorities in making joint investigations, holding joint hearings and making joint or concurrent orders.

The exemption conferred by Section 340 of the General Business Law, above cited, has been upheld as valid in Williams v. Quill, 277 N. Y. 1, 10, and the provisions of this section and also of Section 582 of the Penal Law were also upheld as valid in Barns vs. Dairymen's League Cooperative Association, Inc., 220 App. Div. 624.

In American Fur Manufacturers Association vs. Associated F. C. & T. Mfrs., 161 Misc. 246, 251; affirmed 251 App. Div. 708, the Court held that all contracts and arrangements of a dairy cooperative association were exempt from the said anti-trust laws.

In Liberty Warehouse Company vs. Burley Tobacco Growers Co-operative Marketing Association, 276 U. S. 71, a statute of Kentucky declaring that—"associations are not in restraint of trade" was considered by this Court. It was held that such a statute was not in violation of rights guaranteed by the Fourteenth Amendment, that a state may declare its own policy as to such matters and that a state may freely alter, amend or abolish the common law within its jurisdiction.

There are a considerable number of Federal acts pertinent to the questions presented here. Section 6 of the Clayton Act (Section 17 of Title 15 of the United States Code) specifically authorizes the existence and operation of non-stock co-operative associations and specifically declares that such organizations shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.

It should be noted that cooperative appellants here are non-stock co-operative associations.

After the passage of the Clayton amendment, considerable doubt arose as to the extent of the rights thereby conferred and also it was desired that such rights be extended to stock cooperatives. Legislation for this purpose was introduced in Congress, but although bills passed the House of Representatives action was delayed in the Senate because of a difference in the House and Senate Bill, the difference being chiefly an amendment introduced by the Senate Judiciary Committee which is shown in the report of that Committee, No. 236, of the First Session of the 67th Congress, such amendment being as follows:

> "Nothing herein contained shall be deemed to authorize the creation of or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceeding instituted under the act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, on account of unfair methods of competition in commerce."

Toward the end of the year or early in 1922, President Harding called an Agricultural Conference which he addressed on the subject of co-operative marketing and advocating new legislation on the subject. Resolutions were passed asking for additional legislation exempting co-operative associations from the anti-trust laws, which resolutions were transmitted to Congress and after this, Congress passed what is known as the Capper-Volstead Act which was approved by the President on February 18, 1922, entitled "An Act to authorize association of producers of agricultural products." This act is now listed as Chapter

12 of Title 7 of the United States Code. In the passage of this act, the amendment of the Senate Judiciary Committee was rejected. There has been little discussion of this legislation by the Federal courts. However, in the dissenting opinion by Mr. Justice Brandeis, concurred in by Mr. Justice Holmes and Mr. Justice Stone, in Frost vs. Corporation Commission, 278 U. S. 515, this act is discussed, and in the case of Liberty Warehouse Company vs. Burley Tobacco Growers Co-operative Marketing Association, 276 U. S. 71, the opinion of the Court refers to the recognition by Congress of co-operatives in the Clayton Act amendment, in the Capper-Volstead Act and in the Co-operative Marketing Act of 1926. See also Board of Trade of Chicago, 67 Fed. (2d), 402, 408, certiorari denied 291 U. S. 680.

In the Co-operative Marketing Act of 1926 (Section 455, Co-operative Marketing Act, Chapter 18 of Title 7 of the United States Code) there is an express authorization for co-operative associations to exchange statistical, economic and similar information by direct exchange either through associations and federations thereof or through a common agent created or selected by them. The Agricultural Marketing Act of 1929 (Sub-Chapter VII of Title 12 of the United States Code in Sub-divisions 3 and 4 of Section 1141) declares it to be the policy of Congress to permit the effective merchandising of agricultural commodities in interstate and foreign commerce—

> "(3) By encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled co-operative associations and other agencies.

(4) By aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity."

Also in Section 10-b of the Agricultural Adjustment Act of 1935 (Section 610-b of Title 7 of the United States Code) there is the following provision:

"The Secretary in the administration of this title, shall accord such recognition and encouragement to producer-owned and producer-controlled co-operative associations as will be in harmony with the policy toward co-operative associations set forth in existing acts of Congress and as will tend to promote efficient methods of marketing and distribution."

It is noteworthy that about 40 states have adopted statutes declaring that co-operative associations are not in restraint of trade or monopolies. Reference to these acts is made in Liberty Warehouse Co. vs. Burley Tobacco Growers, supra. Numerous decisions uphold such statutes and declare that co-operative associations are not in restraint of trade or illegal monopolies.[1]

[1] Kansas Wheat Growers vs. Schulte, 13 Kan. 672; Brown vs. Staple Cotton Growers Co-op. Asso., 132 Miss. 859; Northern Wisconsin Co-op. T. P. vs. Bekkedal, 182 Wis. 571; Dark Tobacco Gr. Co-op. Asso. vs. Dunn, 150 Tenn. 612; Minnesota Wheat Growers vs. Huggins, 162 Minn. 471; List vs. Burley Tobacco Growers Co-op. Asso., 114 Ohio 361; Dark Tobacco Growers Co-op. Asso. vs. Robertson, 84 Ind. App. 51; Potter vs. Dark Tobacco Growers Co-op. 201 Ky. 441; Harrell vs. Cane Growers Co-op, 160 Ga. 30; Nebraska Wheat Growers vs. Norquist, 113 Nebr. 731; Warren vs. Alabama Farm B. Cotton Asso:. 213 Ala. 61; Manchester Dairy System vs. Hayward, 132 Atl. 12, 19; 83 N .H. 193; Clear Lake Co-op. Live Stock Asso. vs. Weir, 200 Iowa 1293; Hollingsworth vs. Texas Hay Asso. 246 S. W. 1058; Washington Cranberry Asso. vs. Moore; 17 Wash. 430; Poultry Producers vs. Barlow, 189 Cal. 278; Oregon Growers Co-op. Asso. vs. Lentz, 107 Ore. 561; South Carolina Cotton Growers vs. English, 135 S. C. 19; Milk Producers' Marketing Co. vs. Bell, 234 Ill. App. 222; Barns vs. Dairymen's League Co-operative Asso. Inc., 220 App. Div. (N. Y.) 624.
Tobacco Growers Co-op. Asso. vs. Jones, 185 N. C. 265.

These decisions were summarized in a report from the Federal Trade Commission to the United States Senate on Co-operative Marketing, May 2, 1928, at Page 341 as follows:

> "Court decisions are now practically unanimous in reaching the conclusion that the standardized co-operative marketing acts are valid and that the associations formed under them are not monopolies in restraint of trade."

Even the grant of a monopoly by a state legislature if otherwise an appropriate exercise of the police power is not void as denying equal protection of the law.

Pacific States Box & Basket Co. vs. White, 296 U. S. 176, 184.

The adoption of similar legislation by so many states in relation to co-operative associations and anti-trust laws and the unanimity of decision by the courts that agricultural co-operatives are operating in the public interest and should not be deemed to be monopolies or operating in restraint of trade, clearly demonstrate that statutes along this line are neither abitrary nor capricious. West Coast Hotel Co. vs. Parrish, 300 U. S. 379; Bain Peanut Co. vs. Pinson, 282 U. S. 499.

In Liberty Warehouse Co. vs. Burley Tobacco Growers Co-op. Marketing Asso. 276 U. S. 71, the Court, after reviewing some of the decisions quoted above, said:

> "The opinion generally accepted - - - and upon reasonable grounds, we think - - - is that the co-operative marketing statutes promote the common interest."

The legality of a combination should be determined by a consideration of economic conditions and whether or not its

operations are detrimental to public interest. United States vs. United States Steel Corp., 251 U. S. 417. If this rule is to obtain, it is certainly a fair deduction that the law-making bodies may declare that public interests will be promoted by certain combinations and agreements. Surely they must have power to discriminate between good and bad combinations and to declare that some promote public interest and others are detrimental to it.

"* * * Whatever the law condemns is against the policy of the law and whatever the law expressly, albeit unwisely, permits, cannot be condemned by the Courts as against public policy."

Hollis vs. Drew Theological Seminary, 95 N. Y. 166, 172.

Public policy is what the lawmakers declare it to be.

United States vs. Trans. Missouri Freight Asso., 166 U. S. 290;

Twin City Pipe Line Co. vs. Harding Glass Co., 283 U. S. 353;

Messersmith vs. Am. Fid. Co., 232 N. Y. 161, 163;

Lincoln Park Coal & Buck Co. vs. Wabash Ry. Co., 338 Ill. 82.

Operations of a co-operative are not against or contrary to public policy.

Conn. Milk Prod. Asso. vs. Brock-Hill Dairy Co., 122 Conn. 482.

Moreover, the anti-trust laws are aimed at aggregation of capital.

Standard Oil Co. vs. United States, 221 U. S. 1, 50.

Co-operative Associations are organized along different lines without aim at pecuniary profits and are a refuge from these aggregations of capital.

Dissenting opinion in *Liggett vs. Lee*, 288 U. S. 517;

In view of all of the statutes, Federal and State above cited, and decisions of the Court cited supra, it is submitted that the Findings of Fact and Conclusions of Law by the Court below as to conspiracy and monopoly on the part of the plaintiffs, Dairymen's League Co-operative Association, Inc. and Metropolitan Co-operative Milk Producers Bargaining Agency, Inc. were contrary to the public policy, both of the United States and of the State of New York, and were not proper or authorized that no such Findings or Conclusions can be legally made by any Court as to intrastate transactions in New York State on account of its statutory provisions, above cited, nor as to interstate transactions under the provisions of Section 6 of the Clayton Act, the Federal Marketing Act of 1926, and the Capper Volstead Act, except possibly under a proceeding pursuant to said Act.

The basic grounds of the alleged conspiracies and monopolies are, first, that the program of these co-operatives in securing passage of the New York State amendments to the agricultural law (commonly known as the Rogers-Allen Law) and the organization of the Bargaining Agency thereunder and the petition for and efforts to secure the adoption of a Federal order under the Marketing Agreement Act of 1937 were part of a scheme to achieve monopoly. Even granted that this be true, co-operatives are not subject to prosecution therefor except as may be permitted under the Capper-Volstead Act. Secondly, it is claimed that there

was an illegal conspiracy to force the defendants to sign a marketing agreement. The marketing agreement which was proposed by the co-operatives was not a part of the cause of action by the Government or the other plaintiffs in this case. Even if signed, the making thereof was specifically declared by Congress in Section 8-b of the Marketing Agreement Act of 1937 to be not in violation of any of the anti-trust laws of the United States and that any such agreement shall be deemed to be lawful.

Moreover, the agreement simply provided that the dealer should pay the producers or co-operative associations from whom he received his milk according to the terms of the Federal order, with the right to cancel such agreement at the end of any month on thirty days' notice. It was, therefore, merely a marketing agreement, as its name indicated, between the co-operative associations or producers depending on the parties thereto for the sale of the milk of the producers at the prices fixed by the Government. It was, therefore, squarely within the powers authorized by the State and Federal laws, and it is submitted that it could not be considered a conspiracy as to interstate commerce under either Section 6 of the Clayton Act or the Capper-Volstead Act. The associations as agents for their producers had the duty of selling milk and of agreeing on the terms therefor and there must be coupled with such power the right to refuse to sell in case the terms are not satisfactory. The alleged attempts of intimidation or coercion were merely the adoption by the co-operatives of their undoubted right to refuse to sell if the buyer would not agree to pay satisfactory prices and to buy upon terms satisfactory to the co-operative.

Thirdly, the co-operatives had the right to circulate among other producers, pursuant to the provisions of the

Federal Marketing Act of 1926, full information in regard to conditions of the market, the refusal of the dealers to pay prices or to sign marketing agreements, as well as to notify them of the dealers who were not complying with the Federal and State orders.

2. The Capper-Volstead Act provides an exclusive method of review of the activities of cooperatives which result in monopoly or restraint of trade.

It is submitted that the Capper-Volstead Act as a supplement to the Clayton Act provision definitely provides a new remedy in the case of agricultural co-operative associations in case of violations which otherwise come under the anti-trust acts and that the exclusive remedy, at least in the first instance, is that set forth in the act; namely, a proceeding before the Secretary of Agriculture of the United States and a determination by him reviewable in the Federal Courts and, if necessary, a decree therein finally determining the issues presented.

Similar questions were presented in this Court under provisions of the Federal Shipping Act and Interstate Commerce Commission Act in United States Navigation Co. vs. Cunard S. S. Co., 284 U. S. 474; Terminal Warehouse vs. Pennsylvania R. R., 297 U. S, 500, and New York Lumber Trade Association vs. Lacey, 245 App. Div. 262, affirmed 269 N. Y. 595 and certiorari denied in 298 U. S. 684.

3. The refusal of co-operatives to sell milk to dealers who would not comply with the order was not unlawful.

It was not illegal for co-operative associations to demand that the dealers to whom they were selling the products of their members should pay the prices which the producers demanded and which were the prices fixed by Federal and State orders. Except where under the police power prices

are fixed in businesses affected with a public interest by State authorities or by Federal authorities under the commerce power, it is the right of an owner to fix the price at which his property shall be sold as an inherent attribute of the property itself under the due process of law clauses of the Fifth and Fourteenth Amendments.

Old Dearborn Distributing Co. vs. Seagram, Distillers Corp., 299 U. S. 183, 192.

"The right of a person to do business with whomsoever he desires is well established. * * * There is no reason based on the common law or the Sherman Law, which requires the defendants to do business with Plaintiff, if he is objectionable to them, and that objection is based upon sufficient reason."

Hart v. B. F. Keith Vaudeville Exchange, 12 Fed. (2d) 341, citing *Adair vs. U. S.*, 208 U. S. 161, and *Federal Trade Comm. v. Gratz*, 253 U. S. 421;

See also *Federal Trade Comm. v. Clark*, 263 U. S. 565.

A vendor may dictate his own prices.

Whitwell v. Continental Tobacco Co., 125 Fed. 454.

The associations were actually authorized by statute, Federal and State, to act in collectively marketing for the producers and they could either act separately or jointly through a common agency, such as the bargaining agency, which was specifically authorized by the New York State statute to act in such matters. It is not unlawful to do lawful acts unless there be some direct illegal acts in connection therewith.

Apex Hosiery vs. Leader, 90 Fed. (2d) 155;

Carroll Building Corp. vs. Greenberg P. Supplies, Inc., 216 App. Div. 268.

Individual producers of milk are helpless in bargaining with a dealer in a milk shed like that of New York where milk must be shipped long distances and must be collected and cooled at a shipping station. The producer must deliver his milk—a perishable product—at the station in his vicinity. The dealer can shut out any producer at any time or close his station. Only by collected action through co-operative associations has the producer any bargaining power and these associations should be permitted the rights of peaceable persuasion and pressure of notoriety allowed labor unions.

(See *Nann vs. Raimist*, 255 N. Y. 307, 314.)

Furthermore, the co-operatives are not aggregations of capital. They are organiations of men—men who are endeavoring to sell products produced by them largely as a result of their own labor. It is submitted that as such, producers of milk have the right not only individually but also through their associations to sell their milk at such prices as they deem advisable and to withhold their milk from the market if such prices are not obtainable, and that in this respect they have and should have the same rights that their fellow-workers have, who are members of labor unions, in collectively bargaining for their labor, in persuading laborers to join their unions and in carrying on a strike where collective bargaining efforts fail. Certainly the New York State Legislature in its anti-trust statutes has placed them on the same basis and it is evidently the intent of Congress to give similar rights to producers of agricultural products. It would surely be a strange anomaly

if the rights given to the laboring man in the city are denied to the farmer who lives by the sweat of his brow in the country. Surely labor unions have the right not only to fix the wage rates for their members which the employer shall pay, but also have the undoubted right to urge that all laborers of the industry affected in the territory shall stand shoulder to shoulder in their demand for such wages. It is true that the co-operatives in New York State did have a program but it was a program to obtain definite prices and conditions for the sale of their milk and it would seem only reasonable that as a part of this program they had a right to urge all producers in the milk shed who were similarly situated and who were members of associations belonging to the Bargaining Agency, to stand shoulder to shoulder with them and not to sell or deliver their milk to the dealers except on the prescribed term. This is what they did and all that they did in this matter except to deliver their milk to other handlers where the dealers refused to make payment according to the terms demanded by them.

There is no claim on the part of the defendant Jetter Dairy Co. that it had any contracts with its producers which were in any way interfered with by the co-operative associations. In the absence of any such contracts with producers, it is submitted that the appellant co-operative associations could lawfully seek to extend their membership by solicitation of the producers, even of the defendant Jetter Dairy Co.

Furthermore, the record is entirely barren of any evidence showing any intent on the part of Dairymen's League Co-operative Association, Inc. to in any way injure the defendant Jetter Dairy Co. or any of the other defendants. Nor was any milk withheld from any of the defendants. To maintain their claim of an illegal conspiracy, it was neces-

sary for them to show that there was a direct injury to them as a proximate result of the acts of plaintiff co-operatives. Hart v. B. F. Keith Vaudeville Exchange, 12 Fed. (2d) 341, 345.

The evidence discloses that prior to September 1, when the Federal and State orders went into effect, a serious condition existed in the milk industry. The price situation was utterly demoralized in New York City. Prices to producers in the country were ruinous. It was to remedy this condition that co-operatives, including the appellants here, adopted a program for securing application of the Federal and State orders and enforcement thereof. This program was not nation-wide but it was limited to the milk producing area for the New York City market and, under all the circumstances existing, it is submitted that the principles enunciated in the case of Appalachian Coals, Inc. vs. United States, 288 U. S. 344, should apply. See also National Association of Window Glass Manufacturers vs. United States, 263 U. S. 403.

Violations of the anti-trust laws are properly the subject of defense only where contracts of the parties involved are in unreasonable restraint of trade or monopoly, and then only when inherently connected with such restraint or monopoly, are directly involved.

A. B. Small Co. vs. Lamborn & Co. 267 U. S. 248.

Number 25 of Defendant's Conclusions of Law is erroneous because of the fact that it charges violation of the provisions of Sections 12 to 14 of Title 15 of the United States Code. Apparently Sections 12 and 14 are not relevant and we assume that the allegations referred to what is commonly known as the Robinson-Patman Act.

The answers of the defendants contain no allegation as to any claimed violation of the Robinson-Patman Act.

The conclusion apparently relates to the 35 cases of milk given to Rose Paley in the summer of 1938, some time before the new orders took effect, but the evidence discloses that this was done in competition and that other dealers selling to the same customer did the same thing. Therefore, it would seem that the rider in the Robinson-Patman Act relating to acts done to meet competition was applicable. The transaction was entirely in intrastate commerce after the milk had arrived in New York City, been processed and distributed from a city plant, and it is submitted that in any event it was not within the purview of the provisions of the Robinson-Patman Act.

III.

The statutory provision authorizing cooperatives to pay their members a blended price rather than a uniform price does not deprive the defendants of their property without due process of law.

The Act, Section 608c-5-F provides:

> "Nothing contained in this Sub-Section (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of Sections 451 to 457 of Title known as the 'Capper-Volstead Act' engaged in making collective sales or marketing of milk or its products for the producers thereof from blending the net proceeds of all of its sales in all markets in all use classifications and making distribution thereof to its producers, in accordance with the contract between the association and its producers; provided that it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the

prices fixed, pursuant to Paragraph A of this Subsection (5) for such market."

In this respect the statute treats cooperative marketing associations in a different manner than it does ordinary business corporations handling milk. It is claimed that this difference in classification renders the Act unconstitutional. At the outset we can dismiss the claim that this difference in classification denies the defendants equal protection of the laws. The Fourteenth Amendment to the United States Constitution, which guarantees equal protection of the laws, is a limitation upon State action and not upon Federal action. No provision of the United States Constitution guarantees any person equal protection of the laws as to Federal action. This action involves the validity of a law passed by Congress, and the most that can be claimed is that the difference in the treatment of cooperatives deprives the defendants of their property without due process of law.

We submit that the practical differences between cooperative marketing associations which are operated on a non-profit basis from business corporations which are operated for profit, justify a different treatment of the two.

A. LEGISLATIVE AND JUDICIAL HISTORY OF EXEMPTION OF COOPERATIVES FROM REGULATIONS IMPOSED UPON ORDINARY BUSINESS ENTERPRISES.

For many years it has been the legislative policy of Congress and the Legislatures of many states to foster the growth and development of cooperative marketing associations and to exempt them from many provisions of the law applicable to ordinary business corporations.

1. Federal Legislation

The Clayton Act, (38 Stat. 73, 15 U. S. C. A. 17) exempts cooperative marketing associations.

The War Finance Corporation Act of April 5, 1918 (40 Stat. 512, 15 U. S. C. A. 348) authorized the War Finance Corporation to make advances to cooperative associations of producers.

The Grain Futures Act of 1922 (42 Stat. 998, 7 U. S. C. A. 1-17) contains protection to cooperatives beyond that given business corporations.

Cooperative associations of tobacco growers are exempt from the requirement of registration under the McKinley Tariff Act by the provisions of Feb. 26, 1926 (44 Stat. 91, 26 U. S. C. A., 750-b).

The Agricultural Marketing Act of June 15, 1929, (46 Stat. 18, 12 U. S. C. A., 1141-1141-J) sets out the policy of the Act as follows:

> "A—It is hereby declared to be the policy of Congress to promote the effective merchandising of agricultural commodites in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economical equality with other industries, and to that end to protect, control and stabilize the current of interstate and foreign commerce in the marketing of agricultural commodities and their food products: * * *.
>
> "(3) By encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies."

The Act of June 16, 1933 (48 Stat. 257, 12 U. S. C. A., 1134-1134-M, 1138-1138-E) authorizes the organization of banks for cooperatives which are authorized to make loans to cooperative associations.

The Grain Futures Act enacted by Congress September 21, 1922 (42 Stat. 998, 7 U. S. C. A., 1-17) was challenged in Chicago Farm & Trade v. Olzen, 262 U. S. 1, on the ground, among other things, that it unduly favored farmer organizations. The Act was upheld, however, despite the fact that the value of membership in the Board of Trade was decreased by the provision favoring cooperative associations.

Agricultural associations have been exempt from the payment of Federal income taxes since 1913. (38 Stat. 172). This exemption was upheld in Flint v. Stone-Tracy Co., 220 U. S. 107, 173, and Brushaber v. Union Pac. R. R. Co., 240 U. S. 1, 21. The 1934 Revenue Act (48 Stat. 700, 26 U. S. C. A., 103 (12)) prescribes a more definite exemption as to cooperative associations of producers.

2. State Legislation

Numerous decisions of State Courts have sustained statutes which treated cooperative associations in a different class from ordinary corporations.

See:

Oregon Growers Cooperative Assn. v. Lentz, 107 Ore. 561; 212 Pac. 811,

Minn. Wheat Growers Cooperative Market Assn. v. Huggins, 162 Minn. 471; 203 N. W. 420,

Harrell v. Cane Growers Coop. Ass., 160 Ga., 30; 126 S. E., 531;

Potter v. Dark Tobacco Growers Coop. Assn., 201 Ky. 441; 257 S. W. 33,
and cases cited in note at page 47 supra.

State milk control laws permit cooperative marketing associations to pay their producers a blended price rather than the regulated price which business corporations must pay the producers from whom they buy milk. Alabama Milk Control Act. (Gen. Acts Ala. Regular Session 1935, pp. 204-220, approved July 9, 1935). The Florida Milk Control Act (Laws of Fla. 1937, Vol. 2, c. 18022, pp. 626-646) contains the same provision. Similar provisions are also contained in the Acts of Pennsylvania, Oregon, New Jersey and Connecticut. The Indiana Milk Control Act contains a provision substantially similar, and in addition, an equalization provision which was sustained in Milk Control Board vs. Crescent Creamery, 14 N. E. (2d), 588 —— Ind. ——; appeal dismissed by U. S. Sup. Ct. Oct. 10, 1938, 59 S. Ct. 87.

The New York Milk Control Law of 1933 required business milk dealers to pay their producers a regulated price, whereas cooperative associations were permitted to return to their producers the blended price. The validity of the New York Milk Control Law was sustained by this Court in—

People v. Nebbia, 291 U. S. 502, 517, 518,

Borden v. Ten Eyck, 297 U. S. 251, and

Hegeman Farms Corp. v. Baldwin, 293 U. S. 163; 55 Sup. Ct. 7.

The cooperative exemption was not discussed in any of those cases. However, the exemption was the subject of controversy in the case of Eisenberg Farms, Inc. v. Baldwin, 265 N. Y. 662. A memorandum opinion was written

by the Court of Appeals in that case, but in the subsequent case of Matter of Mayflower Farms, Inc., 267 N. Y. 9, the Court of Appeals stated:

> "In Matter of Eisenberg Farms, Inc. v. Baldwin, 265 N. Y. 662, this court decided that the differential clause in favor of Cooperative Associations which permitted them to pay producers less than the price fixed by the Commission for milk was constitutional."

This Court has recognized and upheld the separate classification of cooperative associations and ordinary business corporations. In Liberty Warehouse Co. v. Burley Tobacco Growers Coop. Assn., 276 U. S. 71, an action was brought against the Warehouse Company to recover a penalty for wilfully selling tobacco pledged to a cooperative association, in violation of the Kentucky Cooperative Marketing Act. The Warehouse Company contended that the Kentucky Act, which authorized the organization of cooperative associations, protected the contracts made by them with producers and provided that such associations were not to be deemed monopolies, combinations or conspiracies in restraint of trade, was improper class-legislation. The Court upheld the statute. The Court said:

> "It is stated without contradiction that cooperative marketing statutes substantially like the one under review have been enacted by 42 states. Congress has recognized the utility of cooperative association among the farmers in the Clayton Act (38 Stat. 731, 15 U. S. C. A. Sec. 17), the Capper-Volstead Act (42 Stat. 388, 7 U. S. C. A., Secs. 291-292), and the Cooperative Marketing Act of 1926, (44 Stat. 802, 7 U. S. C. A., Secs. 451-457). These statutes reveal widespread legislative approval of the

plan for protecting scattered producers and advancing the public interest.

Although frequently challenged, we do not find that any court has condemned an essential feature of the plan with the single exception of the Supreme Court of Minnesota in the above-cited case. * * * The opinion generally accepted—and upon reasonable grounds, we think—is that the cooperative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This Court has recognized as permissible some discrimination intended to encourage agriculture."

The Nebbia case is significant because of its discussion of alleged discrimination. In that case, a storekeeper buying milk from a dealer had to pay 8¢ per quart and 5¢ per pint, whereas a dealer buying his supply from a farmer could buy his milk at lower prices. The storekeeper had to resell his milk at retail at not less than 9¢ per quart and 6¢ per pint, and the dealer had to sell his milk at retail at not less than 10¢ per quart and 6¢ per pint. It was obvious that a storekeeper buying from a dealer was at a disadvantage in competing with a dealer for retail sales, because the dealer could buy his milk for less money. The Court stated (P. 521):

"But if it were shown that the appellant is compelled to buy from a distributor, the difference in the retail price he is required to charge his customers from that prescribed for sales by distributors is not, on its face, arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of

treatment if the Legislature possesses the power to control the prices to be charged for fluid milk."

No discussion of the validity of an exemption of farmer cooperatives from a regulation imposed upon an ordinary business enterprise is complete without Frost v. Corp. Commission, 278 U. S. 515, 49 Sup. Ct. 235, 73 Law. Ed. 483.

In the Frost case, a statute of the State of Oklahoma required the corporation commission to issue a license to operate a cotton ginning establishment to a cooperative association without a showing of public necessity, when the application of the cooperative was accompanied by a petition signed by one hundred citizens and taxpayers. Other types of business enterprise were required to prove public necessity before the commission could issue a license. The Laws of Oklahoma permitted the organization of two types of cooperative associations: one, a stock cooperative which could declare dividends at not to exceed 8%; the second, a non-stock cooperative.

Frost proved necessity and received a license. Later a stock cooperative applied for a license. The Commission held that regardless of necessity, the statute made it mandatory to issue the license. Frost sued to enjoin the Commission from issuing the license and the bill was dismissed by the Trial Court. The Supreme Court reversed the decree and concluded that the statute under attack was unconstitutional as contravening the equal protection clause of the 14th Amendment. However, the Court stated:

> "As applied to corporations organized under the 1917 Act, we have no reason to doubt that the classification created by the promise might properly be upheld."

The 1917 Act applied to non-stock, non-profit corporations.

The Dairymen's League is a non-stock, non-profit cooperative. Its activities are those which the defendants claim operate to make the Act unconstitutional and the order invoked. The Act as applied to this litigation is, therefore, valid even under the majority opinion in the Frost case.

The dissenting opinion of Mr. Justice Brandeis in the Frost case shows, among other things, the purpose of Cooperative Marketing Associations, their history, the universal legislative recognition of their differences from ordinary business enterprises, and the economic evils that justify different treatment.

The opinion is, as everyone recognizes, a landmark in judicial review of cooperative legislation.

B. PRACTICAL DIFFERENCES BETWEEN COOPERATIVES AND ORDINARY BUSINESS ENTERPRISES WHICH JUSTIFY AN EXEMPTION OF THE FORMER FROM A REGULATION IMPOSED UPON THE LATTER.

The difference between a cooperative marketing association and an ordinary business corporation is of course obvious. The primary interest of the ordinary business enterprise is in the spread between the cost of the product it sells and the sales price of that product. The nature of the cooperative is well stated in a bulletin issued by U. S. Dept. of Agriculture in August, 1929, Circular No. 94, entitled "Farmers Cooperative Associations in the United States, 1929," which reads in part as follows:

> "Cooperation among farmers, whether for marketing, for obtaining credit, or for the purchase of farm supplies, aims at providing a means whereby farmers may strengthen their economic position. Through cooperative marketing and purchasing, the farmer becomes a joint owner in large-scale business units which are directed toward rendering farm production and the distribution of farm products more

efficient. Farmers, through cooperative organization, aim to eliminate waste, to improve the grading and standardization of farm products, to handle and distribute farm products efficiently, and to promote better production practices—in short, to achieve more efficient production and marketing.

"Cooperative organization also aims to improve the most important part of rural life, human relationship—to encourage the development of greater social unity in a community and a occupational consciousness and pride on the part of the farm population. In this respect, one of the big problems of American agriculture is psychological. Although other branches of American industry and commerce are far advanced in the development of group efforts, the farmer, in many branches of agriculture, is still trailing behind as an individual. That is one of the great difficulties with which the American farmer is confronted today; he is still too individualistic in the conduct of his business in a society where organization is becoming more and more the basis of large-scale business.

"Under present farming conditions in North America, production is primarily an individual activity, but marketing of farm commodities and purchasing of farm supplies may be done most effectively through group effort. The farmer, as an individual, can have little control over the conditions under which his crops or livestock products are sold. Therefore group action in agriculture should center around the selling and purchasing departments of farmers' business associations.

"The American farmer operating the family-size farm unit has individual problems which are concerned with the efficient organization and management of the farm. On the other hand, the farmers' net income is influenced by the prices which he receives for his products and the prices which he pays for farm supplies. The farmer, as an individual, can do little to improve these conditions. These are problems which require group action.

* * * * *

"A farmers' cooperative business association is a form of organization by which farmers may act together in the collective handling, processing, and marketing of their agricultural products or in the purchasing of farm supplies. Individual farmers acting alone, operating the average American family-size farm, are helpless in establishing and maintaining outlets and markets for their products, except in a comparatively few local instances: Through their association farmers can apply modern business methods to the assembling, grading, standardizing, processing, transporting, financing, distributing, and selling of farm products.

"The Agricultural cooperative association may in a sense be looked upon as the hired man of the farmer members. The association enables a group of farmers to bring together the output of their individual farms for collective marketing. The farmer, through his association, is simply applying the principle of group effort to those phases of his farm business that lend themselves to large-scale operations.

"Both the State and Federal Governments have recognized the cooperative form of organization as a means by which farmers may act together in the collective marketing of the products on their farms, the purchasing of farm supplies, the securing of credit and in other farm activities."

This is the legislative and judicial background upon which we must examine the validity of Section 608-c-5-F of the Act which authorizes cooperative associations to return to their producers the blended price rather than the uniform price. The reports of public bodies which have investigated the milk business and the record before the Secretary on Order No. 27 furnish the economic background for an examination of the Act and order as applied to the New York Milk Shed. The statutory exemption of cooperative associations from various regulations affecting ordinary business corporations indicates a widespread belief that cooperative associations are entitled to different treatment.

There is a greater need for a cooperative marketing association available to milk producers than to other farm products. Milk is perishable and it cannot be stored.

Requiring business corporations to pay producers a regulated price for milk does not deprive the business corporations of their property without due process of law. That is well established by the numerous cases decided by this Court sustaining price-fixing statutes. If price-fixing does not deprive the dealers of their property without due process of law, then it follows that a statute which permits farmers to market their product collectively and pay themselves whatever they receive for their product, does not deprive business corporations of their property without due process of law.

Farmers marketing their products through a cooperative association cannot receive more than the prices received for those products, less expenses. To hold otherwise would drive cooperatives from the field of marketing.

IV.

The cooperative differentials provided for in Article 7, of Section 5 of the Order are authorized by the Act and do not deprive the defendants of their property without due process of law.

As we understand the defendants' position, it is not claimed that these payments are not authorized by the Act, nor is it claimed that these payments are improper as compensation for services performed by cooperatives which benefit the market as a whole. It seems to be the defendants' position that these payments enable the League to cut prices and therefore, further, the alleged conspiracy to destroy competitors and the alleged attempt to monopolize the market. We submit that the conspiracy and monopoly charges are unsupported by proof and are immaterial, for the reasons heretofore discussed. However, the Trial Court seemed to take the view that these cooperative payments were discriminatory and were a factor in depriving the defendants of their property without due process of law. We will show, therefore, that these payments do not operate to deprive the defendants of their property without due process of law and that the payments are authorized by provisions of the Act.

A. THE DEFENDANTS ARE NOT ENTITLED TO QUESTION THE LEGALITY OF THESE PAYMENTS.

At the outset, we submit that these defendants are not in

a position to complain about these payments. The payments come from the producers' settlement fund and therefore come out of the producers. The defendant Jetter is not a producer and, under well-settled constitutional principles, is not in a position to complain that the property of someone else may have been taken without due process of law. The cooperative defendants are entitled to the payments by qualifying for them under the provisions of the order, and therefore cannot complain.

B. THE EVIDENCE BEFORE THE SECRETARY SHOWS AN ECONOMIC NEED FOR THESE PAYMENTS.

The cooperative payments are justified. To receive such a payment, the cooperative must satisfy the Secretary that it is qualified to do so under the provisions of the order which read as follows:

> "Sec. 5—Payments to Cooperative Assocations: Any cooperative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class 1 milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members."

This payment to a cooperative has its roots in the surplus milk problem. The evidence before the Secretary justifies the conclusion that without adequate control of the surplus problem, the order would be unworkable and that these payments to cooperatives are an essential means to a

proper control of the problem of surplus. The evidence before the Secretary (Exhibit A-3) justifies the following statements:

1— Surplus milk is the primary cause of low milk prices.

2— The reports of numerous legislative and administrative investigations which were referred to in the evidence before the Secretary indicated that the producers' interests would be best served by the continued existence of cooperatives able to handle surplus milk, or to bargain for its handling in a manner that would protect producers.

3— The cooperative payments provided for in the order are necessary to compensate cooperatives for their services in disposing of surplus milk for the benefit of producers.

1.

The problem of the disposition of surplus milk has been referred to as a disturbing factor in numerous legislative and administrative reports. Perhaps the clearest statement on the subject will be found in the Pitcher Committee Report quoted in the Nebbia case (291 U. S. 502 at 517 and 518) as follows:

> "Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor.

The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment."

2.

The Pitcher Committee report, at page 17, stated:

"Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization, appears to offer the best prospect for permanent stabilization of the dairy industry in the New York milk shed."

In the report of the Commissioner of Agriculture and Markets, Holton V. Noyes, to the New York Legislature, with reference to an audit of milk dealers and cooperative associations, he stated:

"It seems to me that this examination has shown very clearly that if the farmers are to control prices which they receive for so-called Class 1 or fluid milk, they must also have control of the surplus. This could only be brought about by complete cooperation of the farmers and by handling all their own milk through their own plants properly equipped to take care of the surplus. It is my definite opinion that

as the industry is now operated, the surplus is in the wrong hands.

"If they maintain their own facilities for handling their surplus and sell only to the distributors what is needed for fluid consumption, the farmers then will have the satisfaction of knowing exactly what their surplus milk brings and realize more clearly their obligation to stabilize the industry by avoiding overproduction which, in turn, creates a burdensome surplus."

The report of the New York State Attorney General to the Legislature in 1938 contains the following statement at page 55, (Hearing Record, page 109) Ex. A-3:

"And finally, a producers' organization is definitely necessary in order to stop the purchase of surplus milk at surplus milk prices by distributors and its subsequent use in fluid form."

Under Point I of this brief, we referred to the evidence taken at the hearing showing the development of surplus facilities by the League in 1920 and 1927, and the curtailing of those activities in 1925 at a time when the milk was needed to balance the fluid market.

The evidence before the Secretary showed that an ordinary business distributor who found himself with excess milk over and above his fluid and manufactured product requirements would discontinue the purchase of milk, thus throwing the surplus back on the producers. The cooperative, because of its contractual relation with its members and because of its very nature as a marketing agency for producers, must continue to handle surplus, even though it may have no profitable outlet and even though the manufactured market may be glutted with regular supplies.

In the milk business someone must stand ready to handle

the surplus milk of farmers during the seasons when there is a surplus, unless the milk is to be thrown away or blindly dumped on the market. Likewise, someone must stand ready to close manufacturing plants and let them lie idle during periods of short supply when the milk is needed for the fluid market. The evidence before the Secretary showed that in the past the only organizations ready and willing to perform these services were the producer-controlled cooperative marketing association.

The evidence likewise showed a need for cooperative marketing association able to bargain for the sale of the milk of their members so as to enable producers to collectively and intelligently market their product. A cooperative which has no manufacturing facilities performs services which benefit the entire body of producers. A cooperative marketing association enables producers to protect themselves against exploitation. If the cooperative is fostered so that it can bargain effectively, the selling conditions of non-members are improved accordingly. There is an analogy to the increased wage a union secures which raises the wage level of all workmen, whether members or not. Similarly, the improved conditions in the sale of milk, resulting from the efforts of a strong bargaining cooperative, are enjoyed by all producers, whether members of the cooperative or not.

A cooperative enables a group of producers to shift large volumes of milk from one outlet to another to meet the demands of the market. Without cooperation, there is a blind rush to market all milk as fluid milk. A cooperative marketing association leads to an orderly market, i.e., the shipment of fluid milk sufficient to meet its needs and intelligent disposition of surplus. The orderly market thus attainable by perfect cooperation of all producers, is attainable in part

ien part cooperation exists. Blind shipping, resulting in ernate stuffing and starving markets, hurts all producers. derly shipping of a large volume of milk through intelli- nt cooperative selling gives all producers a better oppor- nity to market their product.

These services which cooperatives perform in finding a rket for milk, in standing by ready to handle surplus, in ing willing to close manufacturing plants when their milk needed for the fluid market, are essential services, if any lk control order is going to work. They are the services ich cooperatives must show themselves able and willing perform before they become entitled to receive these pay- nts under the order. They are the services which benefit od ers as a whole.

It costs cooperatives money to perform these services ich benefit the market. The Secretary was directed to ich benefit the market. The Secretary was directed by tute to encourage cooperatives. Charging the expense of ese services which cooperatives perform to the market as whole is the surest way to encourage producer-controlled operatives. This is particularly true when numerous gislative investigations have pointed out that the develop- nt of cooperatives would promote more efficient methods marketing.

With all of this evidence before the Secretary, he was stified in authorizing these cooperative payments where e cooperatives have met the qualifications set forth in the der.

In the absence of any provision in the order to compen- te the cooperatives for these services which they render d which benefit the entire body of all producers, the ex- nses of the cooperative in performing these services uld have to be borne by its members alone and cast the

The lower returns which members of cooperatives would receive if they had to bear the entire expense of these market-wide services would eventially lead to a disintegration of cooperatives. Members of cooperatives are not going to continue as members if they alone have to bear the expense of these services. The services cannot be continued unless cooperatives continue. The evidence before the Secretary showed that the amounts of these payments specified in the order were reasonable compensation for the expenses thus incurred in performing the various services. burden of surplus upon a part instead of the whole industry.

C. ACTICLE VII, SEC. 5 OF THE ORDER IS AUTHORIZED BY THE PROVISIONS OF THE ACT.

Three things are, therefore, apparent. First, that a distribution of these expenses throughout the entire body of all producers is necessary to equitably adjust among producers and cooperatives the value of the milk handled or produced by them. Second, the distribution of these expenses over the entire body of producers is necessary to make the order workable. Third, the payments are necessary to give cooperatives the encouragement which Congress directed they should have. Under these circumstances, the payments are authorized by at least two provisions of the statute.

Section 608 (C) (5-b) (II) provides that an order may provide for the payment to all producers and associations of producers delivering milk to all handlers, of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to * * * (d) a further adjustment, equitably to apportion the total value

of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

The payment of these cooperative expenses for the services rendered to the market comes out of the Producers' Settlement Fund and is, therefore, an adjustment which equitably apportions the total value of the milk among producers and cooperatives.

Under Section 608-c (7-d) an order may contain a provision "incidental to, and not inconsistent with, the terms and conditions specified in subsections 5, 6 and 7, and necessary to effectuate the other provisions of the order."

The evidence before the Secretary which has been described above amply justifies the conclusion that the maintenance of cooperatives to bargain for milk and to take care of surplus was necessary to maintain an orderly market, without which a marketing order could not work, and to assure producers the greatest possible return for their milk.

Section 610, Subd. (b) of Title 7, provides:

> "The Secretary in the administration of this chapter shall accord such recognition and encouragement to producer-controlled cooperative associations as will be in harmony with the policy towards cooperative associations set forth in existing acts of Congress and as will tend to promote efficient methods of marketing and distribution."

This section is a recognition by Congress of the value of cooperative associations in any marketing program. The encouragement of cooperatives by virtue of these payments is the declared policy of Congress, and the evidence shows that such encouragement will promote efficient methods of marketing and distribution of milk. Therefore, the provisions of the order authorizing these payments are justified

by the language of 608-(c) (7-d), wherein an order issued by the Secretary may contain an incidental provision necessary to effectuate the other provisions of the order.

Ordinary business corporations are not eligible to receive these payments. The evidence before the Secretary did not show that such corporations performed any service for the market as a whole which would entitle them to receive any such payments. Any argument that these payments constitute preferential treatment of cooperatives over business corporations has been answered in Point II of this brief. Such treatment is justified by the fundamental differences between a cooperative and a business corporation, particularly when viewed in the light of the evidence before the Secretary.

These payments to cooperatives do not deprive any persons of their property without due process of law. The payments come out of the producers' settlement fund which is set up to equalize the burden of surplus. Producers whose milk is used in the low priced manufacturing class receive enough from the fund to equalize the prices they receive with the prices received by producers whose milk is used in the high priced fluid and cream classes. The payments to cooperatives for their expenses in performing services to handle and dispose of surplus are an integral part of the equalization plan. These payments stand on the same footing as payments to producers whose milk is used in the low priced class. If the operation of the equalization plan does not deprive any person of his property without due process of law, payments to cooperatives which are a necessary part of that plan likewise do not deprive any person of his property without due process of law.

We submit, therefore, that these cooperative payments are not only justified by the terms of the order but they are amply justified by the evidence.

* * * * * * * * *

V.

The decree appealed from should be reversed as to all appellants.

The Court is relieved of the necessity of determining whether or not the Dairymen's League could maintain an independent action to compel these defendants to comply with the Order. The League did not force its way into the action. It came in following the suggestion of the Court and at the invitation of the Government. The defendants did not object to the intervention and conceded that the League had to make no proof other than the proof offered by the Government (see original transcript, page 1525). The Trial Court expressly stated that the League could offer no proof other than its corporate status, and that that was admitted. The purpose of intervention as appears in the original transcript was to facilitate the proof upon the trial. It is obvious from reading pages 4 to 11 and 1515 to 1525 of the original transcript that the League's complaint was to stand or fall with the Government's complaint.

The Trial Court has awarded costs to the defendants against the League and the Bargaining Agency. It has improperly made findings of fact and conclusions of law which are prejudicial to the League and the Bargaining Agency. In view of the nature of the intervention and the concessions of the parties upon the trial, a reversal of the decree in the Government's appeal should carry with it a reversal of the decree to all parties. The opinion of the Trial Court and the findings and conclusions which were made clearly show that the dismissal of the League's complaint was solely that the Order was invalid and the Act unconstitutional and upon no other grounds.

Under Point II of our brief we have shown that the findings of fact and conclusions of law relating to the alleged conspiracy and monopoly were unsupported by the evidence. We ask the Court to disapprove of those findings and conclusions.

CONCLUSION.

For the foregoing reasons, the decree of the lower court dismissing the bill should be reversed.

Respectfully submitted,

SEWARD A. MILLER,
Counsel for Appellant.

EDWARD SCHOENECK,
PAUL J. MCCAULEY,
LYLE HORNBECK,
Of Counsel.

APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION
OF
AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

Reenacting, Amending, and Supplementing the Agricultural Adjustment Act, as Amended

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language

of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

ANNOTATED COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 RE-ENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED [1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

Declaration

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of famers and destroys the value of agricultural assets which support the national credit structure and that these conditions effect transactions in agri-

[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agriculture Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

cultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy);

Declaration of Policy.

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such *orderly marketing conditions for agricultural commodities in interstate commerce as will establish*[3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the prewar period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and

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[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of comodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agriculture commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

[3] The italicized words were substituted, by sec. 2 (b) of the Agriculture Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

potatoes shall be the pre-war period, August 1909-July 1914. the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement);

SEC. 8a (5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forefeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating [4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the

[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: "the provisions of this section, or of".

United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directy burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be

deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

Orders

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Commodities to which Applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Navel Stores Act and standards established thereunder (including refined or partially refined oleoresin).

Notice and Hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance to such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

Terms—Milk and its Products

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[5] of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing

[5] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5) for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract be-

tween the association and its producers: *Provided,* That it shall not sell milk or its products to an handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

Terms—Other Commodities

(6) In the case of fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size,

or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [6] sold by such producers in such prior period as the Secretary determines to be representive, or upon the current *quantities available for sale by* [7] such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equally among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof,

[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.

[7] The Italicized words were substituted, by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the esablishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

Terms Common To All Orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Provided that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provide in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6) and (7) and necessary to affectuate the other provisions of such order.

Orders With Marketing Agreement

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be ap-

proved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

Orders With or Without Marketing Agreement

(9) Any order issued pursuant to the section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such represenative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity

sold within the marketing area specified in such marketing agreement or order.

Manner or Regulation and Applicability

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the adversing of any commodity or product covered by such marketing agreement.

Regional Application

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectiyely carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so

far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

Cooperative Association Representation

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contact with, such cooperative association of producers.

Retailer and Producer Exemption

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

Violation of Order

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50

or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

Petition by Handler and Review

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columba) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with direc-

tions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title, except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Termination of Orders and Marketing Agreements

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effctuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided,* That such majority have during such rep-

resentative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

Provisions Applicable to Amendments

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price

of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[8]

Producer Referendum

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this sub-

[8] This Italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

section shall be construed as limiting representation by cooperative associations as provided by subsection (12).[9]

(f) Section 8d (relating to books and records);

Books and Records

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of

[9] This Italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

Determination of Base Period

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the

base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

Miscellaneous

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall

[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: "including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title, and to any persons subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes."

commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or

the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

Appropriation

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus re-

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

ductions [14] with respect to the dairy-and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

Separability of Provisions

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

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[14] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

(k) Section 22 (relating to imports);

Imports

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States under such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any produce processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That

no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[15]

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[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title", whereever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment", whereever they appeared, and inserting in lieu thereof the word "any".

Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows:[16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in footnotes 2 to 9 inclusive and 11 to 14 inclusive, supra.

approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

APPENDIX B

UNITED STATES
DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
Washington, D. C.

ORDER SERIES—ORDER NO. 27

(Issued by the Secretary of Agriculture, August 5, 1938)

Order of the Secretary of Agriculture issued pursuant to Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, regulating such handling of milk in the New York Metropolitan Marketing Area as is in interstate commerce, and as directly burdens, obstructs or affects interstate commerce.

Whereas, under the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, under the terms and provisions of said act, the Secretary of Agriculture is empowered to issue orders applicable to processors, producers, associations of producers, and others engaged in the handling of any agricultural

commodity or product thereof specified in subsection (2) of section 8c, such orders to regulate only such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the New York metropolitan marketing area, would tend to effectuate the declared policy of said act, gave, on the 29th day of April 1938, notice of public hearings to be held on a proposed marketing agreement and a proposed order, said hearings being held jointly with the Commissioner of Agriculture and Markets of the State of New York at Albany, New York, May 16, 1938; Malone, New York, May 17, 1938; Syracuse, New York, May 18, 1938; Elmira, New York, May 19, 1938; New York City, May 20, 24, 25, and 26, 1938; and Albany, New York, June 3, 4, and 7, 1938, and at said times and places all interested parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order; and

Whereas, the Secretary of Agriculture has found and proclaimed the period August 1921–July 1929 to be the base period to be used in connection with ascertaining the purchasing power of milk produced for sale in the New York metropolitan marketing area; and

Whereas, the Secretary of Agriculture finds that a pro rata assessment on handlers at a rate not to exceed 2 cents per hundredweight of Class I, II-A, and II-B milk handled will provide funds necessary for the proper administration of this order; and

Whereas, the Secretary of Agriculture finds, upon the evidence introduced at the said public hearings:

1. That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing area; and that all milk which is produced for sale in the marketing area is handled in the current of interstate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and its products, except as such milk is regulated by an order of the Commissioner of Agriculture and Markets of the State of New York, to which this order is complementary;

2. That the prices calculated to give milk handled in the marketing area a purchasing power equivalent to the purchasing power of such milk as determined pursuant to section 2 and section 8e of the act are not reasonable in view of the available supplies of feeds, the price of feeds, and other economic conditions which affect the supply and demand for such milk, and that the minimum prices fixed in accordance with the method set forth in this order are such prices as will reflect such factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;

3. That this order regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement upon which hearings have been held;

4. That the orderly marketing conditions for milk flowing into the New York metropolitan marketing area are so disrupted as to result in impairment of the purchasing power of such milk, and that the issuance of this order and all of its terms and conditions will tend to effectuate the declared policy of the act.

Now, therefore, the Secretary of Agriculture, pursuant to the authority vested in him by said act, hereby orders that such handling of milk produced for sale in the New York metropolitan marketing area as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof according to article X, be in conformity to and in compliance with the terms and conditions hereinafter set forth.

Article I—Definitions

Section 1. *Definitions.*—The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which reenacts and further amends certain provisions of Public No. 10, 73rd Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "New York metropolitan milk marketing area" means the city of New York, and the counties of Nassau, Suffolk, and Westchester, all in the State of New York, and is hereafter called the "marketing area."

4. "Person" means any individual, partnership, corporation, association, or any other business unit.

5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

6. "Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce. This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment. This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area.

7. "Market administrator" means the agency, which is described in article II, for the administration of this order.

ARTICLE II—MARKET ADMINISTRATOR

SECTION 1. *Selection, Removal and Bond.*—The agency for the administration of this order shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

SEC. 2. *Compensation.*—The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

SEC. 3. *Powers.*—The market administrator shall have power:

1. To administer the terms and provisions hereof;

2. To receive, investigate and report to the Secretary complaints of violations of this order.

SEC. 4. *Duties.*—The market administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Secretary at any and all times;

3. Furnish such information and such verified reports as the Secretary may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

5. Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 15 days after the date upon which he is required to perform such acts, has not

(a) Made reports pursuant to section 3 of article V or

(b) Made payments required by sections 1 and 8 of article VII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof;

7. Pay out of the funds received pursuant to article VIII

(a) The cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, (b) his own compensation, and (c) all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties;

8. Maintain a main office and such branch offices as may be necessary.

SEC. 5. *Announcement of Prices.*—The market administrator shall publicly announce prices as follows:

1. Not later than the 25th day of each month, the Class I and Class II-A prices to be in effect for the following month, pursuant to section 1 of article IV.

2. Not later than the 5th day of each month, the prices effective for the preceding month for Classes II-B, III-A, III-B, III-C, III-D, IV-A and IV-B, pursuant to section 1 of article IV.

3. Not later than the 14th day of each month, the uniform price computed pursuant to section 2 of article VI.

ARTICLE III—CLASSIFICATION OF MILK

SECTION 1. *Basis of Classification.*—All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or movement from, the plant where received from producers, including members of any cooperative association; *Provided,* That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant; and provided further that, if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant, classification of such milk at the first plant may be in accordance with its utilization at such second plant.

Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the

market administrator to verify such statement by an audit of such person's records.

Any milk or cream which is on hand at any plant at the end of any month shall be classified in accordance with the form in which it leaves, or is utilized at, such plant not later than the 8th day of the following month.

SEC. 2. *Classes of Utilization.*—The classes of utilization of milk shall be as follows:

1. Class I milk shall be all milk which leaves a plant as milk, chocolate milk, or any whole milk drink, and all milk the utilization of which is not established for classification in some other class named in this section, except that loss or waste of milk in the plant where received from producers, not to exceed 2 percent of the total quantity of milk received from producers, may be prorated to each class in the proportion which the milk in such class is of the total quantity of milk classified.

2. Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs 5 and 7 of this section.

3. Class II-B milk shall be all milk the butterfat from which leaves, or is on hand at, a plant in the form of plain condensed milk or, except as set forth in paragraph 6 of this section, frozen desserts or homogenized mixtures.

4. Class III-A milk shall be all milk the butterfat from which leaves, or is on hand at, a plant in the form of evaporated milk in hermetically-sealed cans, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than American Cheddar and cream cheese.

5. Class III-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is subsequently held in a licensed cold storage warehouse for more than seven days at a temperature below zero degrees Fahrenheit.

6. Class III-C milk shall be all milk the butterfat from which leaves a plant in the form of frozen desserts or homogenized mixtures which were sold outside of New York City.

7. Class III-D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese.

8. Class IV-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of butter.

9. Class IV-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of American Cheddar cheese.

Article IV—Minimum Prices

Section 1. *Class Prices.*—For milk containing 3.5 percent of butterfat received, during each month from producers or cooperative associations of producers at plants in the 201-210 mile zone, each handler shall pay per hundredweight not less than the prices set forth in this section. For milk containing more or less than 3.5 percent of butterfat or received from producers or cooperative associations of producers at plants in other zones, each handler shall pay per hundredweight not less than the prices set forth in this section plus or minus the differentials set forth in sections 2 and 3 of this article.

The minimum prices for Class I and Class II-A milk shall apply to all Class I and Class II-A milk which is sold in the marketing area or which passes through a plant in the marketing area. The minimum prices for milk in Classes II-B, III-A, III-B, III-C, III-D, IV-A, and IV-B shall apply to all milk of any handler in these classes unless such handler

has milk in Class I to which the minimum price is not applicable, in which event the minimum III-A, III-B, III-C, III-D, IV-A, and IV-B prices shall not apply to the percent of his milk, if any, in each of the said classes which is equal to the percent of his total milk received from producers to which the Class I price is not applicable.

Payment of the minimum prices for milk received direct from producers shall be in accordance with article VII. Any handler who purchases or receives milk from a cooperative association of producers which is also a handler shall pay such cooperative association in full for such milk at not less than the minimum prices applicable pursuant to this article.

1. For Class I milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, of the prices reported daily during the 60 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range	Class I price	
	April thru July	August thru March
Cents per pound	Dollars per cwt.	Dollars per cwt.
Under 20	1.80	2.05
20-24.9	2.00	2.25
25-29.9	2.20	2.45
30-34.9	2.20	2.65
35-39.9	2.40	2.65
40-44.9	2.60	2.85
45-49.9	2.80	3.05
Over 49.9	3.00	3.25

2. For Class II-A milk the price during each month shall be as shown in the schedule below in this paragraph for the butter-price range in which falls the average, as determined by the market administrator, or the prices reported daily during the 30 days preceding the 25th day of the preceding month, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market.

Butter-price range	Class II-A price		
	March thru July	August thru October	November thru February
Cents per pound	Dollars per cwt.	Dollars per cwt.	Dollars per cwt.
Under 20	1.30	1.35	1.50
20-24.9	1.50	1.55	1.70
25-29.9	1.70	1.75	1.90
30-34.9	1.85	1.90	2.05
35-39.9	2.00	2.05	2.20
40-44.9	2.15	2.20	2.35
45-49.9	2.30	2.35	2.50
Over 49.9	2.45	2.50	2.65

3. For Class II-B milk the price during each month shall be 10 cents higher than the Class III-A price.

4. For Class III-A milk the price during each month shall be 10 cents higher than the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such month to farmers by each of the evaporated milk plants which are located at places listed in this paragraph and for which prices are reported: *Provided*, That in no event shall the Class III-A price be less than a price computed by the market administrator as follows: To the average price of 92-score butter at wholesale in the Chicago market for such

month, as reported by the United States Department of Agriculture, add 30 percent, multiply by 3.5, and add 7 cents.

Locations of Evaporated Milk Plants

Mt. Pleasant, Mich.; Sparta, Mich.; Hudson, Mich.; Wayland, Mich.; Coopersville, Mich.; Greenville, Wis.; Black Creek, Wis.; Orfordville, Wis.; Chilton, Wis.; Berlin, Wis.; Richland Center, Wis.; Oconomowoc, Wis.; Jefferson, Wis.; New Glarus, Wis.; Belleville, Wis.; New London, Wis.; Coldwater, Ohio; Delta, Ohio.

5. For Class III-B milk the price during each month shall be 20 cents higher than the Class IV-A price.

6. For Class III-C milk the price during each month shall be 10 cents higher than the Class IV-A price.

7. For Class III-D milk the price during each month shall be 7½ cents higher than the Class IV-A price.

8. For Class IV-A milk the price during each month shall be a price computed by the market administrator as follows: From the average of the highest prices reported daily during such month by the United States Department of Agriculture for 92-score butter at wholesale in the New York market, deduct 4 cents, add 20 percent, and multiply by 3.5.

9. For Class IV-B milk the price during each month shall be a price computed by the market administrator as follows: Take the average of the weekly quotations, with differentials as indicated, from such of these markets as may issue quotations during such month; Single Daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York; deduct 3 cents, and multiply by 9.45. In the

absence of any such quotation the price for the preceding month shall be effective.

SEC. 2. *Butterfat Differentials.*—The minimum prices for Classes I, II-A, II-B, III-B, III-C, and III-D milk set forth in section 1 of this article shall be subject to payment of butterfat differentials pursuant to section 3 of article VII. The minimum prices for Classes III-A and IV-A milk containing more than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the respective prices set forth in paragraphs 4 and 8 of section 1 of this article, divided by 35. The minimum price for Class IV-B milk containing more or less than 3.5 percent butterfat shall be plus or minus, for each one-tenth of one percent butterfat, an amount equal to the price set forth in paragraph 9 of section 1 of this article divided by 9.45 and multiplied by 0.23.

SEC. 3. *Transportation Differentials.*—The market administrator shall from time to time publicly announce for each plant operated by each handler the freight zone set forth in the schedule below in this section according to the railway mileage distance from New York City of its nearest railway shipping point, or its highway mileage distance from New York City, if the latter is less than the former by 15 miles. Any such mileage distance shall be that recognized for rate-making purposes by the Interstate Commerce Commission. The minimum prices set forth in section 1 of this article shall be plus or minus the amounts set forth in the following schedule:

A Freight zone miles	B Class I, Cents per cwt.	C Classes II-A, II-B, III-B, and III-C, Cents per cwt.	D Class III-A, Cents per cwt.
1-10			
11-20	+15	+8	+4
21-25	+14	+8	+4
26-30	+13	+8	+4
31-40	+13	+7	+4
41-50	+13	+7	+4
51-60	+10.5	+7	+4
61-70	+10.5	+6	+3
71-75	+9.5	+6	+3
76-80	+8	+6	+3
81-90	+8	+5	+3
91-100	+8	+5	+3
101-110	+7	+5	+3
111-120	+7	+4	+2
121-125	+6	+4	+2
126-130	+5	+4	+2
131-140	+5	+3	+2
141-150	+5	+3	+2
151-160	+3.5	+3	+2
161-170	+2.5	+2	+1
171-175	+2.5	+2	+1
176-180	+1.5	+2	+1
181-190	+1.5	+1	+1
191-200	+1.5	+1	+1
201-210	0.0	+1	+1
211-220	0.0	0	0
221-225	−1	0	0
226-230	−1	0	0
231-240	−1	−1	0
241-250	−2	−1	0
251-260	−2	−1	0
261-270	−3.5	−2	−1
271-275	−3.5	−2	−1
276-280	−3.5	−2	−1
281-290	−3.5	−3	−1
291-300	−4.5	−3	−1
301-310	−5.5	−3	−1
	−5.5	−4	−2

A	B	C	D
Freight zone miles	Class I, Cents per cwt.	Classes II-A, II-B, III-B, and III-C, Cents per cwt.	Class III-A, Cents per cwt.
311-320	—5.5	—4	—2
321-325	—7	—4	—2
326-330	—7	—5	—2
331-340	—7	—5	—2
341-350	—8	—5	—2
351-360	—8	—6	—3
361-370	—8	—6	—3
371-375	—9	—6	—3
376-380	—9	—7	—3
381-390	—9	—7	—3
391-400	—9	—7	—3
401-410	—10.	—8	—4
411-420	—10.	—8	—4
421-425	—10.5	—8	—4
426-430	—10.5	—9	—4
431-440	—11.5	—9	—4
441-450	—11.5	—9	—4
451-460	—11.5	—10	—5
461-470	—12.5	—10	—5
471-475	—12.5	—10	—5
476-480	—12.5	—11	—5
481-490	—14	—11	—5
491-500	—14	—11	—5

Article V—Reports of Handlers

Section 1. *Preliminary Monthly Reports.*—On or before the 23rd day of each month each handler shall, when requested by the market administrator, report to the market administrator in the manner and form prescribed by him: (a) The total quantity of milk received during the first twenty days of such month from producers, and (b) the utilization of such milk in the several classes set forth in article III.

Sec. 2. *Reports of Deliveries Per Day Per Producer.*—Each handler shall, upon request of the market administra-

tor given not less than two weeks in advance, report the average deliveries of milk per day per producer during a specified period of time.

SEC. 3. *Final Monthly Reports.*—On or before the 10th day of each month each handler shall report to the market administrator, in the manner and on forms prescribed by the market administrator, with respect to milk received at each plant during the preceding month:

1. The total quantity of milk, with the average butterfat content thereof, received from producers, from other plants, from such handler's own farm, and from other handlers;

2. The total quantity of milk and of each product of milk moved out of such plant during such month or on hand at such plant at the end of such month, the butterfat content of each product; and the destination of any milk which moved out of such plant;

3. If classification of any milk is claimed by such handler on the basis of utilization at some other plant, the utilization of such milk, together with written consent for verification by audit thereof signed by the operator, if not a handler, of the other plant, and

4. The computation, pursuant to section 1 of article VI of such handler's net pool obligation.

SEC. 4. *Verification of Reports and Payments.*—The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records. Each handler shall, during the usual hours of business, make available to the market administrator or his representative such of his records and facilities as will enable the market administrator to:

1. Verify the receipts and utilization of all milk required to be reported pursuant to this article, and, in case of errors or omissions, ascertain the correct figures;

2. Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

3. Verify the payments to producers prescribed in article VII.

ARTICLE VI—DETERMINATION OF UNIFORM PRICE

SECTION 1. *Net Pool Obligations of Handlers.*—The net pool obligation of any handler for milk received from producers during each month shall be a sum of money computed for such month as follows:

1. Determine the total quantity of milk in each class at each plant;

2. Subtract from the quantity of milk in each class the quantity of such milk received from other plants or from other handlers;

3. Subtract pro rata out of each class the quantity of milk received from the handler's own farm;

4. Subtract from the remaining quantity of milk in each class, the quantity of each to which the prices in section 1 of article IV do not apply, which result shall be known as the "net pooled milk" in each class;

5. Multiply the total quantity of net pooled milk in each class, at all plants of the handler combined, by the respective class prices set forth in section 1 of article IV and add together the resulting sums;

6. Deduct, in the case of each plant where the average butterfat content of all milk received from producers is in excess of 3.5 percent and add in the case of each plant where the average butterfat content of all milk received from producers is less and 3.5 percent, an amount equal to the difference between the total value of the butterfat differentials on net pooled milk in Classes III-A, IV-A, and IV-B at the rates set forth in section 2 of article IV for such milk and

the total value of the butterfat differentials on such milk as set forth in section 3 of article VII;

7. Deduct, in the case of each plant nearer New York City than the 201-210 mile zone, and add, in the case of each plant farther from New York City than the 201-210 mile zone an amount equal to the difference between the sum of the respective transportation differentials, as set forth in section 3 of article IV, on all net pooled milk in Classes II-A, II-B, III-A, III-B, and III-C and the sum obtained by applying the appropriate zone differential set forth in column B of the schedule in section 3 of article IV to the total net pooled milk at each plant in Classes II-A, II-B, III-A, IIIB, III-C, III-D, IV-A and IV-B.

8. Deduct 20 cents per hundredweight for all net pooled milk received from producers at plants in the counties or portions of counties listed below in this section. The result thus obtained shall be known as the "handler's net pool obligation."

New Jersey counties

Hunterdon	Union	Sussex
Somerset	Morris	Passaic
Essex	Warren	

New York counties

Columbia	Orange	Westchester
Dutches	Putnam	
Nassau	Suffolk	

Towns in Ulster County, New York

Marbletown	Rosendale	Gardiner
Hurley	Esopus	Plattekill
Kingstown	New Paltz	Marlborough
Ulster	Lloyd	Shawangunk

Connecticut	Massachusetts
Litchfield County	Berkshire County

SEC. 2. *Computation of the Uniform Price.*—The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the final report submitted for the preceding month by each handler and, on the 14th day of such month, compute from all of such corrected reports the uniform price in the following manner:

1. Combine into one total the net pool obligations of all handlers;

2. Subtract the total of payments required to be made for such month by section 5 of article VII and the total of payments claimed pursuant to section 6 of article VII;

3. Add the amount of cash in the producer settlement fund;

4. Divide the result by the total quantity of milk represented in the sum obtained pursuant to paragraph 1 of this section; and

5. Substract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 20-210 mile zone.

Article VII—Payments to Producers

SECTION 1. *Time of Payment.*—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article. If, however, the net pooled milk in all classes at all plants of such handler is less than the total milk he received from producers and he does not pay the uniform price for

all milk received from producers, such handler shall pay each producer the uniform price on such producer's pro rata share of the net pooled milk at all of his plants. Each handler shall give each producer a clear statement of the percentage of such producer's milk which was paid for at the uniform price and furnish a copy of such statement to the market administrator at the time payment is made.

SEC. 2. *Transportation and Location Differentials.*—The uniform price shall be plus or minus the differential shown in column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of Article IV, plus 25 cents in the case of plants located in the counties listed in paragraph 8 of section 1 of article VI.

SEC. 3. *Butterfat Differential.*—The uniform price shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of one percent above or below 3.5 percent of average butterfat content of milk delivered by any producer during any month.

SEC. 4. *Grade A Premiums.*—In addition to the uniform price and all other payments required pursuant to this article, each handler shall pay for milk which is qualified under the New York City Department of Health requirements for sale as Grade A milk and which is delivered to a plant similarly qualified, an amount per hundredweight equivalent to the following differentials on that Class I milk which such handler sold in the marketing area as Grade A milk;

Butterfat content	Bacteria colonies per c. c.		
	10,000 or less	10,000 to 25,000	Over 25,000
	Cents per cwt.	Cents per cwt.	Cents per cwt.
Percent			
3.7	60	42	5
3.8	66	48	7.5
3.9	72	54	10
4.0 and above	78	60	12

SEC. 5. *Payments to Cooperative Associations.*—Any cooperative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members. After such determination, the cooperative association of producers shall be entitled to continue to receive such payment until it has been disqualified by the Secretary, after hearing, for failure to exercise the authority and to perform the functions upon which such determination was based.

The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members by such association and on which such handler has made the reports and payments required by this order.

2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifiations, such association has been determin-

ed by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association.

SEC. 6. *Market Service Payment.*—The market adminstrator shall pay out of the producer settlement fund to any handler immediately after audit of claim for such payment made on forms supplied by the market administrator:

1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area, which was, during any month except November or December, moved to a plant where it was utilized in Classes II-A, II-B, III-A, III-B, III-C, III-D, or, during the month of October, IV-A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles, and plus 1/10th of 1 cent per hundredweight per additional mile, of the shortest highway distance between the two plants; and

2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equiped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area.

SEC. 7. *Producer Settlement Fund.*—The market administrator shall establish and maintain a separate fund known

as "the producer settlement fund" into which he shall deposit all payments made by handlers pursuant to sections 8 and 10 of this article and out of which he shall make all payments to handlers pursuant to sections 6, 9 and 10 of this article, and to cooperative association of producers pursuant to section 5 of this article.

SEC. 8. *Payments to the Producer Settlement Fund.*—Each handler shall on or before the 18th day of each month pay to the market administrator for payment to producers through the producer settlement fund the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price.

SEC. 9. *Payments Out of Producer Settlement Fund.*—On or before the 20th day of each month the market administrator shall remit to each handler for payment to producers the amount, if any, by which such handler's net pool obligation is less than the amount obtained by multiplying the net pooled milk of such handler by the uniform price. If at such time the balance in the producer settlement fund is insufficient to make all payments due to such handler, the market administrator shall reduce uniformly the payments made to each handler and shall complete such payments as soon as the necessary funds are available. No handler who, on the 25th day of the month, has not received the balance of such reduced payment from the market administrator shall be deemed to be in violation of section 1 of this article if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer settlement fund.

SEC. 10. *Adjustments of Errors in Payments.*—Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer settlement fund, the market admin-

istrator shall promptly bill such handler for any unpaid amount, and such handler shall, within five days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within five days, make such payment to such handler. Whenever verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of less than is required by this article, the handler shall make up such payment to the producer not later than the time of making payment next following such disclosure.

Article VIII—Expense of Administration

SECTION 1. *Payment by Handlers.*—As his pro rata share of the expense of administration hereof, each handler shall, on or before the 20th day of each month, pay to the market administrator a sum not exceeding 2 cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handler, directly or at the instance of a cooperative association of producers, and which was utilized in Classes I, II-A, and II-B, the exact amount to be determined by the market administrator subject to review by the Secretary. This section shall not be deemed to duplicate any similar payment by any handler under any order issued by the Commissioner of Agriculture and Markets of the State of New York to which this order is complementary.

Article IX—Suspension, Termination and Liquidation

SECTION 1. *Continuing Obligation of Handlers.*—Unless otherwise provided by the Secretary in any notice of amendment, termination or suspension of any or all of the provisions hereof, such amendment, termination or suspension shall not (a) affect, waive, or terminate any right, duty,

obligation, or liability which shall have arisen or may thereafter arise in connection with any provision of this order; (b) release or waive any violation of this order occurring prior to the effective date of such amendment, termination or suspension; or (c) affect or impair any right or remedies of the Secretary or of any other person with respect to any such violations.

SEC. 2. *Continuing Power and Duty.*—If, upon the termination or suspension of this order, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, or by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such termination or suspension.

The market administrator shall (a) continue in such capacity until discharged by the Secretary; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator, to such person as the Secretary shall direct; and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property and claims vested in the market administrator pursuant to this order.

SEC. 3. *Liquidation.*—Upon the termination or suspension of this order, the market administrator shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

Any funds collected for expenses, pursuant to the provisions of this order, over and above the amounts necessary to meet outstanding obligations and the expenses necessar-

ily incurred by the market administrator in liquidating the business of the market administrator's office shall be distributed by the market administrator to handlers in an equitable manner.

Article X—Effective Time

SECTION 1. *Effective Time.*—This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary and on the first day of the month following, by more than three days, publication in the Federal Register by the Secretary of (a) his finding that the order is approved by more than two-thirds of the producers voting in a referendum, (b) a marketing agreement containing provisions similar to this order approved by him and signed by handlers of more than 50 percent of the milk sold in the marketing area, or, his determination approved by the President that the failure or refusal of handlers to sign tends to prevent the effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of producers pursuant to such declared policy of the act.

IN WITNESS WHEREOF, I, H. A. WALLACE, Secretary of Agriculture of the United States, have executed in duplicate and issued this order to become (Seal) effective in accordance with article X hereof, and caused the official seal of the Department of Agriculture to be affixed hereto in the city of Washington District of Columbia, this 5th day of August, 1938.

H. A. WALLACE,
Secretary of Agriculture.

APPENDIX C

ROGERS-ALLEN LAW
LAWS OF NEW YORK, 1937
* CHAPTER 383

AN ACT to amend the agriculture and markets law, in relation to bargaining agencies, orders and marketing agreement.

(Art. 21 amended: new §§ 258-k to 258-n added.)

Became a law May 19, 1937, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-one of chapter forty-eight of the laws of nineteen hundred and twenty-two, re-entitled by chapter two hundred and seven of the laws of nineteen hundred twenty-seven "An act in relation to agriculture and markets, constituting chapter sixty-nine of the consolidated laws," as added by chapter one hundred twenty-six of the laws of nineteen hundred thirty-four, and as amended, is hereby amended by adding thereto four new sections, to be sections two hundred fifty-eight-k, two hundred fifty-eight-l, two hundred fifty-eight-m and two hundred fifty-eight-n to read, respectively, as follows:

§ 258-k. *Declaration of Policy.* It is hereby declared that the dairy industry is a paramount agricultural industry of this state and the normal processes of producing and marketing milk have become an enterprise of vast economic importance to the state and of vital interest to the consuming public which ought to be safeguarded and protected in

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* Enacted after repeal of milk control laws.

the public interest; that it is the policy of this state to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled cooperative associations; that unfair, unjust and destructive demoralizing trade practices have been and are likely to be carried on in the production, sale, processing and distribution of milk and that it is a matter of public interest and for the public welfare for the state to promote the orderly exchange of commodities and in cooperation with the federal government, in its regulation of interstate commerce, to take such steps as are necessary and advisable to protect the dairy industry and insure an adequate supply of milk for the inhabitants of this state.

§ 258-l. *Producers' bargaining agencies and distributors' bargaining agencies.*

(a) Incorporated producers' associations operated under and subject to the cooperative corporations law of this state, or similar laws of another state and organized and controlled by milk producers, may establish producers' bargaining agencies for the various production areas of the state designated by the commissioner. Cooperative corporations similarly incorporated hereafter and owned and controlled by producers shall be entitled to use and participate in such a bargaining agency and be represented by it in order that producers not now represented by a co-operative association may be entitled to the benefits of this act.

The voting power of each association participating in such an agency shall be on the basis of one vote for each one hundred producers under contract with such association for the marketing of their milk within such marketing area, and in case of an association with less than one hundred producers under contract with it, a fractional vote in proportion to the number of such producers. Only active contracts shall be considered.

The purpose of a producers' bargaining agency is to negotiate agreements or the basis of orders in the respective marketing areas for presentation to the commissioner for his consideration and approval, as provided in section two hundred and fifty-eight-m herein. A producers' bargaining agency shall be authorized to negotiate with a distributors' bargaining agency in such marketing area in regard to arrangements or agreements to be presented to the commissioner as a basis of marketing agreements or orders pursuant to said section two hundred and fifty-eight-m,

Each association upon joining or employing the producers' bargaining agency shall file with it a certified copy of its certificate of incorporation, its by-laws, copies of form of contracts with its producers and a certified statement of the number of such contracts which are in force.

A producers' bargaining agency may appear before and negotiate with the commissioner in regard to marketing agreements or orders, as provided in section two hundred and fifty-eight-m herein.

It shall be lawful for such producers' bargaining agency to act as a common marketing agency for the various co-operative associations of producers which it represents and such cooperative associations as may make contracts with each other and with such producers' agency for such purpose and for the collective processing, preparing for market, handling and marketing of the products of such associations and for effectuating the purposes of this act. In order to carry out and effectuate such purposes, contracts and agreements may be made pursuant to section twenty-five of the co-operative corporations law and as to interstate commerce pursuant to act of congress of February eighteenth, nineteen hundred twenty-two, entitled, "An act to authorize association of producers of agricultural products,"

(b) A distributors' bargaining agency may be organized by the distributors in a marketing area. The voting power of each distributor in such bargaining agency shall be in proportion to the volume of milk equivalent distributed by him in such area in form of milk and cream. The amount of such volume shall be determined by that distributed during the preceding year as reported to the commissioner. In the New York metropolitan milk marketing area the voting power of each distributor shall be on the basis of one vote for each ten million pounds of milk or milk equivalent distributed in such market during the preceding year and in case of a distributor handling a less quantity of milk, a proportionate fractional vote. In other marketing areas the voting basis shall be one vote for each one hundred thousand pounds distributed during the preceding year in such market with a proportionate fractional vote in case of distributors handling a less quantity of milk. The purpose of distributors' bargaining agencies is to negotiate with producers' bargaining agencies as to the agreements or the basis of orders in the respective marketing areas for presentation to the commissioner for his consideration and approval, as provided in section two hundred figty-eight-m herein.

A distributors' bargaining agency may appear before and negotiate with the commissioner in regard to marketing agreements or orders, as provided in section two hundred fifty-eight-m herein.

Producers' bargaining agencies and distributors' bargaining agencies may also meet and negotiate in order to carry out the purposes of this act and subject to the approval of the commissioner as provided in section two hundred fifty-eight-m, may make marketing agreements with each other and with cooperative associations in relation to the marketing of milk which may be handled or distributed

in more than one marketing area. Such agencies may also meet and negotiate and take such reasonable measures as are necessary and advisable to cooperate with the commissioner and legally constituted authorities of other states and of the United States with respect to the handling and control of milk handled in interstate commerce and carry out and effectuate the provisions of section two hundred and fifty-eight-m.

Except as specifically provided in section two hundred and fifty-eight-m, the activities and operations of producers' bargaining agencies and distributors' bargaining agencies and of the constituent members thereof, and contracts, agreements or arrangements made by them, pursuant to the provisions of this subdivision, and of section two hundred and fifty-eight-m hereof, shall not be deemed or construed to be conspiracies, combinations, contracts or agreements in restraint of trade or commerce or an illegal monopoly.

"Milk production area" as used in this section means that territory in which is located those dairy farms which have been approved by the board or boards of health having jurisdiction in the marketing area in which the milk from such dairy farms has been distributed during at least a portion of either of the preceding two years, together with such other dairy farms as may hereafter be so approved and which are located within the confines of such area as determined by the commissioner.

§ 258-m. *Orders fixing prices for milk and marketing agreements.* 1. Upon the petition of a producers' bargaining agency of the production area supplying a marketing area, such agency representing at least thirty-five per centum of the producers of milk therein, alleging the existence of conditions so affecting the orderly marketing of

milk in such area that public interest requires regulation of prices of milk in such area in order that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective, it shall be the duty of the commissioner to call a public hearing for the consideration of said petition and to give notice thereof by advertising such call in such newspaper or newspapers of general circulation in such marketing area as the commissioner deems advisable. Such notice shall specify a time not less than ten days after the date thereof and a place within the marketing area at which the hearing will be held and at which the applicants and other persons, including producers, distributors and consumers and associations thereof may be heard. If after such hearing the commissioner shall find, either upon the testimony given at the hearing or upon information concerning conditions existing in the milk industry in such marketing area, which the commissioner has otherwise obtained, that conditions exist so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective and that it is favored by at least seventy-five per centum of the producers of milk produced in the production area for said marketing area, he may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers. Such price fixing order or orders shall be rescinded effective at the end of the current month after a public hearing whenever the commissioner shall find either that such conditions have ceased to exist or that such termination is favored by at least thirty-five per centum of the producers of milk handled within such market.

2. The commissioner may, from time to time upon like petition, during the existence of such conditions revise the prices so fixed, after holding a hearing thereon.

3. Before fixing any prices pursuant to the provisions of the two preceding paragraphs, the commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect of milk and what prices for milk in the market or markets affected by such prices and under varying conditions will be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the cost of production and distribution, including compliance with all sanitary regulations in force in the market or markets affected, the cost of feeding stuffs used in the production of milk, the supply of milk in such market and the purchasing power and welfare of the public. The commissioner shall fix prices to producers on the basis of the use thereof in the various classes, grades and forms. Any prices fixed or approved by the commissioner shall be deemed to be prima facie reasonable.

4. In determining the approval or request for an order as herein provided or the termination thereof on the part of producers the commissioner shall consider the approval, request or favor in respect thereto by any bona fide cooperative association of producers engaged in marketing milk within such marketing area as the approval, request or favor either of making an order or of termination thereof of the producers who are under contract with such cooperative association of producers.

5. Maketing agreements. It shall be lawful for a producers' bargaining agency of the production area supplying a marketing area and a distributors' bargaining agency for such marketing area to enter into marketing agreements as to the prices to be paid by distributors to producers for milk sold or otherwise utilized in said marketing area, as to rules and regulations covering the method of determining

the proportion of the product of the entire dairy herd of a producer which shall be accepted and paid for pursuant to such price or prices, as to be rasonable trade practices affecting the relations between producers and distributors in such market. Such agreement may also contain provisions for a committee to administer the provisions of said marketing agreement. No agreement, however, shall be effective until a copy thereof signed by all persons parties thereto shall have been filed with the commissioner.

If the commissioner shall have reason to believe that any such marketing agreement results in a monopoly or restraint of trade to such an extent that the price of milk is unduly enhanced by reason thereof, he shall serve upon the parties to such agreement a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing specifying a date and place, not less than thirty days after the service thereof, requiring the parties to such marketing agreement to show cause why an order should not be made directing them to cease and desist from such monopolization or restraint of trade. The parties so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given at such hearing shall be taken under such rules and regulations as the commissioner shall prescribe, reduced to writing and made a part of the record therein. If upon such hearing the commissioner shall be of the opinion that such marketing agreement results in monopoly or restraint of trade to such an extent that the price of milk in the marketing area affected by such agreement is unduly enhanced, he shall issue and cause to be served upon the parties to said agreement an order reciting the facts found by him and directing them to cease and desist from such undue enhancement of prices. If such order is not obeyed by the parties to such agreement, the

commissioner shall file with the attorney-general a certified copy of the order, evidence of such disobedience and all of the records in the proceeding, and the attorney-general may apply to the supreme court for an order or decree affirming, modifying or setting aside such order or for making such other order or decree as the court may deem equitable in the premises.

Upon application of the parties to said marketing agreement and after a hearing, as provided in subdivision one of this section, the commissioner may by order make the provisions of said marketing agreement, relative to prices to producers and other provisions thereof, effective as to all producers, distributors and handlers in said market notwithstanding that they may not have approved of said agreement if he shall find that the terms and conditions of said agreement are fair, equitable and in public interest, and that the agreement has been fairly entered into without fraud, that public interest so requires, in order to effectuate the declaration of policy contained in section two hundred fifty-eight-k of this chapter, that the proportion of the producers and distributors who have executed such agreement or shall have approved same upon the hearing is equal to that required for an order under subdivision one of this section, and further provided that the commissioner shall determine that the prices set forth in said marketing agreement are reasonable and proper prices, as required by this section for prices fixed by an order of the commissioner. Any order so issued shall terminate effective on the last day of the current month, and in the same manner and upon the same request after a hearing, as provided for the termination of an order in subdivision one of this section.

6. If approved by seventy-five per centum of the producers affected, any order or marketing agreement fixing

the price to producers under either subdivision one or subdivision five of this section for market or markets, may provide for an equalization of prices to all producers of the production area of the market affected so that each producer or co-operative association shall receive the same base price for all milk delivered subject to reasonable differentials for quality and location and for services.

In order to effect such equalization of prices to producers the commissioner shall require a monthly report from each dealer receiving milk from producers for such market showing the disposition of all milk handled by the reporting dealer in such market and shall thereafter require payment by each dealer, to a trust company designated as a fiscal agent by the commissioner, of any amount by which the sum otherwise due by such dealer to its producers in accordance with all the prices fixed by such order exceeds the equalized base price as determined by the commissioner from such reports, which amounts so paid to said fiscal agent, the commissioner shall direct it to pay to those dealers whose reports show that the base prices they will pay their producers in accordance with such order are less than the equalized base price as so determined by the commissioner, for repayment in turn by such dealers to their producers so as to bring all lower rates of payment up to the equalized base price. Such payments to said fiscal agents shall not be deemed to be included within the provisions of section two hundred fifty-eight-i of this chapter and shall not be deemed to be state funds.

The provisions of this subdivision shall not become operative as to the New York state metropolitan market production area, however, until pursuant to federal or state statutes, or by action of authorities duly constituted and authorized thereunder, prices to producers are so equalized

and made effective throughout all the production area of New York state metropolitan market area.

7. After the commissioner shall have fixed prices in any area or approved prices in a marketing agreement to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to buy or offer to buy milk at any price less than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less than such price, or prices, as shall be applicable to the particular transaction, whether by a discount or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

8. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach.

9. Any marketing agreement or order of the commissioner may provide for necessary deductions from payments to producers to provide for marketing services to them, including auditing of dealers' classifications and no marketing agreement or order shall prevent a cooperative association from blending as heretofore the proceeds of all sales and distributing to its producers the resultant blended

price subject to deductions and differentials as provided by its contracts with its producers, but no such cooperative association shall sell milk at prices lower than the prices fixed by the commissioner in an order for the markets affected.

10. "Distributor" as used in this and the preceding section means a milk dealer as defined in this article who delivers milk to stores and/or consumers within the marketing area, from a milk depot or milk plant owned and/or operated by such dealer.

§ 258-n. *Interstate and federal compacts* The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control with states and/or as between states and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his power hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearing and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders.

§ 2. This act shall take effect immediately.

APPENDIX D

CAPPER-VOLSTEAD ACT
Title 7 U. S. C. A., Sections 291-292

CHAPTER 12.—ASSOCIATIONS OF PRODUCERS OF AGRICULTURAL PRODUCTS

Sec. 291. Authorization of associations; powers generally.

Sec. 292. Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure.

Section 291. *Authorization of associations; powers generally.* Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. (Feb. 18, 1922, c. 57, § 1, 42 Stat. 388.)

§ 292. *Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure.* If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the assaciation an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agricul-

are shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof. (Feb. 18, 1922, c. 57, § 2, 42 Stat. 388.)

APPENDIX E

CLAYTON ACT

Title 15 U. S. C. A., Section 17

§ 17. *Antitrust laws not applicable to labor organizations.* The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agriculture, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.)

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Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 828.

METROPOLITAN COOPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC.,
Appellant,

vs.

ROCK ROYAL COOPERATIVE, INC., *et al.*,
Appellees.

BRIEF FOR APPELLANT.

EDMUND F. COOKE,
Counsel for Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N.Y.

INDEX.

Table of Contents.

	PAGE
inion Below	1
risdiction	1
tement of the Case	2
signment of Errors	4
onomic Memorandum	
I. Economic Necessity for Equalization	5
II. That all of the milk produced in the Metropolitan Milk shed is in the current of Interstate Commerce or so as directly to burden, obstruct or affect Interstate Commerce of milk and its products	11
nclusion	13

Statutes.

t of August 24, 1937, section 2 (50 Stat. 752)	1
ricultural Adjustment Act of 1933 (48 Stat. 31)	2, 7
ricultural Adjustment Act of 1935 (49 Stat. 750)	2
ricultural Marketing Agreement Act of 1937 (50 Stat. 246)	2, 7
les of Federal Procedure—Rule 24B	3

Miscellaneous References.

der No. 27	3, 9
cher Report (New York Legislative Document No. 114 of 1933)	11

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METROPOLITAN COOPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC.,
Appellant,

vs.

ROCK ROYAL COOPERATIVE, INC., *et al.*,
Appellees.

On Appeal from the District Court of the United States for the Northern District of New York.

BRIEF FOR APPELLANT.

Opinion Below.

The District Court rendered an opinion after the trial of the action (R. 743). That opinion is as yet not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 2 of the Act of August 24, 1937, 50 Stat. 752 (28 U. S. C. Sec. 349 a).

The decree of the District Court was entered March 21, 1939, and the petition for appeal was allowed March 21, 1939. The case was docketed in this Court on March 30, 1939 and the Court entered an order noting probable jurisdiction on April 3, 1939.

Statement of the Case.

The statute involved is the Agriculture Marketing Agreement Act of 1937 (Public No. 137, 75th Congress, 50 Stat. 246), which reenacted and amended certain provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), which had been added to the original Agricultural Adjustment Act by an amendment enacted August 24, 1935. (49 Stat. 750.) The regulation involved is order No. 27 issued thereunder by the Secretary of Agriculture, regulating the handling of milk in the New York Milk Marketing Area which is in the current of interstate commerce, or directly burdens, obstructs, or affects interstate commerce.

The defendants having failed to pay their indebtedness to the Market Administrator, the United States of America on October 27, 1938, as plaintiff, commenced an action against the defendants Rock Royal Co-Operative, Inc., Schuyler Junction New York Milk Shed Cooperative, Inc., and Central New York Cooperative Association, Inc. (R. 1), and another action against Jetter Dairy Company, Inc. on November 23, 1938 (R. 40). By an order of the Court below, these actions were consolidated. (R. 61.) These complaints in effect were for mandatory injunctions to compel the defendants to comply with Order No. 27 issued by the Secretary of Agriculture.

Thereafter, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., the appellant herein, moved for an order under Rule 24-B of the Rules of Federal Procedure permitting it to intervene as party plaintiff on the ground that its claim arose out of the same controversy as that of the original plaintiff and was ancillary to the claims as set forth in the complaints of the plaintiff, the United States of America. The said motion permitting Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. to intervene as a party plaintiff was granted by consent of all the parties. The complaints of the said intervening plaintiff against the defendant ask for the same relief as the original plaintiff, the United States of America.

These actions as consolidated came to trial and on February 23, 1939, the Court below rendered its written opinion (R. 743), holding that:

(1) Order No. 27 unlawfully discriminates in favor of large cooperatives and deprives proprietary handlers and small cooperatives, such as the appellees, of their property without due process of law, in violation of the Fifth Amendment.

(2) This discrimination is necessarily present in Order No. 27 by reason of the provisions of the Act, particularly the provisions of Section 8c (5) of the Act, specifying the terms which an order pertaining to milk shall contain; and, therefore, the Act is unconstitutional.

(3) The Secretary's determination, approved by the President pursuant to Section 8c (9) of the Act, that Order No. 27 was approved or favored by more than two-thirds of the producers, producing milk for sale in the marketing area, was in-

effective to put Order No. 27 in operation, because the referendum among producers, conducted by the Secretary pursuant to Section 8c (19) of the Act, was influenced by false and misleading propaganda in favor of the Order carried on by the Bargaining Agency and the League and by misleading statements contained in a pamphlet issued by the Department of Agriculture.

The District Court entered its findings of fact and conclusions of law on March 21, 1939 (R. 127) and on the same day entered its final decree dismissing the action (R. 743). The appellant appeals from the final order and decree dismissing its bills of complaint.

Assignment of Errors.

The appellant herein specifies the same errors as the appellant, the United States of America, in its appeal No. 771, intended to be argued simultaneously herewith, and this appellant hereby adopts as his brief, the brief filed by the appellant, the United States of America, in case No. 771 aforementioned. Supplementary thereto, this appellant files this memorandum bearing upon two points:

1. Economic necessity of equalization of prices in the Metropolitan Milk Shed to secure orderly marketing, assure each producer a fair share of the fluid milk market, and obtain market stability.
2. That all of the milk produced in the Metropolitan Milk Shed is in the current of interstate commerce or so as directly to burden, obstruct or affect interstate commerce of milk and its products.

I.

Economic Necessity for Equalization.

The New York metropolitan milk marketing area under the Federal and State orders includes the City of New York and the counties of Nassau, Suffolk, and Westchester, all in the State of New York. This area is the largest market for fluid milk in the world. An average of more than 13,000,000 pounds of milk a day is delivered by dairy farmers to plants approved by health authorities to ship milk into the New York market. About half of this amount is shipped into the marketing area in fluid form, the other half being used for cream and other dairy products for the market.

More than 10,000,000 people live in the area covered by the Federal-State milk marketing program. Most of the plants which ship milk to supply this population are located from 150 to 350 miles from the marketing area. Some plants are located over 500 miles away.

Numerous difficulties arise because of the great size of the market and the vast territory covered by the producing area from which the necessary milk supply must be drawn. During the fall and winter months, when milk production is naturally short, it is necessary for the market to reach out to the farthest points of the producing area in order that the total supply of milk may be adequate for the needs of the market. In this distant producing area, located for the most part in northern New York, the climate is severe and there is a great variation in the amount of milk produced during different seasons of the year, late fall and win-

ter production often being about half of that in the spring and summer.

Because of the metropolitan market's demand for their fluid milk during the short period of the year, farmers located at great distances from the market must maintain throughout the year a sufficient number of cows in their herds to produce the amount of milk required. During the spring and summer months these farmers have nearly twice as much milk available as they have during the fall and winter months, but the metropolitan market does not require their milk because the supply nearer the market is also plentiful at that time. Throughout the year the distant producers must maintain their herds and farms and keep up to standards required by New York health regulations, just as if their milk went to the metropolitan market every day.

This situation, arising as it does out of the metropolitan market's demand for fluid milk during the time of the year when production is naturally down, has forced the distant producer to engage in a constant struggle for a place in the market during the spring and summer months when milk supplies are plentiful. Through this struggle the distant producer has tried to obtain a sustaining share of the market for fluid milk on a year round basis. On a few occasions the struggle has gone to the extent of milk strikes, accompanied by disorder and the dumping of milk, as in 1933 and 1937. These strikes were costly to dairy farmers, and menaced the milk supply of consumers.

The early efforts of dairy farmers to improve milk marketing conditions and to obtain more equitable

treatment in their market are characterized by the organization of cooperatives. This group action to achieve market stability has helped producers to a considerable extent and is now regarded as an integral part of the dairy industry.

Effective as cooperatives were, it soon became evident that measures were needed to supplement the efforts which producers were exerting through their organizations. By 1933 the periodic struggles of producers to hold a share in the New York market were an old story. Other milk markets had experienced similar difficulties.

Producers throughout the country sought the aid of their State and Federal Governments in improving milk marketing conditions. Federal help in providing for milk market regulatory programs first came into existence in 1933 under the Agricultural Adjustment Act, the marketing provisions of which were reenacted and amended by the Agricultural Marketing Agreement Act of 1937. Also in 1933, the New York State Milk Control Act was passed, the first such piece of legislation in the United States. Today, about half the States have State milk regulatory laws in effect.

The New York State Milk Control Act, which was upheld by the United States Supreme Court in 1934, appeared to benefit producers to a large degree in its early years. Handlers of milk in New York, however, soon found that they could evade the effects of the State law by getting their milk supplies from outside of the State. This shift to outside sources of milk reduced the effectiveness of the State law. In the spring of 1937, this milk control measure was not reenacted.

In its place, the Rogers-Allen Act was passed as a New York State law in May 1937. This measure authorizes cooperative associations of producers to bargain collectively with milk distributors. It aims at stabilizing marketing conditions in milk markets of New York State through collective bargaining procedure between organized producers and organized distributors. The act also authorizes the State Commissioner of Agriculture and Markets to issue orders under certain conditions if the bargaining system fails to produce satisfactory results. The orders may fix prices paid by handlers to milk producers in the State.

As soon as the Rogers-Allen Act was passed, groups of producers organized the Metropolitan Cooperative Milk Producers' Bargaining Agency. Nearly 100 different cooperatives having a membership of over 40,000 milk producers became members of the bargaining agency. At the same time handlers organized the New York Metropolitan Milk Distributors' Bargaining Agency to negotiate with the producers' organization.

For a while conditions in the metropolitan New York milk market took on a more orderly aspect. This improvement, however, did not last very long. A considerable number of dairy farmers remained outside of the producers' bargaining agency. Many handlers broke away from the distributors' bargaining agency and were free to buy milk from producers at their own prices, which were less than those negotiated between the two organizations. As a result market conditions once more became chaotic.

In an effort to meet these conditions, milk producers started a move to invoke the regulatory features of the Rogers-Allen Act, and at the same time requested the help of the Federal Government in regulating the handling of milk that comes into New York from outside the State. They sought a program to establish uniform rules under which handlers would buy their milk from producers both in and out of the State. Such a program, they felt, would overcome the weaknesses of earlier efforts which were confined to milk produced within the State.

Efforts to develop such a program continued for nearly a year. Through conferences with representatives of producers, consumers, distributors, and representatives of the Agricultural Adjustment Administration and the New York State Department of Agriculture and Markets, a proposed Federal-State program was developed. This proposal was considered at a series of public hearings held in various sections of New York State from May 16 to June 8, 1938. The hearings were conducted jointly by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets, and gave producers, consumers, and distributors an opportunity in which to express their views on the proposal.

The Federal-State program mentioned above, expressed in Federal Order No. 27 and New York State Order No. 126, approved by the producers affected by referendum and promulgated by the Secretary of Agriculture of the United States and the Commissioner of Agriculture and Markets of the State of New York, sought particularly to establish market stability

by keeping "distressed" milk off the fluid market by supplying only normal fluid market demands and providing for the manufacture of such milk as might be in excess of such demands. In this manner the stability of the fluid and cream market was maintained, its price protected and a higher blend price assured to producers. The universal scramble among producers for a share of the fluid market which contributes so largely to market breakdown in times of milk surplus was eliminated by removing the incentive for an exclusive fluid market, and by the knowledge on the part of the producer that under equalization his return would be equal to the return of every other producer in the milk shed regardless of the utilization of his milk.

Competition for fluid markets by producer groups periodically causes market breakdown. Eliminate that competition by equalization of prices by which you give every producer his share of the fluid market but compel him to share his portion of the burden of surplus, and a stable market can be maintained. The Orders destroyed the practice of dumping "distressed" milk from fluid plants which had lost their regular markets or which over-produced and had no manufacturing facilities, by equalization of prices, accomplished partly through charges against all milk, paid out of the producers' settlement fund before the uniform price was fixed, to pay the extra expense of moving this surplus milk to other country-plants for manufacture.

Unless equalization is adopted as a basic principle of a milk marketing program, that program must fail, and in the strife for obtaining the best market available, each producer and each producer group will con-

tinue to send its milk to the fluid market until competition has reduced the fluid price to the manufacturing level. Only by removing the incentive for placing fluid milk from one country plant in competition with fluid milk from another country plant in the city market can orderly marketing with price stability be attained, and equalization of prices is the only method of achieving that result. It assures all handlers the same cost for milk sold in the marketing area and assures payments to all producers at a uniform rate for that milk.

"The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and by all distributors in the milk shed. So long as the surplus burden is unequally distributed, the pressure to market surplus milk in fluid form will be a serious disturbing factor." (Pitcher Report, 1932.)

II.

That all of the milk produced in the metropolitan milk shed is in the current of interstate commerce or so as directly to burden, obstruct or affect interstate commerce of milk and its products.

The vast amount of milk necessary to meet the daily needs of 10,000,000 people in the marketing area is produced by approximately 65,000 farmers situated in the states of New York, Pennsylvania, New Jersey, Vermont, Maryland, Connecticut and Massachusetts, all of which milk produced for sale in the marketing

area is handled in the current of interstate commerce or so as directly to burden, obstruct or affect interstate commerce of milk and its products.

> "That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing area." (Findings of Secretary of Agriculture, R. 12.)

The need for Federal regulation of milk in the metropolitan area has been felt for a considerable time due to the interstate character of the industry. The principal reason for the failure of the New York State Milk Control Law which went into effect April 1st, 1933, and was abandoned in 1937, was the inability of the State of New York to control the prices of milk coming into the Metropolitan Area from other States, resulting in an ever-increasing tendency upon the part of distributors in the Metropolitan Area to abandon their sources of supply in New York State and seek them in surrounding States. A general resort to this

practice resulted in market breakdown, the milk from outside of New York State being sold at lower prices than New York State milk could be sold for under the Milk Control Law. Unless all dealers are compelled to pay the same prices for milk in all of the States tributary to the Metropolitan Marketing Area, there cannot be that uniformity of price essential to the maintenance of stabilized marketing. The solution of the problem lies not in individual action by the States, but in a Federal Order regulating interstate commerce in milk with a complementary State Order with practically identical terms and provisions.

Conclusions.

It is respectfully submitted that the lower court erred in dismissing the bills of complaint on appeal herein and the decree of the court below should be reversed.

EDMUND F. COOKE,
Counsel for Metropolitan Cooperative Milk Producers Bargaining Agency, Inc.

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Supreme Court of the United States

OCTOBER 1938 TERM No. 771

UNITED STATES OF AMERICA,
Appellant,

v.

ROCK ROYAL CO-OPERATIVE, INC., et al.,
Appellees.

BRIEF FOR APPELLEE CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC.

LEONARD ACKER,
Counsel for Appellee Central New York Co-operative Association, Inc.

INDEX

PAGE

STATEMENT 1

SUMMARY OF ARGUMENT 2

ARGUMENT—

I—The statute evidences a clear intent that co-operatives are not subject to the making of payments to any equalization fund such as the producer settlement fund of the order and the order properly interpreted does not subject this co-operative to such payments 3

The order fairly interpreted carries out the intent of Congress and under its provisions this co-operative is not obligated to make payments to the producer settlement fund 8

As to the co-operative being a handler 12

II—The provisions of the order in respect of payments to the producer settlement fund deprive the members of this co-operative of their property and deprive the co-operative and its members of the liberty of carrying on a lawful enterprise in the manner they desire, without due process of law in violation of the fifth amendment 14

To compel this appellee to make payment to the producer settlement fund would invalidly interfere with the liberty of making lawful contracts between it and its members 18

The equalization fund is not a regulation of interstate commerce 19

III—The statute invalidly delegates to producers the legislative power of Congress 21

PAGE

IV—The statute invalidly delegates the legislative power of Congress to the Secretary of Agriculture 28

V—The statute and the order, by regulating the prices to be paid for an agricultural commodity, regulate a matter of local concern beyond the powers of Congress 29

VI—The Secretary of Agriculture improperly permitted co-operatives to vote for their members without first ascertaining their wishes 31

VII—The statute does not authorize the market service provisions of the order 33

VIII—The order improperly seeks to utilize the power of Congress to regulate interstate commerce so as to protect an industry in one area of the United States from the competition of the same industry in other areas of the United States 34

IX—Equitable relief was properly denied to enforce an order which was prepared by and enacted as a result of the efforts of one group of handlers, the intervening league and bargaining agency, and which order was designed to give to such handlers advantages over their competitors including this co-operative. The order moreover invalidly discriminates in favor of such handlers 36

X—The order must be deemed never to have become effective in view of the invalidity of the state order to which it was intended to be complementary 39

CONCLUSION 40

TABLE OF CITATIONS

Cases

PAGE

rd of Trade v. Olsen, 262 U. S. 1 28
ter v. Carter Coal Co., 298 U. S. 238 ..... 22, 23
cago, St. P. M. & O. Ry. v. Holmburg, 282 U. S. 2, 167 15
ak Co. v. City of Chicago, 242 U. S. 526 25
ton-Goose Creek Ry. v. U. S., 263 U. S. 456 ..... 19, 20
Giovanni v. Camden Fire Ins. Assoc., 296 U. S. 64 38
mmer v. Dagenhart, 247 U. S. 231 30
hland v. Russell Car & Snow Plow Co., 279 U. S. 3 19
per v. Texas, 139 U. S. 462 38
ke v. Farmers' Grain Co., 256 U. S. 50 28
Control Board v. Eisenberg Farms, 83 L. Ed. 5 30
ional Labor Relations Board v. Jones & Laughlin teel Corp., 301 U. S. 1 29
bia v. New York, 291 U. S. 502 ..... 16, 20, 34
es v. Erie & Wyoming Farmers Co-operative orp., 170 Misc. 42 39
ama Refining Co. v. Ryan, 293 U. S. 388 27
road Retirement Board v. Alton R.R. Co., 295 S. 330 15
des v. Little Falls Dairy Co., 230 A. D. 571, affd. 6 N. Y. 559 9
echter Poultry Corp. v. U. S. 295 U. S. 495 ..... 22, 27, 28, 29
tle Trust Co. v. Roberge, 278 U. S. 116 22
g Bros. v. United States, 280 U. S. 420 28
mpson v. Consolidated Gas Utilities Corp., 300 S. 55 15
ed States v. Butler, 297 U. S. 1 ..... 30, 36
rginian Ry. Co. v. System Federation, No. 40, 300 S. 515 19

Statutes

PAGE

Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246, 7 U. S. C. A. Secs. 601 et seq.) ... 3, 4, 10, 21, 25, 26, 27, 30, 31, 33, 39

Constitution of the United States:

Article IV—
Section 1 ... 10, 11

Article VI—
Section 1 ... 8, 10, 14, 17
Section 2 ... 8

Article VII—
Section 1 ... 14
Section 6 ... 33
Section 8 ... 8, 10
Section 9 ... 14

Federal Tobacco Inspection Act:
49 Stat. 731-735 ... 24

National Industrial Recovery Act ... 26

7 U. S. C. A. 453 ... 6

Supreme Court of the United States

OCTOBER 1938 TERM No. 771

UNITED STATES OF AMERICA,
Appellant,

v.

ROCK ROYAL CO-OPERATIVE, INC., et al.,
Appellees.

BRIEF FOR APPELLEE CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC.

Statement.

This appellee is a co-operative corporation under the laws of New York, whose members are dairy farmers with farms in New York.[1] It operates four country milk receiving plants. It receives and ships the milk of its members to three business companies, all of whose stock it owns, to be sold in the marketing area on behalf of its members. The milk is sold to retail stores and consumers and the net proceeds distributed pro rata among its members. The co-operative markets milk of some producer patrons on the same basis (R. pp. 265-267).

The net proceeds have exceeded the value of the milk calculated at the uniform prices under the order. For September, 1938, the difference was over $5,000 which the co-operative is holding and would have distributed to its members but for the order (R. p. 267).

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[1] In the Government's brief the term "appellees" from page 41 to the end is used to refer to the appellees other than this appellee.

Summary of Argument.

POINT I. The statute evidences a clear intent that co-operatives are not subject to the making of payments to any equalization fund such as the producer settlement fund of the order and the order properly interpreted does not subject this co-operative to such payments.

The order fairly interpreted carries out the intent of Congress and under its provisions this co-operative is not obligated to make payments to the producer settlement fund.

As to the co-operative being a handler.

POINT II. The provisions of the order in respect of payments to the producer settlement fund deprive the members of this co-operative of their property and deprive the co-operative and its members of the liberty of carrying on a lawful enterprise in the manner they desire, without due process of law in violation of the fifth amendment.

To compel this appellee to make payment to the producer settlement fund would invalidly interfere with the liberty of making lawful contracts between it and its members.

The equalization fund is not a regulation of interstate commerce.

POINT III. The statute invalidly delegates to producers the legislative power of Congress.

POINT IV. The statute invalidly delegates the legislative power of Congress to the Secretary of Agriculture.

POINT V. The statute and the order, by regulating the prices to be paid for an agricultural commodity, regulate a matter of local concern beyond the powers of Congress.

POINT VI. The Secretary of Agriculture improperly permitted co-operatives to vote for their members without first ascertaining their wishes.

NT VII. The statute does not authorize the market ervice provisions of the order.

NT VIII. The order improperly seeks to utilize the ower of Congress to regulate interstate commerce so s to protect an industry in one area of the United States from the competition of the same industry in ther areas of the United States.

NT IX. Equitable relief was properly denied to enorce an order which was prepared by and enacted as result of the efforts of one group of handlers, the ntervening league and bargaining agency, and which rder was designed to give to such handlers advantages ver their competitors including this co-operative. The rder moreover invalidly discriminates in favor of such andlers.

NT X. The order must be deemed never to have beome effective in view of the invalidity of the state rder to which it was intended to be complementary.

POINT I

he statute evidences a clear intent that co-operatives not subject to the making of payments to any alization fund such as the producer settlement fund the order and the order properly interpreted does subject this co-operative to such payments.

he statute evidences a clear intent that co-operatives, as this appellee, which acts as agent for its mems and remits to them the net proceeds of the sales of r milk, are not obligated to make payments to an alization fund, like the producer settlement fund.

ection 8c(5)(A) authorizes an order to classify milk ccord with its utilization and to fix minimum prices each classification to be paid by handlers for milk rchased" from producers or associations of producers. s provision is the basis for the minimum price proons of the order.

Section 8c(5)(Bii) authorizes the payment to all producers and associations of producers of uniform prices for all milk, irrespective of the use made of such milk by the handler to whom it is delivered. This section is the basis for the uniform price provision of the order.

Section 8c(5)(C) provides:

> "In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof."

This section empowers the Secretary to include in the order the producer settlement fund provision, that being the method chosen by him "to the end that the total sums paid by each handler shall equal the value of the milk purchased by" such handler at the minimum prices. Under this authorizing section the equalization pool is to cover the milk "purchased" by any handler. Co-operatives in general operate as this defendant and purchase no milk but act as agents for their members.

The provisions authorizing minimum prices and the equalization fund each cover only milk "purchased" from producers or producer associations evidencing clearly that they are not applicable to co-operatives which do not purchase their members' milk.

The intent that co-operatives were not intended to be necessarily included in any equalization pool but might come within such pool only if they chose to discontinue acting as agent for their members and to purchase their milk in the fashion of a proprietary handler is made even clearer by Section 8c(5)(F), which provides:

> "Nothing contained in this subsection (5) is intended or shall be construed to prevent a coopera-

tive marketing association qualified under the provisions of sections 451 to 457 of this title, known as the 'Capper-Volstead Act', engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk."

This section carefully differentiates between the purchaser-seller relationship between proprietary handler and producer, and the principal-agent relationship between a co-operative and its members, which results in the "blending of the net proceeds" of the sales of the members' milk and "the distribution thereof" to the members.

The Government's brief states (p. 30) that a "co-operative is required to pay the minimum class prices fixed by the order". The statute is exactly to the contrary, since by Section 5c(F) a co-operative is entitled to blend "the net proceeds of all of its sales * * * and to make distribution thereof to its producers". That co-operatives are thus exempted from the minimum price as well as the uniform price regulations is recognized in the Government's point Ic. 4 (pp. 131-149).

The proviso at the end of Section 5c(F) that a co-operative shall not sell its members' milk to a handler "at prices less than the prices fixed pursuant to paragraph (A) of this subsection" (the minimum prices) demonsfrates that a co-operative is not required to return the minimum prices to its own members. If a co-operative is to sell its members' milk at the minimum prices it manifestly cannot deduct the expenses of marketing and

other operating expenses and still return the minimum prices to its producers.

The plain meaning of the statute is that a co-operative may sell directly to stores and to consumers, as this co-operative does, at prices which are unregulated or else may sell to handlers at the regulated minimum prices, and distribute the net proceeds of either type of sale among its members.

This co-operative is within the provisions of the Capper-Volstead Act, being engaged "in the co-operative marketing of agricultural products". 7 U. S. C., Section 453.

Under subdivision F of Section 8c(5) the co-operative may market its members' milk, blend "the net proceeds" and make "distribution thereof to its producers". It is impossible for this co-operative so to blend the net proceeds of its sales and make distribution thereof in accordance with its contract, if it is compelled, as here sought, to pay into the producer settlement fund the difference between the proceeds of its members' milk and its value calculated on the basis of the uniform prices. It would then no longer be blending the net proceeds of the sales and making distribution in accordance with its contract, but would be turning over to its members a portion of the net proceeds equal to the value of the milk at the uniform prices, and turning over the rest of the proceeds to a fund to be passed on to other producers.

The provision that a co-operative may distribute the net proceeds of its sales among its own producers necessarily excludes equalization of those proceeds with other producers selling milk to handlers or other vendees, for it would not then be making distribution to its producers of the "net proceeds of all of its sales".

This co-operative, in accord with accepted principles of modern co-operative marketing, does not purchase its members' milk or accept its members' milk at a fixed

guaranteed price, but acts as an agency operating at
t, through which its members pool their individual
rketing operations and the members in accord with
ir contract with the co-operative are entitled to the
l proceeds of their milk less expenses of marketing
x. 41 to stipulation of facts).

The language of subparagraph (F) as well as the other
rtions of Section 5c patently contemplate such type
co-operative marketing, and evidence the intent of
ngress to provide that co-operatives might if they chose
ntinue their characteristic method of marketing and
uld each distribute the net proceeds of the milk of
ir members among their own members.[1]

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[1] The Congressional intent is further evidenced by the remarks on the
r of the Senate in reference to the sections covering the fixing of prices
milk. The following appears at page 11139, Congressional Record, 74th
gress, 1st Session:

"SENATOR COPELAND: The amendment which we have before us pro-
es that a co-operative association shall not sell its milk or products to
handlers at prices less than those fixed. In New York State there are
great many co-operatives that sell their milk directly to consumers.
ere is nothing in the proposed amendments which provides that the co-
rative that sells milk and milk products directly to the consumer shall
rge itself with the prices fixed. If this condition shall be allowed to
st, it will be a short time only before the entire fluid market in every
will be taken away from the regular handlers of milk who are pur-
sing their supply directly from the producers, as they will be required
pay the prices set by the order. It is further contended that the co-
ratives, in the absence of a set resale price, and with the exemption I
e mentioned, would be able to sell milk at a lower figure, and return
their members the net proceeds of their sales, regardless of what they
y be.

A conference was held in Syracuse in February, 1934, as I remember.
e producers did not agree 'upon acceptance of the proposed program or
n any other plan of production adjustment' which included a processing

SENATOR MURPHY (of Iowa, in charge of milk sections of the bill for
Committee): Mr. President, if the Senator will pardon me, there is
processing tax in this provision. Furthermore, in the case of the par-
lar producers to whom the Senator refers, there is not any obligation
n them to come in under this provision at all. They are free to stay
If they do not wish to come in and have their condition bettered, and
roper price paid them for their milk, this is a matter of their election.
will not be imposed upon them."

The order fairly interpreted carries out the intent of Congress and under its provisions this co-operative is not obligated to make payments to the producer settlement fund.

The order provides that in calculating his net pool obligation each handler may "subtract pro rata out of each class the quantity of milk received from the handler's own farm" (Art. VI, Sec. 1[3]).

There is therefore no net pool obligation in respect of milk produced on a handler's own farm, such milk does not enter into the computation of the uniform price and is not subject to the uniform price or producer settlement fund provisions of the order (Art. VI, Sec. 2; Art. VII, Sec. 8).

This co-operative does not own the farms on which its members' milk is produced. The Government's brief (p. 40) erroneously states this appellee contends it owns the farms of its members. It makes no such claim and its answer (par. 11) admits it "owns and operates no farms" (R. p. 78). This appellee's contention that the order itself exempts it from payment to the producer settlement fund is based on the fact that it is only an organization of producers selling milk produced by themselves on their own farms, and utilizing the co-operative and its subsidiary companies solely as agents to market their milk. The Government's brief (p. 132) points out "co-operative associations * * * are composed of milk producers who have organized to handle and sell their own milk * * *". The members at all times are the principals and the true handlers in the co-operative enterprise in which they market their milk. The Government's brief points out in respect of producer members of co-operatives (p. 31) "they (the producers) are also participants in a handling enterprise". Even in the case of co-operatives which take title

to their members' milk the New York Courts have ruled that the relationship is not "the ordinary one of purchase and sale" but that the relation is "of a trust or fiduciary character" in which the co-operative deals with its member's property. *Rhodes* v. *Little Falls Dairy Co.*, 230 A. D. 571, affd. 256 N. Y. 559. The members of this appellee operate their own farms; their milk is received by the co-operative, shipped to New York City and sold on their behalf to retail stores and consumers through subsidiary companies, the stock of which is all owned by the co-operative; the net proceeds of the sales are distributed among the members (R. pp. 265-267).

The producers are the principals in the marketing of milk produced on their own farms, for the co-operative is a mere agent or conduit for the sale of the milk, the net proceeds of which are transmitted to the producer principals. The Government's brief thus points out (p. 145) members of co-operatives "are owners of the handling enterprise * * * more concerned with what they receive for the milk they produce and sell through the co-operative". And at page 170 the Government's brief points out "Co-operatives are owned by and composed of producers * * * the amount they ultimately receive is * * * the net income of the co-operative enterprise * * *". The situation is no different than that of an individual farmer selling his own milk except that a group of farmers have joined together to acquire facilities to distribute their milk in the New York market, which as a practical matter is the only market in which it can be sold. The producer members are the principals, and so the actual handlers, and handlers who are marketing milk produced on their own farms and so handlers whose milk is not within the net pool obligation or producer settlement fund provisions of the order.

That the order does not intend co-operatives which market milk as agents for their producers to be subject to the producer settlement fund is further shown by the failure of the order to subject co-operatives to the payment of either the uniform or the minimum prices. In accord with the act, Section 5c(F), the only requirement of the order is that handlers must pay the minimum prices to co-operatives (Art. IV, Sec. 1).

A handler's obligation to the producer settlement fund is the difference between his net pool obligation and an amount "obtained by multiplying the net pooled milk of such handler by the uniform price" (Art. VII, Sec. 8). A handler's net pool obligation is the value of the milk handled by him calculated at the minimum class prices (Art. VI, Sec. 1). A co-operative is under no obligation to pay its members either the minimum or the uniform price. It is a fair interpretation of the order that it is under no obligation to make payments to the settlement fund, for irrespective of anything else neither end of the equation by which the obligation to the settlement fund is measured is applicable to the transactions of the co-operative. The Government's brief (p. 27) points out "The effect of order No. 27 is to create a market-wide pool of milk so that each handler, in effect, purchases his milk at the class prices from a pool created by all producers". This arrangement does not apply to a co-operative which purchases no milk, and Congress did not intend that co-operatives should be included in such plan since it expressly authorized them to continue to blend "the net proceeds" of their sales and make "distribution thereof" to their producers.

The Government in a footnote at page 194 states this appellee "is a completely dealer-controlled co-operative". Whether the Government is attacking the bona fide nature of this co-operative or whether it is merely asserting that

some dealer participated in its organization is not clear. No claim that this appellee is in any wise not a bona fide co-operative organized and operating for the benefit of its producer members is asserted in the complaint or has at any time been asserted in this case and there is no such issue in the case. The footnote on the last page of appellant's brief is the first intimation of any such claim.

This co-operative was organized in 1934 some years prior to the statute and order involved herein and could not possibly have been organized by reason of or in contemplation thereof.

Just what the Government means by the term "dealer-controlled" is not clear. No claim is made that this appellee does not operate along the same lines and with the same relations existing between itself and its members as co-operatives in general. Nor is any claim made that its members do not secure the net profits of the sales of their milk. That such is so is a stipulated fact (R. pp. 266, 267; Ex. 41 to stipulation of facts, R. p. 644).

The letter referred to by the Government for its assertion, Exhibit 23ii, to the stipulation of facts is a letter written by the intervening plaintiff bargaining agency and is manifestly in the nature of a self-serving declaration. Furthermore, the exhibit was not offered by this appellee, but by the other appellees and is in no wise binding upon it. The exhibit is under paragraph 58 of the stipulation of facts (R. p. 263) which paragraph relates to the defense raised by the other appellees that the order was secured through misleading publicity given out by the proponents of the order.

Moreover, if the exhibit was offered in evidence it apparently was so done through inadvertence. The stipulation of facts (R. p. 263) describes Exhibits 23aa to 23ii as "printed statements and radio broadcasts issued by the bargaining agency and its officers". The exhibit as

printed in the record does not fit this description for it has no possible bearing upon the issue of the misleading publicity and is a letter written by counsel for the bargaining agency.

Finally the exhibit itself demonstrates that this appellee is in fact a producer controlled co-operative. The exhibit refers to findings made by the New York State Division of Milk Control in August, 1934, a few months after the co-operative was organized. These findings in part state that the producers who are members of the co-operative "in addition to the risks of possible loss in producing milk which they have always taken, these producers are now assuming risks in its distribution in a market turned by fierce competition". Manifestly, if the producers have assumed the risk of loss it is because they are the actual entrepreneurs and principals in the enterprise who secure all profits made and, as the Division of Milk Control found, likewise take the risk of loss. That is exactly the nature of a true co-operative marketing organization.

As to the co-operative being a handler.

The Government urges this co-operative may not claim exemption from the settlement fund obligation, since by the definition of the order it is a handler (p. 194). The question is not whether the co-operative is a handler, but whether Congress intended to subject co-operatives to the equalization provisions of any order and whether this co-operative is such handler as comes within the exemption, which permits a handler to subtract from his net pool obligation the milk produced on his own farm.

That a person is a handler does not necessarily subject him to make payments to the fund. The order defines a handler as "any person who engages in the handling of

lk or cream therefrom, which was received at a plant proved by any health authority for the receiving of lk to be sold in the marketing area" (Art. I, Sec. 1[6]). nder that definition a truckman who received milk di- etly from some producer and trucked it on behalf of the oducer would be a handler, but no one would seriously im that such truckman was under obligation to make yments into the settlement fund. Likewise, a farmer ning a herd of several hundred cows who sells his milk rectly to consumers is a handler, but is under no obliga- n to make payments to the settlement fund as the milk produced on his own farm. In the same way the rmers who utilize this co-operative as agent to market eir milk are under no obligation to pay to the settlement nd. They are handlers, but they market milk produced their own farms.

Were these producers collectively to market their milk rough a commission agent, to whom commissions were id for his services, it would hardly be claimed that e agent was obligated to make payment to the producer ttlement fund, although he neither bought nor sold milk his own behalf.[2] It would be clear beyond question at the handlers within the meaning of the producer ttlement fund provision were the producers and not their ent. The present situation is the same, except that e producers instead of paying an agent to market their lk have organized a mutual agency through which they arket their milk without the need of paying commissions.

[2] The marketing of milk through such commission agents was once a stomary mode of distribution in New York. Report of New York Joint gislative Committee to Investigate the Milk Industry (N. Y. Legislative cument 1935, No. 114, p. 100).

POINT II

The provisions of the order in respect of payments to the producer settlement fund deprive the members of this co-operative of their property and deprive the co-operative and its members of the liberty of carrying on a lawful enterprise in the manner they desire, without due process of law in violation of the fifth amendment.

The order (Art. IV, Sec. 1) provides minimum prices for milk dependent upon its ultimate utilization. Handlers pay producers a uniform price which is a weighted average of the value of all milk covered by the order each month, figured on the basis of the applicable minimum prices (Arts. VI, VII, Sec. 1). Each handler has a monthly "net pool obligation" which, with adjustments, is the value of the milk purchased from producers calculated at the minimum prices (Art. VI, Sec. 1). A handler whose "net pool obligation" exceeds the amount he must pay producers at the uniform price is obligated to pay the excess to the producer settlement fund (Art. VII, Sec. 8). A handler whose "net pool obligation" is less than he must pay producers at the uniform price is entitled to receive the difference from the fund (Art. VII, Sec. 9).

To compel this co-operative to make payments to the producer settlement fund would take the property of its members without due process of law. This co-operative's members sell their milk directly to stores and consumers, sales unregulated by the order. The net proceeds of the sales of their milk exceed the amount they would receive if they received therefor a sum computed on the basis of the uniform prices. For September, 1938, this difference was over $5,000 (R. p. 367).

To compel the members of this co-operative to take a portion of the proceeds of their milk and through the device of the settlement fund to turn over such proceeds to other producers who have not had the same good fortune, business sense or diligence to acquire so lucrative a market would directly take their money and turn it over to other producers without compensation and without due process of law. One person's property may not thus be taken for another's private use. *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 350; *Chicago St. P. M. & O. Ry.* v. *Holmburg*, 282 U. S. 162, 167.

To compel the members of this co-operative to turn over part of the proceeds of their more lucrative market to other producers through the settlement fund would compel them to share their market with other producers. That may not constitutionally be done. *Thompson* v. *Cons. Gas Utilities Corporation*, 300 U. S. 55, 79, 80.

The purpose and effect of the statute and of the producer settlement fund avowedly is to compel producers having a more lucrative market to share the proceeds of their milk with producers who would otherwise receive less for their product.[1]

The question is squarely presented whether Congress may regulate an industry or industry in general in such manner as to compel the distribution of a prevalent "burden" among all participating in an industry and by legis-

[1] Bulletin D. M. —6 of August, 1938, issued by the Department of Agriculture, an explanation of the order (Ex. 9 at par. 13 of stipulated statement of facts), reads in this respect: "Purpose of the program * * * 2. Assure uniform returns to producers for milk sold in the marketing area regardless of the handler to whom the milk was sold, or the use made of the milk by the individual handler; 3. Assure each producer a fair share of the fluid milk market; and 4. Provide for the co[illegible] of surplus milk supplies so that the burden is borne fairly by all producers interested in the metropolitan market, and enable the use of surplus so that it will bring the highest return to producers."

Bulletin D. M. —8 of October, 1938, issued by the Department of Agriculture states that the order "enables each producer to obtain his fair portion of the benefits from the fluid-milk market and to bear his equitable share of the market's surplus milk burden."

lative fiat saddle with the "burden" those who by good fortune, good sense or diligence manage to avoid it.

If Congress may compel all in the milk industry to share the burden of a prevalent surplus, then it would seem that it likewise could compel all workers in interstate employment to share the burden of unemployment, a "burden" which prevails in industry even in prosperous times.[2]

The State legislatures would appear to have the same power in respect of intrastate employment. This would mean that a portion of the wages earned by workers who have employment could be taken from them against their will and distributed among those without work. It would also seem that workers who secure more for their labor in one section of the country than do other workers for the same labor in another section could be compelled to share their higher earnings with those whose remuneration is less. If the present statute is valid, the same legislative power of compelling the sharing of "burden" would appear to exist in respect of seasonal trades, in which there is always some period of the year when all workers in the trade do not secure work. Congress or a State legislature, dependent upon whether the industry is interstate or intrastate, could compel those who secure work for the entire year, due to good fortune, diligence or ability, to share, against their wishes, a part of what they earn during "off" seasons with workers in the trade who are not working during such seasons.

The Government's brief urges (p. 107) that if the classified use plan is adopted as here then some equalization plan is essential. This ignores that the price-fixing statute before this Court in *Nebbia* v. *New York*, 291 U. S. 502, was based on a classified use plan and contained no such

[2] Statistical Abstract of the United States 1937, U. S. Dept. of Commerce, pp. 317-324. Article on Unemployment Statistics by Isador Lubin, 22 Encyclopedia Brittanica (14th ed.), pp. 696, 697.

ovision although it dealt with the same milk shed as
ered by this order. The only claim advanced by the
pellant for the failure of the State law to function
perly was the inability of the State to regulate the
ce of milk received in New York from other States
22).

Moreover, different plants are maintained for the
cessing of fluid milk and the processing of various
es of manufactured products. The order by its "market
rvice" provisions recognizes this. At most it is a book-
eping detail to determine to which type of plant and
what utilization milk has been put. In plants where
lk is commingled for different uses it is likewise a
tter of bookkeeping detail to determine what percentage
milk goes into each use class, a method long used by
ndlers paying a "blended" price to producers and which
ust be done under the order (Art. VI). Producers
uld be paid a minimum price based upon a classified
e plan with the ultimate amount received dependent
on the use to which the handler to whom they sold
t the milk, without the need of any equalization plan
contained in this order. The equalization fund is an
cident not of the minimum class prices, but of the plan
hereby handlers pay each producer a uniform price,
respective of utilization (Government's brief, p. 27).

The argument, moreover, has no possible application
co-operatives such as this appellee, whose members
l their milk directly to stores and consumers and get
net proceeds of such sales, without their milk being
d to any handler.

The Government urges (p. 124) that the payments to
producer settlement fund deprive handlers of nothing.
is ignores that to compel payments into the equalization
ol by this appellee directly takes from its members,
ich it represents, a portion of the net proceeds of their

milk to be paid over to other producers. There could be no more direct taking of property.

The Government argues that "the equalization payments are essentially fair because they provide for a mutuality of burdens and benefits" (p. 126). This begs the question which is whether, consistent with due process, Congress can take a part of the property of one person and turn it over to another, so that one who has managed to avoid the "burden" prevailing in some industry may be forced to assume such "burden".

The contention is advanced (p. 124) that this appellee may not complain as the proceeds of its members' milk would not have been as great but for the order. This proposition is of no import. The sales of the milk of this appellee's members are not regulated by the order. Whether or not the price has risen since the order, it is an unregulated price. There is nothing to show these competitive prices have been raised by reason of the order. This is in no wise a case where a person has voluntarily sought advantages offered by the terms of some law and afterward tries to attack its validity. Irrespective of the price at which the milk is sold, it is an unregulated price, and to compel the members to pay over a portion of the proceeds of those sales to other producers is to take their property.

To compel this appellee to make payment to the producer settlement fund would invalidly interfere with the liberty of making lawful contracts between it and its members.

The producer settlement fund is a means of obligating all handlers to pay no more and no less than the uniform price to producers (Government's brief, p. 27). To compel this appellee to make payments into the fund is to

compel its members and it to carry on business as if it were purchasing their milk.

The co-operative does not purchase its members' milk, but markets it as agent for them, as sanctioned by the Co-operative Corporations Law of New York. This mode of marketing has long been encouraged by the Federal and State authorities.

To compel the co-operative and its members to operate as if the co-operative purchased its members' milk, although its members desire to market their milk without any sale to the co-operative, is an arbitrary interference with the right of the co-operative and its members to conduct their business in the lawful manner in which they desire to conduct it and an arbitrary interference with their liberty to make lawful contracts contrary to the Fifth Amendment. *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253, 261.

The equalization fund is not a regulation of interstate commerce.

The order and the statute are valid only if a regulation of interstate commerce. The power to fix prices of merchandise handled in interstate commerce may be assumed for the argument. But, to compel some producers to share the receipts of their milk with other producers has no possible relation to the regulation of interstate commerce and "the commerce power is as much dependent upon the type of regulation as its subject matter". *Virginian Ry. Co.* v. *System Federation*, No. 40, 300 U. S. 515, 557.

The cases relied upon by the Government do not sustain the equalization scheme.

New England Divisions Case, 261 U. S. 184, and *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, involved

statutes providing for a division of the income of railroads so that each received a fair return. The statutes were sustained as valid upon the proposition (*Dayton-Goose Creek Ry.* case, p. 481) that a person investing in a public utility is entitled to at least and no more than a "fair and reasonable profit".

The present case is much different. No one has yet suggested that a farmer engaged in the producing and selling of milk is engaged in a public utility and this Court in *Nebbia* v. *New York,* 291 U. S. 502, ruled to the contrary; nor is there anything in the present statute or order guaranteeing a fair return and no more to any milk producer or handler.

Mountain Timber Co. v. *Washington,* 243 U. S. 219, and *New York Central Railroad Co.* v. *White,* 243 U. S. 188, were workmen's compensation cases compelling employers to contribute to a common insurance fund. *Noble State Bank* v. *Haskell,* 219 U. S. 104, and *Abie State Bank* v. *Bryan,* 282 U. S. 765, involved common funds for the insurance of deposits in banks. In those cases, every person contributing to the funds received a benefit commensurate with his contribution, namely, an amount of insurance equivalent to the amount paid into the fund. Furthermore, payments into such insurance funds are operating costs which may be passed on to the general public. There is nothing like that in the present situation where the fund directly takes a portion of the proceeds of the sales of the milk of the members of this cooperative and turns them over to other producers who have a less lucrative market for their milk.

POINT III

The statute invalidly delegates to producers the legislative power of Congress.

The statute is not self-operative. The Secretary of griculture issues orders to carry the act into effect. ec. 8c[1]). Orders like that herein are to be effective ly after a designated percentage of milk producers prove them. When 50% of the handlers in the market- g area sign a marketing agreement regulating the ndling of milk in the same way as a proposed order, e order nevertheless is not effective unless approved a designated percentage of producers (Sec. 8c[8]). oreover, even though more than 50% of the handlers fuse to enter into marketing agreements, any proposed der necessarily becomes effective if approved by the signated percentage of producers and if the Secretary, th the approval of the President, determines the refusal handlers to sign the marketing agreement, tends to event the effectuation of the policy of the statute and at the order is the only practical means of advancing e interests of the producers (Sec. 8c[9]).

The act provides for a referendum to aid the Secretary ascertaining the producers' desires (Sec. 8c[19]). The der was issued upon the basis of such referendum (R. 253).

Under the act, the Secretary merely submits a proposal the producers for their approval. The event which ves the proposal the effect of law is approval by the ecessary percentage of producers, whether ascertained referendum or otherwise.[1]

[1] In a pamphlet distributed by the Department of Agriculture prior to e referendum (Ex. 8 at par. 13 of stipulated statement of facts) the following appears: "5. Q. What is necessary before the Federal-State pro-

Such delegation to private persons of the power to decide that a certain proposal shall become law so as to be binding, as in this case, upon all producers and handlers of milk is an invalid delegation of legislative power.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, this Court said, holding invalid a statute which permitted a majority of those engaged in an industry to adopt codes binding upon all in the industry (p. 311):

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form."

Mr. Chief Justice HUGHES, in his concurring opinion, stated (p. 318):

> "The provision permits a group of producers and employees, according to their own views of expediency, to make rules as to hours and wages for other producers and employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose."

See also: *Schechter* v. *U. S.*, 295 U. S. 495, 537; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116.

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gram can go into effect? A. Most important is the fact that producers must vote their approval of the plan. * * * Both the Federal and State orders must receive the required producer approval before the program as a whole can go into effect."

In another pamphlet issued by the Department (Ex. 9 at par. 13 of the stipulation of facts) the following appears: "Whether the Federal-State program for regulating the handling of milk in the New York metropolitan marketing area goes into effect, rests largely with the producers themselves. The decision of the producers whose votes are expressed in the referendum to be held will indicate whether dairymen favor the issuance of the order and will determine whether it will be possible to put the order into actual operation."

The codes in the *Carter* case were not prepared by Government officials, but by mine operators and workers. The factual difference that the order in this case was submitted by the Secretary to the producers for their requisite approval is of no legal consequence. The terms submitted to the producers were without validity and of no force until approved by the requisite percentage. The proposal submitted was a nullity of no more consequence than if prepared by a private person. It was the approval of the producers which made a nullity into law, binding upon all in the industry, and so the vote of the producers which was the effectual legislative act which determined whether a mere proposal should become law.[2]

The grave danger of permitting a portion of those engaged in an industry to determine "according to their own views of expediency" what shall be binding law for all in the industry is demonstrated by the figures of the referendum. Of 60,220 qualified producers, 45,644 votes were cast. 7,017 votes were rejected as invalid. Of the 38,627 votes counted, 33,663 votes were for and 4,964 against the proposed order (R. pp. 253, 261). The intervening plaintiff, the League, voted for its members and cast 22,287 votes (R. p. 152; Minutes, pp. 360, 361).

The League makes collective sales as agent for its producers (R. p. 262), and is in competition with this cooperative. The figures show that while the League may not have been able to compel the adoption of an order, its voting strength was such as to prevent the adoption of any order it did not desire. As the Court below pointed out (R. p. 757):

> "So great was the power and voting strength of the Dairymen's League, that no order which it

[2] The proposed order was submitted by the Secretary but its terms were prepared not by the Secretary or any government official, but by the intervening plaintiff bargaining agency. (R. p. 253, Exs. 58, 59, A-3).

opposed could be approved, for it controlled more than one-third of the entire number of producers entitled to vote."

The proposed order, as the Court below found, was actively sponsored by the League which initiated the program leading to its adoption (R. pp. 152, 153). It is an order which fits in exactly with the method by which the League was carrying on its operations so as to give to the League various competitive advantages over other handlers, as the Court found (R. pp. 135-139).[3]

By delegating to the producers the determination of whether certain proposals should become law competitors of this co-operative were given the power of determining how the milk industry should be conducted in this area. As was to be expected, those competitors sponsored and by their vote compelled the adoption of an order which gave them as many advantages as possible.

The decision of this Court in *Currin* v. *Wallace*, 83 L. Ed. 413, does not overrule the principle of the *Carter* case. That case sustained the validity of the Federal Tobacco Inspection Act, 49 Stat. 731-735. The act empowered the Secretary of Agriculture to establish standards for tobacco and to designate auction markets where tobacco moved in interstate commerce. Before designating any market, the Secretary was to determine by referendum the desire of tobacco growers who sold tobacco on such market. No market was to be designated unless two-thirds of the growers voting favored it. Nothing in the statute required a designation, however, though two-thirds of the growers did express their approval.

The difference between the Tobacco Act and the present act is vital. The approval of the tobacco

[3] The Court's findings are amply sustained by the proof (R. pp. 263, 264, 330, 331, 332, 334, 357, 373, 374, 742, Exs. 11, 12, 13, 46, 54, 81, 82, Exs. 21, 23, 24, 23-K, 23-L, 23-M to stipulated facts).

growers was purely advisory since, irrespective of their approval, the Secretary was not bound to designate any auction market as subject to the statute. Quite to the contrary the proposal submitted to the producers "shall become effective" when the requisite percentage vote in favor thereof (Sec. 8c[9]).

In the *Currin* case this Court pointed out: "This is not a case where a group of producers may make the law and force it upon a minority." That is exactly this case, for here the approval of the requisite percentage of producers may and did "make the law" which became binding on all in the industry. The Government argues (p. 118) that since it was not necessary to hold a referendum, and the Secretary might have ascertained the approval of the requisite percentage of producers in another way, there was no unlawful delegation. That is besides the point. The Secretary did choose the referendum method. What is important is not the method chosen to ascertain the producers' wishes, but that their approval, no matter how ascertained, was the act given the quality of changing a mere nullity into binding law.

The Government cites *Cusack Co.* v. *City of Chicago*, 242 U. S. 526. In the *Cusack* case, this Court had before it an ordinance which prohibited the erection of billboards on certain blocks but permitted the prohibition to be modified with the consent of the property owners on any block. This Court ruled that a property owner upon such block could not complain as to the provision permitting the modification of the ordinance by the consent of the property owners as he could not be injured thereby but could only be helped by acquiring a greater use of his property than he would have had but for the provision permitting the modification of the ordinance.

The present statute is vitally different, for here the manner in which this appellee may conduct its business is left to the determination of other producers who are its direct competitors and who are thus enabled to and in this case did adopt an order favorable to themselves.

POINT IV

The statute invalidly delegates the legislative power of Congress to the Secretary of Agriculture.

The statute delegates powers to the Secretary of Agriculture in respect of agricultural products similar to those granted to the President under the National Industrial Recovery Act. The Secretary is empowered to fix minimum prices to be paid to producers for milk and provide for the equalization in one of various ways of prices paid by all handlers to all producers.

The only guide is that the order to be issued shall "tend to effectuate the declared policy" of the act, Section 8c(3), namely, to raise the purchasing power of agricultural products to their pre-war level, Section 2(1), while likewise protecting "the interest of the consumer" by approaching the desired level of prices "at as a rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets", Section 2(2).

Under Section 8c(18): "Whenever the Secretary finds * * * that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period * * * are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk * * * he shall fix such

prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest."

The statute contains no definite standard to which the power delegated to the Secretary must conform and the attempted delegation is invalid. *Schechter* v. *U. S.*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

POINT V

The statute and the order, by regulating the prices to be paid for an agricultural commodity, regulate a matter of local concern beyond the powers of Congress.

The statute and order have for their purpose the creation of higher prices for agricultural commodities (Sec. 2). The order does not regulate the movement of milk in interstate commerce. The sole element regulated is the price to be paid to producers for milk sold in the marketing area upon the theory that such milk comes into the area by way of interstate commerce or competes with milk that has so come into the area. The order seeks to give producers a higher price than they would receive through the operation of supply and demand. If Congress may regulate by providing for a higher price, then it manifestly could regulate by providing a maximum price which producers could charge and, by raising and decreasing the price level, bring about increases or decreases in the volume of production.

The only thing here regulated is the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant. The regulated transaction is fully completed before any interstate commerce begins, just as the transactions sought to be regulated in *Schechter* v.

U. S., 295 U. S. 495, 543, commenced only after interstate commerce had fully terminated.

The prices which a dairy farmer may receive for his milk have no more relation to the flow of interstate commerce than had the hours and wages received by the employees of the slaughter house in the *Schechter* case. In that case the Court said at pages 548-549:

> "The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce."

The Government (pp. 95-101) relies on cases such as *Tagg Bros.* v. *United States*, 280 U. S. 420; *Board of Trade* v. *Olsen*, 262 U. S. 1; *Currin* v. *Wallace*, and *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50. To regulate rates and practices, in stock yards, grain exchanges, tobacco auction markets or grain warehouses, which are conduits through which pass commodities being handled in interstate commerce, is a true regulation of the movement of interstate commerce, and not at all like the regulation in this case, which is like that in the *Schechter* case.

If Congress may regulate the prices which a dairy farmer may charge for his product, because it is subsequently shipped in interstate commerce or competes with milk so shipped, it would appear equally in the power of

Congress to regulate all details respecting the production of such milk and so take from each community or State the power of controlling the sanitary conditions under which its milk supply is to be produced. Likewise Congress would seem free to fix the wages which a dairy farmer must pay his hired hands.

It is one thing for Congress to regulate the labor relations existing between a vast multitude of small farmers each of whom may employ at the most one or two hands[1] and an altogether different proposition to regulate an industry such as was before the Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, an organization which was operated "on a national scale" so that its "relation to interstate commerce (was) the dominant factor" in its activities (p. 41). The Court in that case pointed out (p. 37):

> "Undoubtedly the scope of this power (to regulate interstate commerce) must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

In *Schechter* v. *U. S.*, 295 U. S. 495, 554, Mr. Justice CARDOZO, in his concurring opinion, said:

> "I find no authority in that grant (the power to regulate interstate commerce) for the regulation of wages and hours of labor in the intrastate transactions that make up the defendant's business."

The regulation here does exactly that which this Court ruled may not be done, for it regulates the minute trans-

[1] Statistical Abstract of the United States, 1937, U. S. Dept. of Commerce, p. 55, shows that in 1930 there were 6,012,012 farmers, and 2,732,972 paid farm laborers.

actions of a multitude of small dairy producers, transactions fully completed before interstate commerce commences.

The regulation of prices at which a dairy farmer sells his product was recently held by this Court to be a matter of local concern, even though his milk was delivered to a plant, all of the receipts of which were shipped into another state for consumption. *Milk Control Board* v. *Eisenberg Farms*, 83 L. Ed. 495, decided Feb. 27, 1939.[2]

In *United States* v. *Butler*, 297 U. S. 1, this Court, condemning as invalid portions of the Agricultural Adjustment Administration Act, which the present act supersedes, said:

> "It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government."

The present statute and order, under the pretext of regulating interstate commerce, fix the prices to be paid producers for milk, which is an exercise of the power to control the production of milk, a matter purely of local concern, by raising or lowering prices. Nothing in the statute or order in any way seeks to regulate the movement of milk in interstate commerce. Just as Congress may not need the guise of its taxing power to regulate a matter of local concern, so it is denied that power under the guise of regulating commerce. *Hammer* v. *Dagenhart*, 247 U. S. 231.

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[2] There is no warrant for the fear expressed in the Government's brief (pp. 103-105) that unless the Federal Government regulates the price of milk sold to be shipped into another State, the price must remain unregulated. The decision in *Baldwin* v. *Seelig*, 294 U. S. 511, is no basis for such assumption. That case decided New York could not set up what was in effect a tariff barrier against the products of other States and not that a State might not regulate prices of milk sold by its producers in such State because such milk was to be ultimately shipped to another State for utilization. The *Eisenberg Farms* case sustains such power in the State.

POINT VI

The Secretary of Agriculture improperly permitted co-operatives to vote for their members without first ascertaining their wishes.

The statute provides (Sec. 8c[19]):

> "For the purpose of ascertaining whether the issuance of an order is approved or favored by producers * * * the Secretary may conduct a referendum among producers."

Under Section 8c(12) the Secretary is to

> "Consider the approval or disapproval by any cooperative association * * * as the approval or disapproval of the producers who are members of * * * such cooperative association."

The referendum is to be conducted to ascertain "whether the issuance of an order is approved or favored by producers" and it is fair to assume that Congress intended the officers of any co-operative to ascertain the wishes of its members before casting their votes. In this case, one co-operative, the intervening plaintiff, the League, cast sufficient votes to control the referendum. A chronology of events makes clear that the League's officers cast its votes without first ascertaining the viewpoint of its members.

On July 8, 1938, letters were sent to the co-operatives operating in the milkshed advising them of the steps requisite to qualify them to vote for their members, and requiring them to have certain information in the hands of the Secretary at Washington not later than July 16, 1936 (R. pp. 250, 450-453). As the Court below pointed out (R. p. 758) this left four days for the co-operatives, after

necessary time for the transmission of mail from and back to the Secretary.

On August 15, 1938, the acting Secretary directed the referendum agent to notify the co-operatives which had been ruled qualified to vote of such determination and to instruct them to canvass the sentiment of their producers before exercising the privilege of voting for them (stipulation of facts, par. 23, R. p. 255).

The referendum was commenced on August 19, 1938. An organization such as the League manifestly could not and no proof was offered to show it did, within a period of four days, ascertain the wishes of the 22,287 producers for whom it voted, in respect of a novel and complex regulatory scheme.

The referendum, so far as the intervening plaintiff, the League, is concerned, represents merely the opinion of a handful of officers and not the approval of the 22,287 producers whose votes they cast and without whose votes no order could have been adopted.[1]

---

[1] Counsel for this appellee is advised that the brief on behalf of the other appellees will discuss the proof showing the referendum was conducted after the sending of literature by the Government and proponents of the order, which misstated the contents of the order. As a result the producers did not appreciate the nature of the proposed order on which they were voting so that there was no basis for the Secretary finding that the order was approved by two-thirds of the producers voting. The Court so found (R. pp. 148, 149, 150). The finding is amply supported by the proof (Ex. 66, Exs. 8, 9, 22, 23, 23-A to 23-H, 24, 24-A to 24-D, 26-E to 26-L of stipulated facts)

Appellant's brief treats this issue (pp. 182-187) as if it rested upon the claim that proponents of the order with fraudulent motive sought by false representations to mislead producers as to the nature of the order, and the argument is made that no inquiry may be had into the motives of the Government officials or of the proponents of the order. The proof in this respect was not offered in any wise to attack the motives of the Government officials, nor was there any claim of fraud, in the sense in which that term is used in the common law action of deceit. The proposed order was so complex that it is fair to assume it could not be understood by most producers. This is demonstrated by the necessity of sending "explanations" of the order to the producers. The "explanations" did not correctly state the terms of the order and it is fair to infer that the producers voted for or against such "order" as was described in the "explanations". It follows that the approval indicated by the referendum was an approval not of Order No. 27 but of the "order" as described in the "explanations". From this it also follows that there was no factual basis for the Secretary finding that the order was approved by two-thirds of the producers as that finding was based on the referendum.

POINT VII

The statute does not authorize the market service provisions of the order.

The order, Article VII, Section 6, provides so-called "market service" payments. These are (1) payments from the producer settlement fund to handlers who receive milk at plants equipped only for the receiving and shipping of milk who during any month except October, November and December move such milk to a plant where it is made into a manufactured dairy product, and (2) payments made in respect of milk received at a plant equipped for condensing or drying milk, which during November and December is sold in the marketing area as Class I (fluid) milk.

The second of these service payments is available only to handlers who operate plants equipped for condensing or drying milk. In actual practice both service payments become available by reason of inter-plant shipments made by a handler which has both manufacturing plants and fluid milk plants. In at least one instance (R. pp. 345, 346, Exs. 24, 24A) the handler became entitled to such "market service" payments by shifting milk back and forth between two plants which were within one city block of each other.

This appellee operates no manufacturing plants and is not in a position to seek the second of the market service payments (R. pp. 144, 266).

The statute, Section 8c(5)(7), sets forth all the terms which may be included in an order regulating the marketing of milk. The provision for market service payments is not within or incidental to any of such terms.

To sustain the market service payment provisions appellant relies on Section 8c(5)(Bii) of the act (p. 158)

authorizing the establishment of a uniform price to be paid to producers subject to "a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or all handlers, among producers * * * on the basis of their marketings of milk during a representative period of time". The section does not sustain the market service payments. Those payments have no relation to the price paid to producers and do not enter into the calculation of the uniform price. The section authorizes the fixing of a uniform price and enumerates adjustments to which such price may be subject.

This co-operative is not equipped to receive the second of the market service payments. It is directly injured by the unauthorized provision in the order, for if it be subject to the settlement fund provision, then a portion of the proceeds of its members' milk is taken without statutory authority and turned over to competitors of this co-operative and its members.

POINT VIII

The order improperly seeks to utilize the power of Congress to regulate interstate commence so as to protect an industry in one area of the United States from the competition of the same industry in other areas of the United States.

The primary problem of the milk industry in the New York milk shed has been the production of a surplus over the requirements of the population. *Nebbia* v. *New York* 291 U. S. 502, 517. This surplus must be utilized for manufactured products which compete with dairy products produced in other areas of the country where costs of production are lower.

The order fixes the prices to be paid producers for milk which is to be utilized for manufactured products at such levels as to enable handlers who are manufacturers to compete with manufactured dairy products produced in other areas. The pamphlet of the Department of Agriculture (DM-8 at p. 10) issued October, 1938, reads in this respect: "These prices are set up so as to enable the manufacturer of products made from these lower classes of milk to compete without undue advantage or disadvantage with the same products made from milk not qualified for the New York market." (See also appellant's brief, p. 19.)

The proof also is that the market service payments provided by the order enable handlers to utilize milk produced in the New York shed for manufacturing purposes when otherwise milk or cream for such purposes would be purchased from some western source (R. p. 355).

The order thus protects the manufacturer in the New York area from the competition of manufactured products produced in other areas of the country. The statute does not authorize an order with such regulatory provisions. The aim of the act is to raise the level of milk and other agricultural prices, not the protection of handlers in one section of the country against competition from handlers in other sections.

Congress, moreover, has not been granted the power to protect persons engaged in industry in one portion of the country against the legitimate competition of those engaged in the same industry in another section of the country where production costs may be lower. The attempt of the Secretary so to do is in no sense a legitimate regulation of interstate commerce. At best it is an attempt to exercise a power not granted to Congress under the pretext of regulating interstate com-

merce and this may not be done for "it is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted". *United States* v. *Butler*, 297 U. S. 1, 68.

POINT IX

Equitable relief was properly denied to enforce an order which was prepared by and enacted as a result of the efforts of one group of handlers, the intervening League and bargaining agency, and which order was designed to give to such handlers advantages over their competitors including this co-operative. The order moreover invalidly discriminates in favor of such handlers.

The Court below found: (A) The order was issued as a result of the program of the intervening plaintiff, the League, which had sufficient votes to control the referendum. (B) The League sponsored the order and the bargaining agency submitted the order to the Secretary. (C) The League and the bargaining agency carried on a coercive campaign to compel handlers to acquiesce in the order. (D) The bargaining agency and the League conspired to convert the provisions of the statute into instruments of coercion, restraint of trade and monopoly and in furtherance of such conspiracy procured the issuance of the order (R. pp. 150, 151, 153).

The order grants substantial payments to organizations which move milk between fluid and manufacturing plants exactly as they did prior to the order as part of their normal operations (R. p. 352).

The order does not regulate the prices to be paid for milk sold outside the marketing area. Such milk is paid for at prices reached by agreement between producer and handler and need not be accounted for under the order.[1]

The order fits in with the manner in which the League carried on and carries on its business and, as the Court below found, results in great competitive advantages to the League (R. pp. 135-139). Whether the League in putting through its program committed any technical violation of anti-monopoly statutes or any other technically illegal act is of no particular moment. The important element is that it prepared and by its efforts caused the adoption of an order which gave to it advantages which others would not have under the order. The only fair inference to be drawn is that it was acting to secure and secured an order drawn not for the benefit of producers in general but for its own benefit.

In short, the order sought to be enforced was conceived, prepared and put into effect as a result of the program of and the vote of the intervening plaintiff, the League, acting at times through the intervening plaintiff, the bargaining agency, which by means of the order gained discriminatory advantages over its competitors.[2]

The order thus gives substantial advantages to a group of producers in the same class as this defendant, but who sell outside as well as inside the marketing area and

[1] It is of some significance that Order No. 4 regulating the marketing of milk in the Boston area does regulate the out-of-market sales and requires handlers to account therefor under the order (Order No. 4, Article IV).

[2] Counsel for this appellee has been advised that the facts upon which the findings of the Court below, referred to herein, were based will be fully discussed in the brief of the other appellees who raised this issue. For this reason they are not here discussed. The proof amply sustains the findings of the Court (R. pp. 263, 264, 276, 277, 278, 284, 288, 334, 365, 369, 370, 374, 375, 378, 379, 396, Exs. 11, 12, 13, 46, 54, 59, 60, 61, 67, 67-A, 67-B, 77, 81, 82, Exs. 21, 23, 23-H, 24, 24-A to 24-E of stipulated facts).

who also manufacture milk. Manifestly it is the larger co-operatives as contrasted to smaller organizations such as this co-operative that are able to deal in various markets and to maintain both manufacturing and fluid milk plants (cf. appellant's brief, p. 52). To differentiate between persons in the same class so as to give added advantages to those with the greater resources would seem a discriminatory, unreasonable and arbitrary classification and so a denial of due process to those discriminated against. *Lepper* v. *Texas*, 139 U. S. 462.

The Government argues appellees have no standing to attack the reasonableness of the order's terms without first petitioning the Secretary of Agriculture to modify the order (p. 172). This argument has no application to this appellee: (1) It claims to be exempt from the order and could not consistently seek any relief thereunder. (2) It does not attack the order on the basis of unreasonableness but on the claim the order is not in accord with the act and is unconstitutional in its entirety. (3) It attacked the constitutionality of the act itself, a question which could not possibly be heard by the Secretary. (4) It sought no judicial relief of any kind and so is not within the rule that resort may not be had to the Courts for judicial relief until all available administrative remedies are exhausted.

Under the circumstances, it would in any event be contrary to good equity to grant equitable relief. The granting of the injunctive relief sought would serve to further the plan worked out and put into effect by one group of producers for their own benefit, so that the Court properly withheld equitable relief, which is always a matter of discretion. *Di Giovanni* v. *Camden Fire Insurance Co.*, 296 U. S. 64, 73.

POINT X

The order must be deemed never to have become effective in view of the invalidity of the state order to which it was intended to be complementary.

The statute, Section 10(i), authorizes the Secretary "to confer with and hold joint meetings with the duly constituted authorities of any State" and to issue orders "complementary to orders or other regulations issued by such authorities".

The order was voted on in the referendum as an order to be complementary to a State order regulating the marketing of milk in the marketing area and was issued by the Secretary, to be effective as such complementary order.

The order itself shows that it was preceded by hearings conducted jointly by the Secretary of Agriculture and the authorities of the State of New York. Article X conditions the effectiveness of the order upon the existence of the State order to which it is intended to be complementary, and reads that: "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary."

The literature sent to producers prior to the referendum likewise makes clear that the proposal on which the producers voted was a proposed joint "Federal-State Program" (Exs. 8, 9 at par. 13 of stipulation of facts).

On February 21, 1939, after the trial herein, the State order to which the Federal order was intended to be complementary was held invalid, *Noyes* v. *Erie & Wyoming Farmers Co-operative Corp.*, 170 Misc. 42. Advance

Sheets, March 11, 1939, a decision of the New York S preme Court, Special Term, Albany County. Since th decision the State order has been suspended.

The Federal order was voted upon and issued upo the basis of being complementary to an existing Sta order, and as there is no State order, unless the decisio of the Special Term be reversed, it follows that th Federal order either never became effective or else mu be deemed to have terminated with the invalidation o the State order.

CONCLUSION

The decree appealed from should be affirmed.

Respectfully submitted,

LEONARD ACKER,
Counsel for Appellee Central New York
Co-operative Association, Inc.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 771.

UNITED STATES OF AMERICA,
Appellant,

v.

ROCK ROYAL CO-OPERATIVE, INC., *et al.*,
Appellees.

On Appeal from the District Court of the United States for the Northern District of New York.

BRIEF

for

ROCK ROYAL CO-OPERATIVE, INC.,
JETTER DAIRY COMPANY, INC.,
and
SCHUYLER JUNCTION, NEW YORK, MILK SHED CO-OPERATIVE, INC.

WILLARD R. PRATT,
Attorney for Appellees, Jetter Dairy Co., Inc., Schuyler Junction, New York, Milk Shed Co-operative, Inc., Counsel for Rock Royal Co-operative, Inc.,
Office and P. O. Address,
201-202 U. G. & E. Bldg.,
Utica, New York.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1939

Index.

	Page
Statement	1
Parties to the Appeal	1
The Statute and Regulation Involved on this Appeal	2
Questions Presented	3
Proceedings Below	6
Argument	10
Constitutionality of the Act, as Applied in Order No. 27	10
Point I	10
The Order is an arbitrary and discriminatory regulation, and an unwarranted and unconstitutional interference with the individual liberty of the several appellees	10
A. The Order, by regulating all of the business of appellee Jetter, and only parts of the business of the League, Bordens and Sheffields (and that in varying degrees), gives discriminatory competitive advantages to the latter	12
B. Competitive advantages under Article VII, Section 1, to proprietary handlers operating in other markets	14
C. Competitive advantages under Article VII, Section 1, to co-operative distributors operating in other markets	18
D. Competitive advantages under Article VII, Section 5, to co-operative distributors	23
E. Competitive advantages under Article VII, Section 6, to large distributors, whether co-operative or proprietary	38
F. Discrimination in favor of co-operative distributors by exemption from paying producers the uniform price	43

Page

G. The order by its arbitrary and discriminatory regulation, deprives appellees of liberty and property without due process. It takes their property for (an alleged or) a public use and transfers it to others without just compensation 47

H. The provisions of Article VI, Section 8, are discriminatory as against appellees, Rock Royal and Schuyler Junction 52

I. Summary 56

J. The competitive advantages to certain handlers were employed directly to discriminate against appellees 58

K. The Order could have treated all handlers equally or nearly so. It need not have discriminated between either dealers or producers 66

Point II 67

The discriminatory provisions of the Order referred to in Point I, are not authorized by the Act. They are confiscatory. They take the property of appellees for (an alleged or) a public use and transfer the same to others, without just compensation, contrary to the Fifth Amendment 67

A. The defense that these provisions are unauthorized, is properly raised by appellees in their pleadings 68

B. The terms and provisions complained of, are not authorized by the Act 72

C. The terms objected to, take the property of appellees for an alleged public purpose and transfer the same to others, without just compensation 75

Page

D. The taking of moneys of appellees for an alleged public use, and transferring the same to others, without just compensation, is violative of the Fifth Amendment . 78

E. No relief was obtainable by application to the Secretary for review of the Order 87

F. The Dairymen's League, as a co-operative was not entitled to the discriminatory benefits allowed by the Order 87
Co-operatives in general 89

G. There is no decision of a lower Court passing on the questions here raised, except the case at bar 92

H. The Court properly refused to grant the injunction 94

Point III 95

The referendum, on which the Order is predicated, is a nullity 95

Appendix A 106

CITATIONS

Cases:

	Page
Aetna Insurance Co. v. Hyde, 275 U. S. 440, 447	79
Airway Corp. v. Day, 266 U. S. 71, 85	86
A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495	96
Borden Co. v. Baldwin, 293 U. S. 194, 210	86
Butler v. United States, 78 Fed. (2) 1, aff'd 297 U. S. 1	96
Concordia Ins. Co. v. Illinois, 299 U. S. 535, 545	86
49 Corpus Juris, page 182, Section 202	69
49 Corpus Juris, page 182, Section 200	69
Curran v. Holyoke Water Power Co., 116 Mass. 90, 92	94
Currin v. Wallace, unreported	84, 86, 92
DuPlex Printing Co. v. Deering, 254 U. S. 443	88
Frost v. Corporation Commission, 278 U. S. 515 (1929)	89
Great A. & P. Tea Company v. Grosjean, 301 U. S. 412	92
Great Northern Ry. v. Washington, 300 U. S. 154	86
Hegeman Farms Corp. v. Baldwin, 293 U. S. 167 170	80
Joy v. St. Louis	94
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 589, 602	84
Milbank v. Jones, 127 N. Y. 370, 375, 376	70
Moore's Federal Practice, 1938 edition, Vol. 1, page 568	69
Monongahela Navigation Co. v. United States, 148 U. S. 312, 336	84
Morrison v. Work, 266 U. S. 481, 490	94
Nebbia v. New York, 291 U. S. 502, 536	80, 86
People v. Schoemaker, 228 A. D. (N. Y.) 314, aff'd 254 N. Y. 567	32
Railroad Retirement Board v. Alton, 295 U. S. 330	82

Page

Railroad Retirement Board v. Alton R. Co., 295 U. S. 330 83
Smyth v. Ames, 169 U. S. 466 (1897), 525 79
St. Louis & San Francisco Railway v. Gill, 156 U. S. 649, 657 79
Thompson v. Consolidated Gas Utilities, 300 U. S. 55 82
United States v. Butler, 297 U. S. 1 82
U. S. v. Whiting Milk Co., 21 Fed. Supp. 321 93
U. S. v. H. P. Hoods & Sons, unreported 93
U. S. v. Krechting, unreported (Ohio case) 93
U. S. v. Babcock Dairy Co., unreported 94
U. S. v. Beraneck, unreported 94
Virginian Ry. v. Federation, 300 U. S. 515 94
Willard v. Tayloe, 8 Wall. 557, 565 94

Statutes:

Title 7, U. S. C. A., Secs. 601, *et seq.* 2
Title 7, U. S. C. A., Secs. 608c (6) 67
Federal Trade Commissions Report, House Document, 95 32
Title 7, U. S. C. A., Sec. 8c (5) (B) (ii) 73
Title 7, U. S. C. A., Sec. 8c (5) (A) 72, 75
Title 7, U. S. C. A., Sec. 8c (5) (B) 73
Title 7, U. S. C. A., Sec. 8c (5) (C) 73, 74, 75
Title 7, U. S. C. A., Sec. 8c (5) (F) 74
Title 7, U. S. C. A., Sec. 8c (15) (B) 87
Clayton Act, 38 Stat. 730, 15 U. S. C., Sec. 17 88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 771.

UNITED STATES OF AMERICA, *Appellant*,

v.

ROCK ROYAL CO-OPERATIVE, Inc., *et al.*, *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for Rock Royal Co-operative, Inc., Jetter Dairy Company, Inc., and Schuyler Junction New York Milk Shed Co-operative, Inc.

STATEMENT.

Parties to the Appeal.

The appellant, United States of America, in this case was plaintiff in the Court below. Three additional parties plaintiff were added by intervener, viz:

a. Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, herein referred to as "Commissioner."

b. Dairymen's League Co-operative Association, Inc., herein referred to as "Dairymen's League" or "League."

c. Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., herein referred to as "Bargaining Agency."

The appellees are:

a. Rock Royal Co-operative, Inc., herein referred to as "Rock Royal."

b. Schuyler Junction New York Milk Shed Co-operative, Inc., herein referred to as "Schuyler Junction."

c. Jetter Dairy Company, Inc., herein referred to as "Jetter."

d. Central New York Co-operative Association, Inc., herein referred to as "Central Co-operative."

In the appellant's brief, the term "appellees" is employed solely with reference to Rock Royal, Schuyler Junction, and Jetter from page 41 to the end, and elsewhere.

Central Co-operative, the remaining appellee, proceeded upon a different theory and raised different issues than those presented by the appellees represented in this brief. The word "appellees" is used in this brief to refer only to those here represented.

The Statute and Regulation Involved on This Appeal.

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), Title 7, U. S. C. A., Secs. 601, *et seq.*, hereinafter referred to as the "Act."

The regulation involved is Order No. 27, Order • • • Regulating Such Handling of Milk in the New York Metropolitan Marketing Area As Is In Interstate Com-

merce, and As Directly Burdens, Obstructs, or Affects Interstate Commerce, issued on August 5, 1938 (effective September 1, 1938), by the Secretary of Agriculture of the United States pursuant to the provisions of the Act, and is hereinafter referred to as "The Order" (The Order printed R. 11 to 24, incl.).

Questions Presented.

The issues raised by appellees present no challenge to the general power of Congress to regulate the marketing of milk by a marketing order. The challenge is to the application of the statute as applied in Order No. 27, and to Section 8 (5) (F) of the Act, if the Court should hold the manner of its application in the Order as mandatory under the Act.

Judge Cooper, in his opinion (R. 751), said:

> "The laudable purpose of the statute to procure for farmers prices for their milk commensurate with their purchasing power at specified periods of better balance of purchasing power is not criticized or condemned. Nor is there any denial that the production or sale of milk presents peculiar problems due in part to excess supply at certain times and almost scarcity at others.
>
> "The challenge is to the means set up in the statute and order for dealing with the conditions. These means constitute, defendants claim, such gross discrimination as to drive defendants out of business and confiscate their property by the arbitrary discrimination therein provided and without any lack of efficiency on the part of the defendants."

Appellees do challenge the provisions of Section 8c (19), as amended, as an invalid delegation of legislative power to co-operative corporations (Fifth affirmative defense, Jetter answer, R. 100, 101).

Chief among the issues raised by the appellees, are the following:

1. Whether the provisions of the Act, as applied in Order No. 27, are a valid exercise by Congress of power to regulate interstate commerce.

2. Whether the Act as applied in Order No. 27, hereinafter referred to as "The Order," deprives appellees of liberty or property without due process, in violation of the Fifth Amendment.

For brevity, the Constitution of the United States will be referred to herein as "The Constitution," and the Fifth Amendment to the Constitution will be referred to as "The Fifth Amendment."

3. Whether the Order, as promulgated, was authorized by Section 8 (5) (F) of the Act, which provides that a co-operative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, shall not be prevented from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers; and, if the Order is so authorized, whether the same deprives the appellees of liberty or property, without due process, in violation of the Fifth Amendment.

4. Whether, notwithstanding the Findings by the Secretary of Agriculture in support of all the terms and conditions contained in the Order, the validity of the Order as applied was the subject of adjudication by the Trial Court.

5. Whether there was a valid determination of the Secretary of Agriculture, approved by the President, that the Order was favored by at least two-thirds of the producers who, during the representative period determined by the Secretary, were engaged in the production of milk for sale in the marketing area. Appellees asserted that the referendum conducted by the Secretary was a nullity; that it did not comply with the statute; that such vote as was had in favor of the Order, was

induced by misrepresentations as to the terms and effect of the Order, and did not in any sense, reflect the actual approval or disapproval of the producers with reference thereto.

6. Whether the Order, and particularly certain alleged discriminatory provisions thereof, are authorized by the Act, and if so, whether the Order, and the Act as applied therein, constituted an arbitrary discriminatory regulation, depriving appellees of liberty and property without due process, contrary to the Fifth Amendment.

7. Whether the Order, and the Act as applied therein, takes the property of appellees for (an alleged or) a public use, and transfers the same to others without just compensation in violation of the Fifth Amendment.

These propositions will be set out in detail in the argument. They involve the claim that the Order, by its terms, and the Act as applied, constitute a regulation solely in the interests of private monopoly and against producer interests, contrary to the declaration of policy and clear intent of the Act, and contrary to the Fifth Amendment to the Constitution of the United States.

Appellees also maintain that certain of the discriminatory provisions complained of are without authority in the Act. Appellant contends these issues are not available to appellees. This is discussed *infra* (pp. 10 *et seq.*).

However, this is not necessary to support the judgment appealed from. The Court's decision is based on discrimination; the taking of appellees' property without due process and without compensation; the unconstitutional interference with the liberty of the several appellees; and the fact that the referendum vote was secured by misrepresentation, and was a nullity.

Appellees do not challenge, nor did the Court review, the administrative Findings and Conclusions of the Secretary (other than as based on the referendum vote).

Proceedings Below.

This action was commenced, under authority of 7 U. S. C. A., Sec. 608a (6) as amended, by the United States of America, October 27th, 1938, against appellees, Rock Royal, Central Co-operative, and Schuyler Junction, for a mandatory injunction restraining appellees from handling milk in violation of the Order, and requiring appellees to comply therewith. Appellees are all co-operative corporations of milk producers. (A separate brief is presented on behalf of Central Co-operative.)

November 23, 1938, the Government commenced an action against the appellee, Jetter, a proprietary handler or milk dealer, in the same Court in an almost identical action, seeking identical relief.

December 2, 1938, the two cases were consolidated (R. 61).

Holton V. Noyes, as Commissioner, etc., intervened as a party plaintiff, and on December 15th, filed a complaint in the consolidated cause (R. 55).

Appellees, Rock Royal, Jetter and Schuyler Junction, duly filed answers; admitted the issuance of Order No. 27 by the Secretary of Agriculture (herein referred to as "Secretary"), and the issuance of Official Order No. 126, by the Commissioner; denied the allegation in plaintiff's complaint (Paragraph IX, Rock Royal complaint, R. 3, and Paragraph VII, Jetter complaint, R. 42), that Order No. 27 contained "the terms and conditions authorized by the Act, *and no others*" (Rock Royal answer, Paragraphs First and Ninth, R. 63; Jetter answer, Paragraph Third, R. 85, and Paragraph Twentieth, R. 87-88); admitted that a purported referendum was conducted by the Secretary and Commissioner; challenged the validity of the referendum on the ground that the legal effect of the Orders was directly contrary to widespread public representations made by the Dairy Section of the U. S. Department of Agriculture, by the proponents of the Order, and others, hereinafter referred to.

Appellees also asserted, as hereinbefore stated, that the Order, and the Act as applied therein, were discriminatory, confiscatory and void as contravening the Fifth Amendment to the Constitution.

The issues thus raised, were pleaded as affirmative defenses in the answers of Rock Royal, Schuyler Junction, and the Jetter amended answer.

Motions to strike the affirmative defenses on the ground that they failed to constitute a legal defense, and were redundant, immaterial, impertinent and scandalous (R. 83, 103), were denied (R. 104), opinion thereon (R. 105). The motions were argued December 13 (R. 84), and December 14th (R. 104). Present at the argument of the motions December 13-14, 1938 (R. 84-104), were Seward A. Miller, Esq., attorney for Dairymen's League, and Edmund F. Cooke, Esq., attorney for the Bargaining Agency, who stated to the Court that their clients were interested and involved in the allegations contained in defendants' answers, and that they wished to be heard, and might wish to intervene in the action. Judge Cooper, in his opinion denying the motion to strike, said:

> "It is quite true that the Secretary is not responsible for the acts of the non-governmental organizations but the proposed order was admittedly suggested by the Metropolitan Bargaining Agency, of which the Dairymen's League and others are members and had representation upon its board. It is not so important that the Secretary did not send out such publications as it is whether he had knowledge and whether or not the Referendum vote was induced thereby."
>
> * * * * * *
>
> "The Secretary is not burdened to any extent with defending the acts of these non-governmental agencies, for only evidence as to which there can be little or no dispute will be received and *these agencies can be made parties hereto, if they desire, to present any evidence they desire, but only*

with the consent of the plaintiff." (Emphasis supplied.) (R. 109.)

The statement on page 9 of appellant's brief, that the Bargaining Agency and Dairymen's League intervened "at the suggestion of the District Court," is mistaken, except as above stated.

Thereafter, the Dairymen's League and Bargaining Agency moved and were permitted to intervene as parties plaintiff (motions and order permitting intervener apparently not printed).

The intevener was permitted in order that the Bargaining Agency and Dairymen's League might refute appellees' contention that the Order, and its complementary Order (Official Order No. 126, promulgated by intervening plaintiff, Commissioner Noyes), were designed, proposed and enacted as part of

> "a program or scheme to procure for several large member co-operative corporations (of the Bargaining Agency), including the Dairymen's League, a competitive advantage over proprietary corporations and dealers, including this defendant and others similarly situated, in the purchase and sale of milk, and thereby to discriminate against defendant and said others, and to establish in said Bargaining Agency members and companies dealing with them, a monopoly in the purchase and sale of milk in the Metropolitan Area. Said scheme had as its object, the confiscation of this defendant's property rights without due process, and the denial to it of equal protection of the law, contrary to the Fifth and Fourteenth Amendments to the Constitution" (Amended answer of Jetter Dairy Company, R. 91).

The Government assumes at various places in its brief, that the specific defenses, set out in the Jetter answer, following the above general statement, rest upon the Anti Trust Laws. This is not true. Appellees recognize that the Anti Trust Laws may, in effect, be repealed by other subsequent statutes, such as the Act. The Jetter answer, paragraph Thirty-second (R. 100), states:

"Such discriminatory competitive advantage to defendant's competitors, *tends to create a monopoly in said competitors, over this defendant in the purchase and sale of milk,* and permits some or all of said chief competitors to engage in an actual combination or conspiracy in restraint of trade against this defendant and others in a like situation, *and thereby to confiscate its property and property rights without due process and to deny it equal protection of the law in violation of the Fifth and Fourteenth Amendments.*"

(Order 126, enacted under the New York State statute, Chapter 383, Laws of 1937, was subject to the Fourteenth Amendment.)

Similar defenses are pleaded by appellees, Rock Royal and Schuyler Junction.

Paragraph Sixteenth, answer of appellee Rock Royal (R. 74-75), states:

"Sixteenth. Defendant for a Sixth affirmative defense alleges that it is not engaged in business as a distributor of milk, but acts only as a non-profit co-operative corporation in selling the milk of its producer members and others, if any, who deliver milk to its plant, to distributors for resale in the marketing area, described in said Orders.

"The dealer to whom defendant sells its milk is one of those to whom the discriminatory provisions of the said Orders apply, and thereby said Order No. 27 and Official Order No. 126, by their terms, and by the operation thereof, tend to discriminate against the customer purchasing milk of the defendant and to exclude it from the milk business, and *by such operation, exclude this defendant and its members from the sale of its milk and that of its members, and further tends to create a monopoly in the purchase and sale of milk, in handlers who are given a competitive advantage by the provisions of said Orders, to the exclusion of this defendant and others similarly situated.*"

This defense was based on discrimination, and not the Anti Trust Laws.

However, assuming the invalidity of the Order and the Act as applied therein, under the Fifth Amendment, then the Anti Trust Laws apply to the illegal acts of monopoly and restraint of trade found by the Court.

The Government's brief on this appeal is 200 pages long. Briefs have been, or are to be filed, by the three other appellants. For brevity, and to save repetition, the facts claimed by appellees will be discussed under the point to which they are applicable. The printed record was received by appellees April 14th; appellant's printed brief on April 16th. The case is to be argued April 24th, and appellees' brief must go to the printer April 21st, allowing only five days to brief this long and complicated record. Accordingly, this brief will reply principally to the brief of the appellant, United States.

ARGUMENT.

Constitutionality of the Act, as applied in Order No. 27.

POINT I.

The order is an arbitrary and discriminatory regulation, and an unwarranted and unconstitutional interference with the individual liberty of the several appellees.

Appellees represented in this brief, fall into two classes, viz:

1. Appellees, Rock Royal and Schuyler Junction are producer owned and controlled co-operative corporations. Rock Royal owns and operates one milk receiving station at Rock Royal, N. Y., and, Schuyler Junction operates a milk receiving station at Schuyler Junction, N. Y. Neither is engaged in any manufacturing operation (R. 163).

2. Appellee Jetter, is a New York stock corpo-

ration, operating country receiving plants at Bridgewater, N. Y.; Oriskany Falls, N. Y.; and Solsville, N. Y. It has facilities for separating milk for the manufacture of fluid cream at its Solsville plant.

While there appears to be a difference of interest as between the co-operatives and Jetter, actually, their common interests are almost identical, as will appear hereafter.

The co-operative appellees are of the small type, known in the industry as "independent co-operatives." The Jetter Company is of the type known as an "independent dealer" (R. 134).

Rock Royal and Schuyler Junction dispose of their milk to independent dealers, such as Jetter, which have to meet competition of the large proprietary dealers (handlers), Bordens and National Dairy, as well as that of the Dairymen's League (R. 134-135), which handles 34% of all the milk produced in the area (Stip. Fact ¶48, R. 262).

The practical effect of the Order is to create a monopoly in the sale of fluid milk into the three large groups: viz: Dairymen's League, Bordens and National Dairy (Sheffields). This is accomplished by means of the Order, which was designed to and does give to the three large groups, substantial competitive advantages which can be, *and actually have been, used against appellees in cut-throat price competition.*

Milk has been generally sold by the three large groups, at less than cost to appellee Jetter, and dealers purchasing milk of appellees, Rock Royal and Schuyler Junction. Thereby, the customers of appellee Jetter, and dealers purchasing from the other appellees, were captured. The resale price of milk which they could obtain from such customers as they retained, by meeting competition, was also reduced far below cost. Appellee Jetter, under that condition, had two alternatives. One was to go out of business immediately, or continue

until its capital was wholly exhausted. This would require but a short time.

We will now take up the various discriminatory phases of the Order.

A. The Order, by Regulating All of the Business of Appellee Jetter, and Only Parts of the Business of the League, Bordens and Sheffields (and That in Varying Degrees), Gives Discriminatory Competitive Advantages to the Latter.

Article VII, Section 1 of the Order refers to "Payments to Producers." This section provides that handlers, *other than co-operatives,* shall pay a uniform price for milk sold in the marketing area; *exempts co-operatives* from such provision; *permits a blended price,* which in effect reduces the price paid for fluid milk sold in the area.

Judge Cooper, in the 25th Finding of Fact (R. 132), refers to this provision, quoting Exhibit No. 9, Pamphlet issued by the Dairy Section, U. S. Department of Agriculture (pamphlet printed R. 436; portion quoted, R. 445):

> "25. Handlers selling milk received from producers in the production area, but marketed outside of the marketing area, are under no requirement to pay the uniform price for such milk, nor do they pay into the Producer Settlement Fund for the difference between the uniform price and the actual market value of such milk, or otherwise. Such handlers are permitted to blend prices paid or purported to have been paid for such milk sold in other markets, with the uniform price announced by the Administrator for milk sold in the area, thereby reducing the actual price paid by such handlers, for milk sold in the Metropolitan Area, in competition with milk sold by the defendants.
>
> "The construction placed upon said provisions of Order No. 27 by the Secretary is set forth in a pamphlet issued by the United States Department of Agriculture, Dairy Section, in October, 1938, on the cover of which is printed 'Market Ad-

ministrator, New York Metropolitan Milk Marketing Area, 95 Madison Avenue, New York, N. Y.' Page 14 of said pamphlet states:

"'Uniform Pool Prices for Producers

"'Handlers are required to pay the uniform pool, or blended price, calculated by the Market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class I milk outside of the Marketing Area. In such instance, the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. *For the remainder of each producer's milk, the handler may pay such prices as he sees fit,* but is required to furnish the producer with a statement of the percentage of the producer's milk paid for the uniform price.'

"'Thus, the handler may multiply the total pounds of milk sold by it in the area by the uniform price; multiply the total pounds of milk sold in other markets and which is called "unpriced milk," by "such prices as it sees fit;" add the totals, and divide by the total pounds of milk, to obtain the average of "Blended" price paid producers for all milk. *If the price figured by the handler for unpriced milk is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof.*'" (Emphasis supplied.)

The Government, in its brief, page 26, cites a hypothetical case to show the manner of arriving at the uniform price paid to producers, other than those delivering to co-operative associations.

The case assumes the existence of two handlers, each handling 50% of all milk; that one handler uses only Class 1 milk of the value of $2.50 per cwt.; the other using only milk manufactured into butter at $1.00 per cwt. For each two cwt. of milk utilized, one-half brings $2.50 per cwt. and one-half, $1.00 per cwt., or $3.50 for two cwt. The blended or average price would be $1.75 per cwt.

Theoretically this is the base "uniform price" paid to all producers.

However, the blended or uniform price referred to, would not be the true base price paid to producers. Indeed, there is no general uniformity of base price actually received by producers.

Payments by dealers would fall into three classes, as follows:

1. Small dealers operating only in the marketing area, such as Jetter, which would have to pay the full uniform price.

2. Proprietary handlers operating in other markets, and who can manipulate the uniform price downward, limited only by the amount of sales in other markets.

3. Co-operatives (principally, and possibly, only the Dairymen's League), which are also distributors of milk, operating in other markets, and which also manipulate the producer price downward.

Throughout this case, milk sold in other markets, is referred to as "unpriced milk."

B. Competitive Advantages Under Article VII, Section 1, to Proprietary Handlers Operating in Other Markets.

We will first consider proprietary handlers operating in other markets. As an example, we take the Sheffield Farms Company (Sheffields). This Company sells milk in other markets, notably in New Jersey (details Exhibit 51, R. 675). While milk in the New York market, sold wholesale under the Order, brought only 8 to 9¢ per quart, delivered (Finding 63, R. 145), fluid milk sold wholesale in New Jersey in the dealer-to-store trade, brought 11¢ per quart in rural communities, and 12¢ per quart, in the more populous districts (R. 372).

We refer to wholesale milk, for that is the field in which general price cutting starts. Half of all the milk sold in the Metropolitan Area, is sold in the wholesale or dealer-to-store trade. Concerning this, the Dairymen's League

News of May 17th, 1938, Exhibit 24-A to Stipulation (R. 557) says:

> *"The only price that has remained at the established level is the retail Class 1 milk delivered to homes in the New York metropolitan area* and a relatively small percentage of the total volume of milk produced by members of the Association is sold in this way.
>
> *"Today more than half of all milk sold in the New York metropolitan district is handled through stores"* (Emphasis supplied).

The Sheffield Company, under Order No. 27, was required to account into the pool for fluid milk sold wholesale by it (and retail, as well) at $2.45 per cwt. In computing the price paid by Sheffields to its producers, it was at liberty to put in its unpriced milk at "such prices as it sees fit" (R. 445).

Applying this in a practical manner, in October, 1938, the uniform price was $1.91 per cwt. Sheffield paid its producers $1.87 per cwt. (R. 599). In that month, it reported total purchases of 67,306,590 pounds of milk, of which 7,254,320 pounds were used in fluid or Class 1 outside the market. This is called "unpriced" milk, Exhibit 43 (R. 673). Of the Class 1 milk sold by Sheffields in other markets, it sold 92.88% in New Jersey (Exhibit 51 [R. 676]). It also reported 307,311 pounds of milk in Class 2-A, cream, all sold in New Jersey.

The New Jersey price, fixed by the State Control Board, to producers for milk purchased within the State, for sale in Class 1, was $2.76 per cwt. (R. 372), 31¢ higher than the New York (Order) price. For Class 2-A, the fixed New Jersey price to producers, was $1.95 per cwt. (Defendants' Exhibit 63, recd. R. 372, not printed). Nevertheless, on the total of 7,561,631 pounds of "unpriced" milk sold as above stated (11.23% of the whole), the Sheffield Company reduced its blended price, by 4¢ per cwt. on all of its purchases. The amount of the reduction amounted to $26,922.60. This applied to 7,561,631 pounds of unpriced milk, amounts to $.356 per cwt. on the unpriced milk. Ac-

cordingly, Sheffields bought its unpriced milk at $.356 per cwt. less than the uniform price of $1.91, or at $1.554 per cwt. In other words, Sheffields blended its New Jersey sales of milk, which were actually worth at least $2.76 per cwt. with its other purchases, at $1.554 per cwt., thereby giving it a competitive advantage over handlers whose entire businesses were regulated by the Order.

The apparent, or possible advantage enjoyed by Sheffields in its fluid sales in New Jersey alone (the difference between $2.76 per cwt. and $1.554 per cwt., actual price figured in the blend, amounting to $1.206 per cwt. on 6,737,848 pounds, Defendants' Exhibit 51, R. 676), amounted to $81,257.86. **However, there was nothing in the Order, or the construction put upon it by the Secretary above referred to, to prevent Sheffields and others in a like situation from blending their New Jersey milk at 10¢ per cwt., or any other price calculated to bring the blend down to any competitive figure necessary to enable them to undersell their competitors.**

Sheffields used this competitive advantage to capture the trade of its less fortunate competitors. This is shown at various places in the evidence. Rose Paley testified (R. 290), that she purchased "Breakstone" milk from the Sheffield Company. The "Breakstone" milk was delivered on a Sheffield truck (R. 290). She said:

> "I got a rebate from Breakstone. Somebody from Sheffields comes and pays me every month * * * it comes out to 9¢ a quart. That is, I get 3/4¢ rebate" (R. 290).

She then said:

> "I stopped buying from Grand View Dairy right after the summer; I cannot remember what month. *Breakstone gave me 35 cases of free milk.* I am buying three cases from Breakstone now (R. 291) * * *. I don't like Grand View. *Grand View did not give me any free milk.*"

Witness Lavender testified that he received a rebate from Sheffields of 3/4¢ per quart (R. 293). Receipt form

used by Sheffield employees when giving rebates is Defendants' Exhibit 6 (received in evidence, R. 293, printed R. 654). This receipt was filled out for Lavender to sign. He was busy at the time the money was paid him (R. 293), and neglected to sign the receipt. In addition, Sheffields furnished Lavender 13 quarts of milk, instead of 12 quarts to a case. This was equivalent to an additional rebate of 3/4¢ per quart (R. 293), making his cost only 8 1/4¢ per quart.

Applied to the Class 1 milk sold by Sheffields in the marketing area for October (43,662,117 pounds), Sheffield's competitive advantage in this respect alone, was equal to $.1861 per cwt. on its fluid sales. The amount of gain on the half million pounds of other unpriced milk reported by Sheffields in Classes 1 and 2-A, cannot be figured, but that there was some gain, cannot be doubted.

It will be borne in mind, **that only half of all milk utilized in Class 1 was sold in the wholesale market** (R. 557), **where price cutting and chiseling has prevailed.** Assuming that Sheffield's wholesale and retail business was divided on this basis, **it had a competitive advantage of $.3732 per cwt. on its wholesale business, or slightly more than 3/4¢ per quart. By selling at 9¢ per quart, it could make a little profit and drive its competitors, such as Jetter, out of business.**

Sheffields had other competitive advantages which will be referred to in the discussion of market service payments herein.

It may be argued that appellee, Jetter, has the same right as Sheffields to establish a business in New Jersey. This would, of course, require substantial capital and engagement in a new enterprise in another community.

However, that argument is fallacious. It is comparable to a statute providing that concerns doing business in more than one community, are exempted from taxation, or, contrariwise, that small concerns doing business in one locality only should be taxed double or actually forbidden to engage in business.

This is not a case where Sheffields applies profits made in another community to undersell and eliminate Jetter and others in ruthless competition. **Here, the Order, by its terms, as interpreted by the Secretary, is used by Sheffields to reduce the uniform price paid its producers for milk sold in the area, almost at will.** The actual price paid to producers bore no true relation to the uniform price announced by the Administrator.

Sheffields did (in October) not pay its producers $1.91 for milk sold in New York City. It paid them $1.87 without regard to where it was sold.

Had the Order provided that milk sold in New Jersey should be accounted into the pool at its actual value, and had it been honestly so accounted, the Sheffield Company would not have had the competitive advantage above referred to. Should this Order be sustained, there is nothing to prevent the three large companies, Bordens, Sheffields and the Dairymen's League from destroying their competitors within a very limited period of time.

C. Competitive Advantages Under Article VII, Section 1, to Co-operative Distributors Operating in Other Markets.

Paragraph 47, stipulation of agreed facts in evidence (printed R. 262), states:

> *"The Dairymen's League occupies a dual capacity as a co-operative agent of producers and as a distributor. The Dairymen's League as a distributor sells milk in competition with the defendant Jetter and other distributors including distributors purchasing their supplies from it, and is a factor in the price which defendant Jetter and their competing dealers can demand and procure for fluid milk."*

The League handled 34% of all the milk sold in the area (Par. 48, Stip. Facts, R. 262). In addition, it sold milk in the State of New Jersey and in other markets. Its New Jersey sales for the months of September, October and November, and the effect thereof in reducing

cost of milk sold in the Metropolitan Area, was the subject of Finding No. 39 (R. 136, 137), which was as follows:

"39. The amount by which the price actually paid for Class 1 milk sold in the marketing area was reduced by 'blending' proceeds of New Jersey milk with proceeds of New York milk, as applied generally to the Dairymen's League, was as follows:

	Total volume sold in New Jersey	Difference between New Jersey price and price paid producers
	Pounds	
Sept.	10,208,500	$103,105
Oct.	10,457,153	99,342
Nov.	10,143,275	76,074

"The Dairymen's League, as a distributor, was engaged only in the wholesale or dealer-to-store and dealer-to-institutions trade. Total sales reported by the Dairymen's League of Class 1 milk sold in the marketing area, included its own wholesale business and amounts of Class 1 milk furnished to the Borden Company, delivered to its own stations and milk sold to other distributors. The following is a statement of the total amounts of milk utilized by the League in its own wholesale trade; the total amount of milk sold by it in Class 1, including amounts handled by Bordens, other dealers, and the League in its own distributing business, and a statement by which the Class 1 price would be reduced by applying the difference between the actual value of milk sold in New Jersey and the total actual price paid therefor to producers by the League:

	Total amount of milk sold by Dairymen's League in Class 1, including other dealers	Gain on New Jersey milk applied to all sales class 1 milk sold to dealers and in own business, in area
	Pounds	Per hundredweight
September	61,553,968	$ .1674
October	71,137,678	.1396

	Total sales by League in marketing area in its own wholesale business	Gain on New Jersey milk applied to all class 1 milk sold by League in its own wholesale business
	Pounds	Per hundredweight
September	11,292,149	$0.9130
October	12,236,083	.8118
November	10,692,420	.7114"

Possibly, the League passed some of this gain on to Bordens. The proportion so given up to Bordens, if any, does not appear in the record. Assuming that the money was divided pro rata with Bordens, the League still had a substantial competitive advantage on all fluid milk handled by it. If it retained these benefits for itself, it had an advantage ranging from $.7114 to $.9130 per cwt. on all milk sold in its own business during the first three months the Order was operating.

While the appellant argues on page 51 of its brief, that the League had lost 14% of its business through price cutting raids on its business by others, the evidence showed a steady daily increase in League sales of fluid milk in each of the three months. These things are shown in Findings numbered 35 and 36 (R. 135, 136), as follows:

> "35. The number of approved producers included in Dairymen's League membership was in August 1938, upwards of 19,500.
>
> "Reports to the Market Administrator, show that total utilization of milk in the marketing area by all handlers, was as follows:

	For month	Per day
	Pounds	Pounds
September	203,478,066	6,782,602
October	211,946,396	6,836,980
November	204,742,307	6,824,743

> "36. The Dairymen's League, which has receiving stations approved for the Metropolitan Area, and also for the State of New Jersey, and various lo-

calities therein, reported a total utilization of milk in Class I in the marketing area, as follows (Exhibits 11-12-54):

	Total for month	Total per day
	Pounds	Pounds
September	61,553,968	2,051,798
October	71,137,678	2,294,763
November	70,033,283	2,334,427

Gain per day October over September, 242,965 pounds; November over October, 39,664 pounds.

	Total unpriced Class I milk reported to producers, Exhibits 11, 12, 54	Total unpriced milk sold in New Jersey, Exhibit 81	Total unpriced milk reported sold in markets other than New Jersey
Sept.	35,586,543	10,208,500	4,624,717
Oct.	36,619,930	10,457,153	3,737,578
Nov.	35,374,845	10,143,275	"

It will be noted from the foregoing table, that its "unpriced" milk sold in New Jersey, was less than 1/3 of all "unpriced" milk reported by the League. The report of the Joint Legislative Committee to investigate Milk Control (Legislative Document [1937] No. 81), referred to elsewhere herein, and which constituted part of Exhibit A-3 to the stipulation, on Page 17 of the Report, compared the condition of up-state markets with those of the Metropolitan Area. The Report said:

> "The situation up-state is entirely different. This market is not troubled with the cut-throat competition and interstate milk. The Milk Control Law has operated very favorably in this area."

It is readily apparent that the League enjoyed an even greater advantage than Sheffields in the handling of "unpriced" milk.

ing program followed by Sheffields and others, whereby they partially exempted themselves from payment of prices fixed in the Order for fluid milk.

It is unlikely that Congress intended to allow any such exemption, or to permit such discrimination between proprietary handlers. While it is not forbidden, neither is it expressly permitted. However, the decision of Judge Cooper rested on the discriminatory character of Article VII, Section 1, and the construction thereof by the Secretary, which permitted, and by inference, approved the competitive advantages thereby obtained. The decision rests upon discrimination permitted (and practiced) which tended to drive appellee Jetter and others in a like situation, out of business.

Contrary to the Order, the provisions of Section 8c (5) (E) expressly regulate co-operatives, such as the Dairymen's League, with reference to their out-of-market milk. The statute says:

> "(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended (Code, Title 7, Secs. 291, 292), known as the 'Capper-Volstead Act,' engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.*" (Emphasis supplied.)

Accordingly, the provisions of Article VII, Section 1, are unauthorized, and forbidden, by the Act, insofar as the same apply to blending of "unpriced" milk (milk sold in other markets), by co-operatives.

D. Competitive Advantages Under Article VII, Section 5, to Co-operative Distributors.

Article VII, Section 5, of the Order provides:

"Sec. 5. Payments to Co-operative Associations. —Any co-operative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section *by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members.* After such determination, the co-operative association of producers shall be entitled to continue to receive such payment until it has been disqualified by the Secretary, after hearing, for failure to exercise the authority and to perform the functions upon which such determination was based.

"The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each co-operative association of producers under the following conditions and at the following rates:

"1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members by such association and on which such handler has made the reports and payments required by this Order.

"2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

"3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Secretary to have sufficient plant capacity to receive all the

milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association."

We are here chiefly concerned with payments to co-operatives which are city milk dealers or distributors. So far as is disclosed in the record, the Dairymen's League is the only such in the area, unless appellee, Central Co-operative (which has not applied for the payments), may be classed in that category.

We do not find any provision of the Act authorizing these payments. Judge Cooper, in his opinion, expressed doubt on the subject, saying:

> *"The defendants make some further contentions, which may be briefly considered. It is urged that no provision of the statute authorizes Articles VII, Sections 5 and 6, of the order.*
>
> "These relate to payments of 5¢ per cwt. to co-operatives and market services of 23 cents per cwt. and transportation charges, both to co-operatives and proprietary handlers.
>
> *"The court does not find any sections of the act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced"* (R. 772). (Emphasis supplied.)

The Dairymen's League, from the first, was "determined to be qualified" to receive payments under Subdivision 3. Thereby it received a subsidy of 5¢ per cwt. on all milk received at its own plants. **In addition, it received a subsidy of 5¢ per cwt. on all milk delivered to Bordens, which operates 65 milk receiving stations, receiving milk from 8,404 producers** (R. 135).

So far as the record discloses, **the League was the only co-operative "qualified" to receive payments for milk delivered to plants of proprietary handlers.** A few other co-operatives were qualified to receive payments under Section 5.

That the regulation was designed for the principal benefit of the League, is shown by the fact that in *September, out of $66,374.80* paid to co-operatives, *the League received $59,455.59; Sheffield Producers, $5,949.88; while all other co-operatives combined received only $969.33.* Payments made under Article VII, Section 5, and their distribution, are set forth in paragraph 40 of the Findings (R. 137), as follows:

> "40. The Administrator paid to co-operatives under the provisions of Article VII, Section 5, the sums hereinafter stated, which are divided into total payments, payments to Dairymen's League, and payments to other co-operatives:

	Total Payments to Co-operatives	Paid Dairymen's League	Sheffield Producers	Paid to other Co-operatives
September	$66,374.80	$59,455.59	$5,949.88	$ 969.33
October	70,062.29	60,794.07	5,894.88	3,372.34
November	71,805.51	57,280.32	4,824.50	9,700.69"

The competitive advantage applied to fluid milk, enjoyed by the League by payments under Article VII, Section 5, are set forth in the 41st Finding (R. 138), as follows:

> "41. The amounts received by the Dairymen's League under Article VII, Section 5, when applied to all milk sold by it in Class 1, including sales to Bordens and other dealers, and when applied only to milk sold by it in its own business as distributor, were as follows:

	Applied to all milk	Applied to own distributing business
	Per hundredweight	Per hundredweight
September	$0.0965	$0.5265
October	.0868	.4969
November	.0817	.5357"

Appellant seeks to justify these payments (pp. 154, 156

and 157 of its brief). It is argued that co-operative associations should be compensated,

> "for the expenses which they incur in conducting their operations so as to supply Class 1 milk in the marketing area in times of short supply, and to secure utilization of milk in times of long supply in such a manner as to assure the greatest possible returns as to all producers."

This follows the language of the statute, but the argument is not only unsupported by evidence, but contrary to the facts.

Obviously, a co-operative has no greater expense in supplying Class 1 milk when the supply is short, than at other times. As anyone knows, when the demand is greater than the supply a higher price may be, and is, obtained. The many tables of prices received for milk in past years show that higher prices are always received in periods of short supply.

What things are done by a co-operative, that are not done by proprietary handlers, such as Jetter? Both seek to increase their supply of milk. The co-operative, in theory, is a non-profit corporation. It charges nothing for services—only its actual expenses. Why should other proprietary handlers pay one of their chief competitors, a subsidy of 5¢ on all milk handled by that competitor?

If, indeed, the League sells all milk of its members (which we will discuss later), that does not imply any more expense or special service than is rendered by proprietary handlers. Jetter has to pay for coal, supplies, taxes, help and all other items in operating its receiving plants, that the League spends for similar items. No evidence was introduced to show any additional expense.

Witness Rubenfeld, owner of several milk companies, and one of the few beneficiaries of "unpriced" milk, outside of the League, Bordens and Sheffields, testified un-

der examination by Mr. McCarthy, that the diversion of milk with the market service payments, permitted him to take his surplus milk to a cream cheese manufacturer. Thereby, he could take care of sufficient surplus to insure fluid milk requirements the year round; could keep the surplus off the market (R. 355, 356). He said (R. 356):

> "With reference to this milk which was diverted to the cheese factory at Goshen, if I had to ship that milk from Kyserike, New York, and sold it in New York as fluid milk at a loss, the chances are I would not have shipped it to New York. I would have refused to take milk from the producer."

Here was a proprietary dealer, testifying concerning his operations at a fluid plant only. He shipped his surplus milk to a cheese factory. This is what Jetter would have to do with his surplus, under the theory of supplying the market in the short season. It is what the Dairymen's League would have to do, except that it may have operated its own cheese factory.

It will be borne in mind that money was to be made on all manufactured products. The prices charged were supposedly based on the market price of commodities. Actually the price fixed under the order for milk manufactured into cheese, was at least 20¢ per cwt. below its actual market value at all times (see testimony of witness Mills, R. 305). The League, as a manufacturer, benefited by this. In addition, the League got its Market Service Payment of 23¢ per cwt., plus trucking charges, from its fluid plants to those equipped for manufacture. The League manufacturing plants were also fluid plants, and the League could, and no doubt did, ship fluid milk from manufacturing plants, and replace it with milk from its fluid plants, in order to get the additional 23¢ per cwt. Actually, therefore, the League could (and did) utilize its surplus at a competitive advantage of 43¢ per cwt.

It is ironical that other producers and proprietary

handlers are paying the League 5¢ per cwt. on all milk received by it and on all milk received by Bordens as a subsidy for handling this surplus milk, which was already a source of considerable competitive advantage to the League.

(The League, in accounting to the pool, received credits in the producers' settlement fund to net it the uniform price, in addition to the advantage of 43¢ per cwt., which it enjoyed.)

It is also urged that the League should have the 5¢ per cwt., and an additional 30¢ per cwt. on certain milk under Article VII, Section 6, to compensate it for its "losses" on milk from its manufacturing plants, sold in fluid form in the short season. Appellant says in its brief at page 160:

> *"A co-operative which qualifies under Section 5 obligates itself to supply all its milk to the marketing area as Class 1 milk during times of short supply, even though this involves some disruption of its operations and* added expense as would happen, for example, if a co-operative association having its plant equipped for making condensed milk, *and having a favorable market for the sale of this product should suspend the manufacture of condensed milk in order to augment the supply of Class 1 milk in the marketing area."*

Here we have the argument that the Dairymen's League (for no other co-operative comes within this category), **has such a profitable operation in condensed milk, that it can ill afford to sell its milk in fluid form at a much higher price.** Immediately following this argument, the appellant urges that while it would be even more "profitable" to utilize surplus milk in the lower classes, it had an

> "obligation * * * to utilize surplus milk in the higher manufacturing classes in order to increase the return to producers even though * * * it would be more profitable * * * to utilize milk in one of the lower manufacturing classes."

This is inconsistent. If the co-operative was a proprietary handler, operating for profit, it would, of course, as Bordens, Sheffields and Rubenfeld do, make a large profit out of manufacturing surplus milk. **These profits (and the sale of unpriced milk in New Jersey), enable Mr. Rubenfeld to stay in business at a profit** (R. 357), **although he lost 1/2¢ per quart, or $60 a day, on his fluid operations in New York City during October, and he expected his losses to be greater in November** (R. 357).

Appellant urges:

> 1. It was more *"Profitable"* for the League to *manufacture milk at the lowest price brackets.*
>
> 2. It owed a duty to *manufacture in the higher brackets* (as condensed milk, etc.), *in order to return producers more money.*
>
> 3. It is assumed *to operate at a loss in selling milk in the highest bracket* as fluid milk, *even though it gets a bonus on that milk of 30¢ per cwt.* under Section 6.

This argument does not make sense. On page 157, the Government argues that the Jetter Dairy Company had manufacturing facilities at Solsville, and that the other appellees, Schuyler Junction and Rock Royal, could have utilized Jetter's manufacturing facilities. The brief states:

> "If any of the appellees had so desired they might have moved any milk that could not readily be sold as fluid in the marketing area to the Solsville plant of the Jetter Dairy Company, where it could have been converted to cream" (p. 157).

No provision in the Order permits Jetter to receive any bonus or subsidy for maintaining those manufacturing operations, nor does there appear to be any subsidy to the cheese factory, to which Rubenfeld shipped his milk at Goshen (R. 355). Nor does any other proprietary handler get the sudsidy. **And it is discretionary with the secretary as to whether other co-operatives get it.**

Appellant next argues "the payments are simply one

feature of the distribution of the burden of the surplus milk among all producers." *This argument defeats itself. Equalization is supposed to have accomplished this purpose. Part of the moneys, in theory paid to producers having a fluid market, is taken to increase the returns of all other less fortunate producers to the uniform price.*

Appellees, Rock Royal and Schuyler Junction, do not receive these co-operative payments, any more than they were allowed to vote their members in the referendum. Rock Royal made application for the payments, but no action was taken on its application up to the time of trial, four months after the Order was in effect (R.....).

It is argued that the Jetter Dairy Company cannot complain; that these payments to the Dairymen's League and a few others "do not effect the price which the appellee, Jetter Dairy Company, Inc., must pay for its milk." The appellant urges (p. 156):

> "The fact that these payments *may inure to the benefit of the co-operative association which is a competitor of this appellee*, in some of its operations, gives it no standing to complain of such payments * * * *they are paid out of moneys due to producers.*"

Unfortunately, *the co-operative payments do not go to the producers, as we will show hereafter. They are principally paid to the Dairymen's League, which is a dealer and a competitor of Jetter, and in part, at least, are passed back to storekeepers in unfair competition.*

These payments directly affect the Jetter Company as follows:

> 1. They are a part of the higher price exacted from Jetter for milk, than its competitors are required to pay.
>
> 2. The excess payment charged Jetter is used by the League and others in a like situation, if any, to capture Jetter's trade, and to reduce the price received for such milk as he sells.

The argument that all dealers are charged the same price for milk is pure bunk.

The price required *to be accounted into the pool* is *fixed* as to all handlers, *to the extent of milk sold in the marketing area.*

The price to be paid by handlers to producers is not fixed (except proprietary handlers such as Jetter).

The cost of milk to a handler, is the total of payments to the producer and into the pool.

The intent of Congress was that all dealers should be charged the same. The statute itself, Section 8c (5) (A) provides for the

> "fixing * * * minimum prices * * * *which all handlers shall pay.* * * * *Such prices shall be uniform as to all handlers,* subject only to adjustments for (1) volume, market and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the location at which delivery of such milk, or any use classification thereof, is made as to such handler."

There is no authority in the Statute for the Payment to Co-operatives under Article VII, Section 5.

Jetter is entitled to pay the same minimum price for milk as any other handler. However, he is required to pay a higher price than the handlers controlling 70% of all the milk sold in the area. The subsidy of 5¢ per cwt. to the League comes out of the total price which Jetter and others pay.

The Government argues on pages 156 and 157:

> "The co-operative payments are paid out of moneys due to producers; these payments do not affect the cost to appellee Jetter, of its milk."

This argument is unfair and untrue. The 5¢ subsidy *is not used in the equalization fund to enhance the price of producers whose milk is manufactured, nor to permit payment to them of the uniform price.* It is a direct subsidy to the Dairymen's League and other co-operatives receiving the same. Jetter is only obligated by the statute

to pay the same minimum prices charged other dealers, including the League.

Equalization provides payment to the Dairymen's League from the Producer Settlement Fund, of moneys to make up its deficit, if any, in funds necessary to pay its producers the uniform price.

Yet, the League is not obligated to pay its producers any fixed return for milk. It has no obligation to pay, as part of the cost of its milk, a subsidy to a competing dealer. It is not a producer and occupies no actual status other than as a distributor, such as Jetter and others in a like situation.

Finding No. 19 (R. 132) is as follows:

> "19. Milk dealers, licensed as such, under the provisions of Section 253 and 257 of the Agriculture and Markets Law of the State of New York, alone, have the right to engage in the purchase and sale of milk in said Marketing Area, and the term 'milk dealer' includes
>
> > "'Any person who purchases or handles or sells milk, including * * * co-operative corporations and unincorporated co-operative associations.'"

A "dealer" who handles milk received at an approved plant is a handler within the meaning of the Order.

This includes the Dairymen's League.

Its status was determined in the case of *People v. Shoemaker*, 228 A. D. (N. Y.) 314, affirmed 254 N. Y. 567, in which it was held

> "said Association, by virtue of its method of conducting business and the provisions of Section 69 of the Co-operative Corporations Law, is itself a purchaser of milk and does not act as agent for the producers."

Its contract with its producers, discussed in the Federal Trade Commission Report, and by the Dairymen's League in its brief herein, is printed as Appendix A to

this brief. It will be noted that nowhere in the contract does the League agree that it will take the milk of any producer. The contract is all in favor of the League. The provisions of the contract provide:

"Par. 1. The producer appoints the Association as agent, and grants it full power and authority to sell his milk in fluid or manufactured form.

"Par. 2. The producer forfeits to the Association, $10.00 a cow for all of his cows and $3.00 per cow per month, as a penalty in case of breach of the agreement by the producer.

"Par. 3. The producer agrees to comply with the rules of the Health Authority and, if required to manufacture his own milk, must be clean in such manufacture.

"Par. 4. Producer agrees to 'endeavor' to follow instructions of the Association as to proportionate quantities of milk produced during several months of the year.

"Par. 5. This provision deals with a situation in case the League either fails to sell or refuse to accept producer's milk at its plants. The Section provides '5. It is further agreed that in case the Association fails to sell the milk of the Producer as herein stated, that the Producer will in each and every case manufacture such milk into such products as he may desire and deliver said manufactured product to the Association upon its order for sale, or if directed by the Association, will deliver such milk at such station or manufacturing plant as said Association may direct.'

"Par. 6. Producer has a right to give away or retain milk for his own use, but cannot sell to anyone else except where the milk is rejected by the League, or upon its written consent.

"Par. 7. The producer agrees to turn over to the League, any offers made to him to purchase his milk at prices higher than those paid by the League.

"Par. 8. The producer is to loan money to the

League and shall receive therefor, a Certificate of Indebtedness, to be retired at the rate of 1/5 each year.

"Par. 9. Producer agrees to equalization and payments to him at a blended price 'subject to such equitable differentials *as said association* may from time to time establish. Producer consents that the Association shall deduct certain moneys to meet expenses already incurred, together with such other sums as may be necessary to cover interest, overhead, depreciation, guaranties and all such other expenses as may be reasonably estimated as essential to be incurred by the Association in conducting its operations, for which no certificates are to be issued.'[1]

"Par. 10. Producer agrees to further deductions 'to create a special fund to retire loans, build warehouses or other buildings; to purchase land and buildings, equipment, etc., and to provide working capital.' For this, certificates of indebtedness, payable at not to exceed 10 years and one month from date, with interest of not less than 4% is to be delivered to the producer.

"Par. 11. Producer consents to the establishment of differentials and to the manner of distribution of moneys in the blended price, stating that the Association 'is hereby appointed by the producer sole arbitrator of the distribution of such sums, and such distributions when so made shall be final and conclusive and binding upon the party.' Producer in the absence of fraud, 'waives all its rights in law or in equity to an accounting thereof, and this contract shall act as a bar in any proceeding taken by the producer therefor.'

"Par. 12. Distribution of the approximate blended price shall be made to producers on or before the 25th of each month, and final settlement shall be made after the close of the fiscal year, on the basis determined by the League.

"Par. 13. Producer authorizes the association to borrow money in its name and to pledge all

1 It will be noted that these are the same expenses which would be incurred by a proprietary handler.

unsold milk and dairy products, accounts receivable, notes receivable and trade acceptances in which the producer has any interest, as owner or otherwise, as security for such loans.

"Par. 14. Producer authorizes deduction of $1.00 for subscription to the Dairymen's League News.

"Par. 15. Producer agrees to execute an order directing other dealers to whom his milk may be sold (as Bordens) to pay the proceeds thereof, to the Association.

"Par. 16. The producer applies for membership in the Association, said membership to terminate if the producer cancels his contract.

"Par. 17. Contract can be cancelled during the 16-day period between the 12th and 28th day of February each year, effective April 1st."

It will be seen that the League does not commit itself to take the milk of any producer; to sell it at the best price obtainable; or indeed, to do anything except to distribute such amount as it pleases to the producer on the 25th day of any month for milk delivered the preceding month.

The producer has no right to any accounting.

He has no voice in the amounts to be deducted from his checks.

His money is handled by the directors. He is unschooled in law or corporate matters, such as his rights under the By-Laws, whatever they may be. He just agrees to abide by them.

The directors who have control of the vast sums of money received for his and other producers' milk, have the inside track. The producer waives his right to an accounting unless he can prove fraud. He is the helpless victim of the directors of this giant distributor, which in most instances, controls the only outlet for his milk.

He has no access to information as to the dealings

between the League and Bordens. Report of the Federal Trade Commission, part of Exhibit A-3, page 50 says:

> "Numerous charges have been made to the effect that there is an arrangement or a working relationship between The Borden Co. and Dairymen's League Co-operative Association, Inc., whereby The Borden Co. exercises an influence over the activities of the league, which may amount to a combination in restraint of trade."

On page 56 of the Report, the Commission said:

> "* * * No evidence *was found* indicating that there was any special arrangement between the two organizations whereby The Borden Co. received any concessions not shown in this report. *Insofar as this examination disclosed,* relations between Dairymen's League and The Borden Co. were that of vendor and vendee and no evidence was adduced showing the exercise of any control by The Borden Co. over the League."

What are the relations of the League with Bordens under the Order? The League was a party plaintiff to this action. It was there to disprove appellees' charges of monopoly and discrimination; to explain, if it could, what was done with the special payments of $285,000.00 which it received from the Producer Settlement Fund for the months of September and October alone (R. 137-138). It apparently did not pay these sums to its producers as they were paid at least 10¢ per cwt. less than the uniform price in each of those months (Certificates of Indebtedness considered as cash).

It did not explain what it did with the tremendous competitive advantage realized by not accounting its unpriced fluid milk into the Pool. It may be argued that milk brought less in other areas, but we have already shown that milk in other areas, brought higher prices.

By its settlement with the equalization fund, it was allowed the uniform price on all of its milk reported. This was exclusive of its three-fold competitive advantages of unpriced milk, co-operative payments and market service payments.

No evidence was offered by the League to show extraordinary expenses, or any expenses.

The appellees on the trial, stipulated all of the facts in the Government's case. The Government stipulated many facts of the appellees' case.

On the trial four weeks of time was spent; more than 2300 pages of testimony were taken. The testimony of witnesses, in narrative form, occupies only pages 274 to 396 of the printed record, totalling 122 pages. The larger portion of the 2300 pages of typewritten transcript, other than the testimony in the narrative statement, was devoted to extended harangues, repetitious argument and personal attacks upon counsel for appellees, by the attorneys representing the League and Bargaining Agency. It was comparable to a filibuster in the United States Senate. It delayed the trial until, as the typewritten record discloses, upon the insistence by the Government, the defendants rested their case, without having completed all the testimony which they deemed relevant. Witnesses were kept in court for days, while counsel for the League and Bargaining Agency harangued the Court, and were then sent home without having testified.

It is now urged that appellee Jetter has no standing. The money he pays "goes to producers." We repeat, any such argument is unfair and untrue.

Judge Cooper's opinion is a sweeping repudiation of the discriminatory form of the Order, and the unconscionable use to which it has been put by the League.

When producers are paid, only Jetter and proprietary handlers in a like situation, pay the fixed uniform price which is part of the total cost of their milk.

The Sheffield Company pays less than the uniform price, by blending, and its actual cost for fluid milk is still further reduced by competitive advantages on unpriced milk. We pointed out that in October, this amounted to upwards of $81,257.86. This applied to the

total fluid milk sold by Sheffields in the Metropolitan Area of 43,662,117 pounds (Ex. 43, R. 673), reduced the price of fluid milk $.1861 on all its fluid sales. If Sheffields sold half of its milk wholesale, its cost was reduced by twice that amount, or $.3732 per cwt. Since it, with Bordens, sells the greater part of all milk distributed retail to houses, its percentage of wholesale trade was probably less than 50% and its competitive advantage was thereby much greater than the figures given.

The League pays still less. This will be discussed later.

E. Competitive Advantages Under Article VII, Section 6, to Large Distributors, Whether Co-operative or Proprietary.

Article VII, Section 6, in substance provides for two classes of "market service" payments to handlers as follows:

1. For milk received at a shipping station and sent to a manufacturing plant for manufacture (except butter in months other than October) 23¢ per cwt. plus a hauling charge is allowed to the dealer originally purchasing the milk.

2. During November and December, certain condensing and drying plants receive 30¢ per cwt. on all milk sold in fluid form.

The apparent purpose of this provision is to help the handler, having only a fluid shipping plant, by paying him his receiving and transportation costs if he has to resell the milk to a manufacturing plant. An example of this is in evidence in the testimony of Rubenfeld, who shipped certain milk from his Kyserike fluid plant to a cheese factory in Goshen, which has already been discussed. *Where this provision is so applied, it might be slightly inequitable, but the appellees have no reason for complaint.*

However, in its practical application, it went further than taking care of handlers operating only fluid milk plants.

A concrete example is in another of Mr. Rubenfeld's operations. He operated two plants at Slate Hill, N. Y., about a city block from each other (R. 346). Instead of maintaining a separator in both plants, he transferred milk from one plant across the street to the other plant, and had it separated (R. 346). Under the Order, his transportation costs are paid out of the Producer Settlement Fund. In addition, he gets 23¢ per cwt. on the milk so separated, as a "service payment."

He also received similar payments of 23¢ for milk shipped from his Kyserike plant to Slate Hill to be separated (R. 343). Exhibit 28, not printed, shows one of these claims for service charges. The originals are filed and we do not have copies. However, Mr. Rubenfeld testified (R. 350) that he received $1201.75 service charges and $558.89 freight on milk transferred from Kyserike to Slate Hill to be separated in his own plant. *It is interesting to note that the Slate Hill Milk and Cream Company, one of Mr. Rubenfeld's companies, reported less than one-half of 1%, which was accountable to the Pool.* The plant is at Slate Hill, N. Y.; ships 99½% of its milk in fluid form out of the marketing area, as "unpriced" milk (R. 351). Nevertheless, the manufacturing facilities of the Company, in effect, netted Mr. Rubenfeld 23¢ per cwt. on most, if not all milk used by his other companies as fluid cream.

Another example is that of the Queensboro Company, one of the larger, if not the largest of the independent companies. It is engaged in manufacture of milk products, as well as the wholesale fluid milk business.

Mr. Samuel Miller, its president, was sworn as a witness (R. 310). The company operates a manufacturing plant at Canastota where milk is manufactured into cream, which is in turn sent to Syracuse for storage. On September 1st, the company had six or seven thousand tins of storage cream stored at the Syracuse Cold Storage Warehouse (R. 310, 311). The cream is reshipped to and standardized in New York City, by adding

milk to reduce the cream content (R. 311). The plant has a permit to ship fluid skim milk to New York City (R. 311). Queensboro has a plant at Indian Castle and other plants elsewhere (R. 310). It shipped milk from Indian Castle to Canastota to be separated into storage cream for which it paid $1.03 per cwt. It received 23¢ per cwt. market service charge, plus hauling from Indian Castle to Canastota (R. 318). It passed a Dairymen's League manufacturing plant en route (R. 318). This company sells 60% of its milk in fluid form in the short season, manufacturing 40%, and in the surplus season, manufacture 2/3, selling 1/3 fluid (R. 319).

It also shipped milk from its VanHornesville and Blossvale plants to Canastota and got the 23¢ per cwt. market service charge (R. 318). It shipped from its manufacturing plant at Canton to Canastota, but Miller said "they did not pay me for it" (R. 318). The Order did not permit this. Miller said "In New York City now, the competitive situation is a bad situation, very bad in the milk business" (R. 320). Queensboro accepted surplus milk from any other dealers when they had extra milk (R. 316 and elsewhere). This was profitable.

The Queensboro Company made claim for market service charges in September for $2[illegible]36.70 (Ex. 69, R. 735). All, or substantially all, of this amount was paid. The actual amount, we believe, is entered on the original Exhibit, but does not seem to be printed. Mr. Miller testified at (R. 317):

> "• • • *Competing dealers didn't stop chiseling after September 1 and neither did I. When they take my customers, I take theirs. That is the way for me to keep the business. About three weeks we didn't change the price and the trade just flitted away, and then we had to go and get the trade back.*
>
> "Q. *You laid low on chiseling for three weeks, is that right?* A. *That is right.*" (Emphasis supplied.)

Under cross examination by Mr. Wallach, he testified (R. 321):

"There has been chiseling in the milk business before September 1st and as long as I can remember. I remember 1929 chiseling. *Before September 1st and during the year 1938 I would get reports from our outside men that milk was sold by milk dealers to grocery stores at as low as two for seven cents a quart, sometimes lower than that. Since September 1st, 1938, the lowest price that I know of milk being sold to stores is around eight to eight and one-half cents per quart. That is about the lowest.*" (Emphasis supplied.)

He testified at (R. 322):

"Q. *And you say you laid low on chiseling in your concern for a few days, is that right?* A. *A few weeks.*" (Emphasis supplied.)

And at (R. 323):

"Q. *Did Berman (Queensboro employe) report how many cases of trade had been chiseled by you?* A. *I believe so.*

"Q. *How many cases did you chisel?* A. *We have got them marked down.*" (Emphasis supplied.)

At (R. 324), he said:

"After September 1, 1938, the market was only stabilized a few weeks. *It is not any better than it was a year ago, when there was no order, and I think it is worse lately. The last week or so, it got still worse.*"

* * * * * *

"When the Federal Order went into effect on September first, prices were stabilized generally throughout the market in the wholesale business for a period of two or three weeks. *Conditions in the market just now are worse than they were a year ago. The cost of milk is high, and the selling prices cheap. There is no present stabilization in the market.*" (Emphasis supplied.)

This witness and the witness Rubenfeld, who enjoyed competitive advantages under the Order, and apparently would like to see it continued, were unwilling witnesses.

An examination of their testimony in the original typewritten transcript will disclose this.

The League, of course, transported milk between its own plants to get the service charge. It offered no proof as to having shipped any milk to other plants, although it appears by the League News (R. 589) that it received diverted milk. It could receive market service payments only on its own milk. Judge Cooper found, Finding No. 42 (R. 138) as follows:

> "42. The Dairymen's League was paid by the Administrator under Article VII, Section 6 (1) for receiving milk which was moved to other plants for manufacture, 23¢ per cwt. plus certain mileage charges for transportation. These figures, broken down, are as follows:

	Total lbs. of milk	Total amount paid	Total allowance for receiving milk
September	28,374,541	$91,530.17	$65,261.44
October	22,920,087	73,994.62	52,716.20
November	(1)	6,228.27	(1)

(1) Note.—No records are available as to the pounds of milk on which market service payments were claimed, nor is there any information in the record as to whether manufacturing plants shipped fluid milk and received the 30¢ differentials provided for by Article VII, Section 6 (2)."

The Sheffield company was in a like position to divert milk between its own plants, and it may be fairly assumed that it shipped no milk to other companies. The market service payments it received, are shown in Exhibit 77 (R. 740). In September, Sheffields claimed forty odd thousand dollars, and received $38,225.96, in October it received $26,430.96, and in November $8,875.27. It will be borne in mind, that November and December are the two shortest months in the year. This appears in many places in reports contained in Exhibit A-3, and is referred to by the Government repeatedly in its brief. From February to September, Sheffields were in a position to realize much more than $38,000.00 monthly under this provision.

The vice of this "market service" provision is limited

to payments made to the three large companies, and one or two smaller ones by reason of manipulations of milk between their own plants. For bona fide surplus, sold by handlers without surplus facilities, the provision would benefit the industry and would not give any competitive advantage. These advantages, like the others, fitted the operations of the League, Bordens and Sheffield.

F. Discrimination in Favor of Co-operative Distributors by Exemption From Paying Producers the Uniform Price.

As we have repeatedly pointed out, this provision probably chiefly affects League operations. Through it however, the Borden Company, could benefit indirectly.

For instance, if the Borden Company bought direct from its producers, it would have to pay them $2.45 per cwt. for fluid milk utilized in the marketing area. Handlers purchasing from co-operatives operating plants, are obigated only to pay such co-operatives the base price. There is no need to reimburse such co-operatives for plant handling costs which are from 15¢ to 30¢ per cwt. The League can, under the Order, absorb these receiving station costs for Bordens. As to whether it does so or not, does not appear in the record. Such an inference may be drawn from the prices paid by the League to its producers. The League base price to farmers (considering certificates of indebtedness as equivalent to cash), in September, was $1.75 per cwt., and for October, was $1.81 per cwt. (Exhibits 11 and 12, R. 654-655). It operates a plant across the street from Jetter at Solsville, N. Y. These plants are beyond the 200-mile zone, so that the producers get 2¢ less than the base price. The price paid, included a "volume differential." Exhibit 82 is as follows (R. 742).

"Computation of the Actual Base Cash Return to Producers at Solsville, Oneida County, New York

	September	October
Base net cash return 3.5% (201-210)	1.60	1.76
Plus volume differential	.10	
	1.70	1.76
Minus freight	.02	.02
Actual net cash base return paid at Solsville	1.68	1.74
Plus certificate of indebtedness	.05	.05
Price paid at Solsville for 3.5% milk including certificate of indebtedness	1.73	1.79"

The uniform price for September was $1.87; Jetter was obligated to pay his producers, $1.85 per cwt., or 12¢ more than the Dairymen's League. For November, the uniform price was $1.91. Subtracting 2¢ freight differential, the uniform price at Solsville was $1.89. The Dairymen's League paid $1.79 in the same zone. So Jetter paid 10¢ per cwt. more to its producers. These underpayments gave the Dairymen's League, a competitive advantage in September of 12¢ per cwt. over Jetter and others in a like situation, and of 10¢ per cwt. in October. This was as to all Dairymen's League milk. When applied to its fluid milk sales, its competitive advantage is shown in Finding No. 43 (printed R. 138 and 139, and which is as follows):

> "43. Applying the base price paid by the Dairymen's League to the uniform price fixed by the Administrator (see Finding No. 39), shows payments by the League, less than the uniform price, as follows:

	All milk utilized in area	League price less	Total payments less than uniform price
	Pounds	per Hundredweight	
September	118,911,179	$0.12	$142,693
October	121,588,142	.10	121,588
November	114,560,639	.09	103,204

Payments less than the uniform price (paid on milk in the area only), when applied to all Class 1 milk sold by the League, including Bordens and other dealers, and when applied to sales in League's own distributing business, were as follows:

	Total amount	Applied to all milk	Applied to own business
		Per Hundredweight	
September	$142,693	$0.2318	$1.2636
October	121,588	.1709	.9936
November	103,204	.1473	.9652"

The combined competitive advantage to the Dairymen's League under the Order is shown in Finding No. 44 at (R. 139), as follows:

"44. Summarizing the total competitive advantage to the Dairymen's League from sales in New Jersey, payments under Article VII, Sections 5 and 6, Producer Settlement Fund, and by payment to producers for milk at less than the uniform price, the Dairymen's League had the following competitive advantages, as shown by the preceding tables:

Competitive advantage applied to all sales

	September	October	November
	Per hundredweight	Per hundredweight	Per hundredweight
N. J. Sales	$0.1674	$0.1396	$0.1086
Art. VII, Sec. 5	.0965	.0868	.0817
Art. VII, Sec. 6	.1060	.0741	(1)
By payment less than uniform price	.2318	.1709	.1473
	.6017	.4714	(2).3376

1 Note—No adequate data as to the amounts involved or on which payment was made for market service in November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, Section 6 (2) was claimed or paid.

2 Note—November missing.

Competitive advantage if applied only to League Distributing Business

	September	October	November
	Per hundredweight	Per hundredweight	Per hundredweight
N. J. Sales	$0.9130	$0.8118	$0.7114
Art. VII, Sec. 5	.5265	.4969	.5357
Art. VII, Sec. 6	.5779	.4380	(1)
By payment less than uniform price	1.2636	.9936	.9652
	3.3010	2.7403	(2)2.2123

1 Note—No adequate data as to the amounts involved or on which payment was made for market service in November, is in evidence, nor any data as to whether the 30¢ differential under Article VII, Section 6 (2) was claimed or paid.

2 Note—November missing."

We have already pointed out that more than half of all fluid milk sold in New York, is sold wholesale. In September, total sales of milk in Class 1 were reported at 203,478,066 pounds (R. 135). Half of this, representing wholesale fluid milk, equals 101,739,033 pounds. The League in September, sold 11,292,149 pounds in its own wholesale distributing business, Finding No. 39 (R. 137). Accordingly, *the League as a distributor sold at least 11.09% of all wholesale milk sold in New York in September, the first month the Order was in effect. It sold comparable amounts in other months* (R. 137).

It will be seen that if the League applied all of its competitive advantage to its own wholesale business, that in September, that competitive advantage amounted to $3.35 per cwt. *In other words, the League would have the milk which it sold wholesale in its own distributing business, for nothing, and 85¢ per cwt. bonus left over.*

Part of this comes from the subsidies under Article VII, and part from unpriced milk, and underpayments to producers. In October, the competitive advantage was $2.74 per cwt. *Its milk would cost it nothing, and it would have 29¢ besides.* In November, with one figure missing, its advantage was $2.21 per cwt.

How could Jetter, and other proprietary handlers selling fluid milk wholly within the City of New York, compete with that situation? They could not. The *price* which *they paid* both to the administrator and the producers, *was fixed.*

G. The Order by It Arbitrary and Discriminatory Regulation, Deprives Appellees of Liberty and Property Without Due Process. It Takes Their Property for (an Alleged or) a Public Use and Transfers It to Others Without Just Compensation.

While appellee Jetter is a proprietary handler, and appellees Rock Royal and Schuyler Junction are co-operatives, the effect of the Order is to discriminate against both. We will take them up separately.

Jetter Dairy Company.

Any exaction from Jetter of a higher, total price for milk than that charged other handlers, constituted a taking of its property. It is true that only from the amount paid to the Producer Settlement Fund, was there an actual transfer of Jetter's money to its competitors, of whom the Dairymen's League, Bordens and Sheffields were the principal beneficiaries.

But Jetter's producers were not entitled to receive more than other producers. The intent of Congress, as expressed in the statute was that equalization in a market-wide pool, would treat all producers alike.

Moneys paid to the League from the contributions of Jetter to the Producer Settlement Fund enabled that competitor to sell milk at less than the cost to Jetter. Efficiency was no element.

The requirement that Jetter pay its producers more than his competing handlers paid, widened the gap between his total cost and the total cost to his competitors. It rendered him still more vulnerable to attack. Judge Cooper, in his opinion, illustrates the effect of the Order on Jetter's business. He says (R. 765, 766, 767):

> "Co-operatives which are also milk dealers or handlers, may and do pay their producers less than the uniform price and from their payments into the Producers Settlement Fund, if any, they receive payments back for services, which proprietary handlers cannot, and do not receive.
>
> In fact, there is very little that a proprietary handler, who does not sell any milk outside the marketing area, and who has no plant to which he can transfer surplus milk, can do to recoup his losses. He cannot reduce his price by "blending" a fictitious value on "unpriced" milk with that sold in the area. He has no unpriced milk. He has no manufacturing plant, and may possess neither capital or inclination to enter the manufacturing field already principally covered by Dairymen's League, Bordens, National, and some of the larger independents.

The discrimination between the small proprietary handlers and the Dairymen's League will be manifest from the following illustration of the comparative operation of the statute as applied in Order No. 27 as it affects the defendant, Jetter Dairy Company, and the Dairymen's League. The figures include all the differentials in favor of the co-operatives.

The loss per quart is from 1 to 1 1/2 cents per day for milk sold in the market area.

Jetter sells 40,000 quarts per day all in the marketing area, at a loss of $400.00 to $600.00 per day because required to pay the uniform price to producers.

The Dairymen's League sells about 1,640,000 quarts per day or 41 times as much as Jetter. Dairymen's League sells without loss, for what it does not gain from sales in New Jersey and other out-of-State markets, together with the service and other differentials, it may deduct from its producers because it is not required to pay the uniform price.

Jetter owes to Producers Settlement Fund for September and October (September payment has been made)	$ 30,000
Dairymen's League paid to Producers' Settlement Fund for September and October	110,000
or only about 3½ times as much as Jetter.	

Dairymen's League received from the Producers' Settlement Fund under Article VII, paragraph 5, in September $59,455.59, and in October $60,794.07, or a total of $120,239.66, which is about $10,000 more than it paid in.

In addition, it received from this fund under Article VII, section 6, in September $91,630 and in October $73,994, making a total of $165,524. Adding this to the aforesaid $120,239.00, it makes a grand total of $285,763.

This is about $175,000 more than the Dairymen's League paid into the Producers' Settlement Fund.

Jetter received nothing. Jetter loses at a $400.00 to $600.00 per day loss, on a 30-day month, $12,000 to $18,000. In a year that amounts to $144,000 to $216,000. One year's payments into the fund at $15,000 per month would be $180,000. In less than a year it is practically certain that all the assets of the Jetter Company would be taken by the operation of the order, and it would have no funds or assets to pay producers or to make further payments into the fund. In short, its entire property would be confiscated. This is by force of the statute as applied in the Order.

As a matter of fact, the defendant Jetter Company could not last a year. It had on April 1, 1938 only $50,000 capital and $30,000 surplus or a total of $80,000. The taking of its capital at the rate of only $15,000 per month would exhaust its entire assets within 6 months.

Moreover, there is nothing to prevent the Dairymen's League and other large producers from further depressing the price of milk sold in the marketing area in order to capture the customers of competitors and thus forcing the Jetter Dairy Company and others in like situation, out of business at an even more rapid rate.

The Dairymen's League Co-operation, however, could go on indefinitely for the statute and order are greatly discriminatory in favor of co-operatives, especially large ones, which can take advantage of all the opportunities it presents.

The property of the Jetter Company, and, of course, all other proprietary handlers and smaller co-operatives is thus taken by operation of statute and without the due process of law required by the Fifth Amendment.'' (Emphasis supplied.)

Rock Royal and Schuyler Junction Co-operatives.

Appellees, Rock Royal and Schuyler Junction are not equipped to profit by market service payments. They have not been allowed the payments to co-operatives permitted under Article VII, Section 5.

Other co-operatives in the same situation, are the Clin-

ton Co-operative (R. 378, 381) and Worcester Co-operative (R. 306), whose qualifications had not been "determined" by the Secretary, in order that they might receive payments under Article VII, Section 5.

As to appellees and others in a like situation, payments out of the Producer Settlement Fund *depressed the uniform price* and *increased their pool obligation.* They represented their producers in making sales of milk, and were damaged by payments out of their share of the fund, principally to the League, as well as by payments to Sheffield Producers Co-operative, and a very few others.

There is nothing in the record to show any reason for payments to the Sheffield Producers Association. The Sheffield Company paid that Association ½¢ per hundred on all milk purchased by it (R. 596). This payment by the company was of long standing (see Federal Trade Commission Report, House Document No. 95, part of Exhibit 3 to the Stipulation, page 96, which shows "Association dues, $.005"). Of this association, the Report said on page 98:

> "Sheffield Producers Co-operative Association is controlled by its only customer—Sheffield Farms Company, Inc."

Strange as it may seem, in the Stipulation of Agreed Facts in evidence (R. 261), we find the following statement:

> "UNLESS ALL MILK WHICH IS PRODUCED FOR SALE IN THE MARKETING AREA, IS SUBJECT TO THE SAME REGULATION, THE RESULT WILL BE DISCRIMINATION AGAINST THE MILK WHICH IS REGULATED."

This was introduced in evidence by appellant (R. 269). It bears out and confirms appellees' position in this regard. Its truth is self-evident.

H. The Provisions of Article VI, Section 8, Are Discriminatory as Against Appellees, Rock Royal and Schuyler Junction.

This section provides for payment of 20¢ per cwt. to certain producers in 17 counties and 12 towns in Ulster County. This payment to producers is a bonus or extra payment above the uniform (or other) price. Handlers paying the 20¢ to such producers, deduct the same from their pool obligation, and thereby the money so paid, is actually paid (withheld) from the Producer Settlement Fund.

Appellees' plants are both beyond the 200-mile zone. The eighteen preferred counties are nearer New York. Appellees are not allowed this 20¢ payment, and their payments into the equalization fund (pool obligation) are increased thereby, to appellees' substantial damage. It will be borne in mind that these producers' base payments are subject to the transportation differentials set forth in Article IV, Section 3.

Finding No. 50 (R. 142) on that subject is as follows:

> "50. By the provisions of Article VI, Section 8, handlers receiving milk in 18 counties therein enumerated, in making return to the Administrator, are permitted to deduct 20¢ per cwt. for all net pool milk received from producers at plants in said counties. Producers in said counties are paid 20¢ per cwt. more for all milk, than producers in other localities, including all producers delivering to the several defendants herein.
>
> "Accordingly, the price received by producers delivering to the three Co-operative defendants, is reduced by the increased amount of payments to producers in said 18 preferred counties, and in effect, moneys paid by handlers for milk of said defendant co-operatives, are in part expropriated to make such preferential payment to producers in the counties receiving such preferential payments."

Jetter's producers are also discriminated against. It is true that Jetter has no standing to raise this question, but it is proper for the Court to consider this fact since Jetter's producers are in a like situation with the Rock Royal and Schuyler Junction producers. Finding No. 51 (R. 142) on this subject, is as follows:

> "51. In effect, the uniform price return directed to be paid to producers delivering to the Jetter Dairy Company, is reduced by payment to producers in the 18 preferential counties, and moneys of said producers delivering to defendant Jetter, and other proprietary handlers, outside of said preferred counties, are expropriated to make payment to producers therein of payment of 20¢ per cwt. in excess of the uniform price."

The reason for this discrimination is not primarily to benefit the producers who receive this bonus or subsidy from producers delivering to all three appellees. It is to give Bordens, Sheffields and the League, additional competitive advantages in saving of freight. The freight differentials established by the Order, are discriminatory. This was established and is set forth in Finding No. 49 (Printed R. 141) as follows:

> "49. *Establishment of freight differentials was designed to make the base delivered cost of all milk to New York City the same.*
>
> "Milk delivered to New York by truck, in the various zones, cost the handler, according to zones, the actual freight, plus or minus freight differentials, according to whether the point of origin is less or more than 200 miles. Without reducing the schedules to each 10-mile unit, the net freight cost, after applying the differentials, in various typical zones, is as follows:

Zone	Actual freight	Differential	Total cost
25-mile	0.09	+0.13	0.22
50-mile	.115	+ .105	.225
100-mile	.165	+ .07	.235
150-mile	.215	+ .035	.25
200-mile	.265	.00	.265
240-mile	.305	— .02	.285
250-mile	.315	— .02	.295
300-mile	.365	— .045	.32
350-mile	.415	— .08	.335
400-mile	.465	— .09	.375
450-mile	.515	— .115	.40
500-mile	.565	— .14	.425

"The Jetter. Dairy Company, being in the 231-240 mile zone (actually 250 miles by highway), its total freight cost is 6½¢ more per cwt. than milk in the 25-mile zone. It is also higher than in any intermediate zone. Defendant, Schuyler Junction Co-operative's plant is at Schuyler Junction, N. Y., in the same zone; the plant of defendant, Rock Royal Co-operative is in the 176-180 mile zone, and the plants of the defendant Central Co-operative are principally beyond the 200-mile zone, so that the total delivered cost of said milk is greater than the delivered cost of upwards of —% of all milk sold in the area".

and in Finding No. 55 (R. 143) as follows:

"55. Handlers whose milk receiving stations are beyond the nearby freight zones, are at a disadvantage in selling milk, in that the base price of said milk delivered in New York, is increasingly high, as the handlers' receiving stations are at increasing distances from New York."

Exhibit 55 (not printed) discloses that most of the milk receiving stations in the favored 18 counties, are operated by the League, Bordens and Sheffields, or subsidiaries of National Dairy and Bordens (Sheffields is a subsidiary of National Dairy).

For instance, *in Columbia County, only Bordens and Sheffields have plants. In Dutchess County, only Bor-*

dens and Sheffields have plants; in Orange County, fluid milk receiving stations are mostly operated by Bordens and Sheffields, although there are several other stations, including Middletown Milk and Cream Company, and Slate Hill Milk and Cream Company, which are owned by witness Rubenfeld.

It is more profitable for the League, Bordens and Sheffields to ship their fluid milk requirements from these nearby counties because of savings in freight. High prices for milk, of course, lead to larger production by farmers. These companies profit by freight savings in proportion to the increased intake if any due to high prices, and in addition, plant handling costs are reduced by increased plant volume. Regardless of the motive back of this unfair and unwarranted preference, *the preference is unauthorized by the statute.* Section 8c (5) (B) (ii) of the Act, provides:

> "For the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of uses made of such milk by the individual handler to whom it is delivered."

The section then provides for payments of the usual differentials as to location (freight), grade, quality, volume, and market differentials.

These preferred producers have no more right to the fluid market in New York City than the appellees have. The purpose of the Order is to keep appellees from destructive competition. In theory, freight differentials are established so that Rock Royal milk can be delivered to a dealer in New York at the same delivered cost as Columbia County milk. Removal of the incentive to cut prices in order to capture a fluid milk outlet, is the purpose of the Order, and apparently the theory of it is, as stated in the Act, to provide

> *"for the payment to all producers • • • of uniform prices • • • irrespective of the uses made of such milk."* (Emphasis supplied.)

No data is available in the record to show actual volume of milk in the nearby counties, but Exhibit 3 to the stipulation (not printed) shows that in June and November, 1937, the following quantities of milk were produced in the nearby (New York State) zones:

Mileage zone	Amount of Milk handled June (388 plants)	November (365 plants)
	Pounds	Pounds
31- 80	28,891,000	25,450,000
81-130	40,292,000	25,589,000
131-180	74,827,000	29,991,000
Total	144,010,000	81,030,000

This includes only plants in the 8 counties in New York State. There is no data available as to the 10 counties in New Jersey, Connecticut and Massachusetts. However, it is fair to assume that *the plants in these 18 preferred counties are capable of supplying almost the entire fluid milk requirements of Bordens, League and Sheffields even in the shortest seasons of the year.*

I. Summary:

Finding No. 56 (R. 143) sums up nine of the discriminatory features of the Order, as follows:

> "56. By the terms and application of the Order, there is a differentiation between handlers who sell milk at wholesale and retail in the marketing area, and the prices required to be paid by said handlers for fluid milk, in the following particulars:
>
> "a. Co-operative handlers, who are also distributors, are under no requirement to pay any stated price for milk sold to stores and consumers.
>
> "b. The price accounted by co-operative handlers to the Producer Settlement Fund, is reduced by payments to them out of said Fund, pursuant to Article VII, Section 5.

"c. The large handlers, both co-operative and proprietary, being principally National Dairy subsidiaries, Borden's and subsidiaries, Dairymen's League and several smaller companies, including Queensboro Farm Products, Inc., and the several companies operated by Aaron J. Rubenfeld, which are engaged in manufacturing milk into milk products, receive so-called 'market service payments' under Article VII, Section 6, which are not and cannot be received by small handlers, who combine fluid milk operations with manufacturing on a small scale in their own plants, thereby, in effect, substantially reducing the prices paid by such large handlers for milk utilized in fluid form.

"d. Proprietary handlers purchasing direct from producers, are obliged to pay for the cost of maintenance and operation of milk receiving stations, and the cost of receiving milk, whereas handlers purchasing from co-operative associations, are required to pay only the base price for such milk. Such receiving station or plant handling costs are from 15¢ to 30¢ per cwt.

"e. By the terms and application of the Order, the same large handlers referred to in the next preceding paragraph, both proprietary and co-operative, in making payment for all milk purchased in the production area, are permitted to pay a blended price, which price is computed upon the prices fixed in the Order for milk sold in the marketing area, and with arbitrary prices fixed by such handlers as they see fit, for milk sold outside of the area, which milk is known as 'unpriced milk,' thereby, in effect, reducing the price paid by such handlers for fluid milk sold in the marketing area.

"None of the defendants are engaged in the manufacture of milk products. None of said defendants are engaged in marketing milk outside of the marketing area.

"f. National Dairy subsidiaries, including Sheffield Farms and the Borden Company, purchase milk from co-operatives. The Dairymen's League, which is also a distributor, is a co-operative. Said companies, by the reports filed with the Administrator, handle more than 50% of the fluid milk

sold in the area, and the greater part of milk sold out of the area.

"g. Handlers purchasing milk in areas producing milk of high butterfat content, pay a higher price for milk utilized in fluid form than handlers purchasing milk of less butterfat content, although the resale price of such milk in New York City, is neither greater nor lesser by reason of butterfat content.

"h. Handlers purchasing milk beyond the 25-mile zone, in each succeeding zone, pay a greater delivered cost for milk delivered to the marketing area, for the reason that the freight differentials established by the provisions of Article IV, Section 3, are not comparable to the actual difference in freight costs, said unfavorable difference increasing from ½¢ per cwt. in the 50-mile zone, to 22½¢ per cwt. in the 500-mile zone.

"i. Defendant Rock Royal's plant is in the 176-180-mile zone; the plants of the defendant Jetter and Schuyler Junction Co-operative, are in the 231-240-mile zone, and the several plants of the defendant Central Co-operative, are beyond the 200-mile zone."

J. The Competitive Advantages to Certain Handlers Were Employed Directly to Discriminate Against Appellees.

Appellant places much emphasis on the claim that appellee Jetter suffered no loss; that the cost of a quart of milk delivered at New York City, is not 9¾¢.

Finding No. 60, quotes the intervening plaintiff on the subject, as follows (R. 145):

"60. The Dairymen's League News, for May 17, 1938, Exhibit 24 in evidence, states 'Today, More than half of all milk sold in the Metropolitan district, is handled through stores.'

"*The absolute minimum delivered cost per quart of fluid milk delivered to stores in New York City, by handlers, based on the prices fixed in the Order, has been since September 1st, 1938, and now is, 9¾¢ per quart.*" (Emphasis supplied.)

The stipulated facts and evidence (R. 268) are to the same effect. No evidence to the contrary, was given. The League's statement that

> *"the absolute minimum delivered cost per quart * * * is 9¾¢ per quart."*

assumes efficient operation. "Absolute" minimum can imply nothing else.

The manner in which the competitive advantages were used is briefly stated in Findings Nos. 61 to 67 inclusive (R. 145, 146) as follows:

> "61. On September 1, 1938, a majority of the handlers selling Grade B milk in the dealer-to-store trade, raised the price of such milk to 9¾¢ per quart.
>
> "62. On September 1, 1938, the Jetter Dairy Company had been selling to one Weintraub, 30 cases of milk daily, at 9¾¢ per quart. *On September 4, 1938, intervening plaintiff, Dairymen's League, solicited said account, and by selling at 9¢ per quart, acquired 10 cases of said trade.* Gold Medal Farms, Inc., by same price cutting, as the League, on same day also acquired 10 cases of said trade. In order to retain the balance of 10 cases of such trade, Jetter Dairy Company was compelled to and did reduce its price to 9¢ per quart on September 5, 1938.
>
> "63. *Within two weeks after September 1st, milk was being sold generally in the dealer-to-store trade in the City of New York at from 8¢ to 9¢ per quart. The Sheffield Farms Company, in order to capture the trade of Herman Lavender, furnished said Lavender milk at 9¾¢ per quart; rebated to said Lavendar ¾¢ per quart on all purchases, and in addition thereto, delivered 13 quarts per case, the extra quart of milk further reducing the price ¾¢ per quart, making the net cost to said Lavender, 8¼¢ per quart.*
>
> "The Sheffield Company sold milk to one Rose Paley; gave her 35 cases of milk free, in order to induce her to buy 'Breakstone milk.' Prior to that time, the Dairymen's League had given the same

witness 35 cases of free milk to procure her to buy Dairymen's League milk. The Grandview Dairy Company refused to give Mrs. Paley any free milk, and she discontinued buying from them, obtaining her requirements from Sheffields and Dairymen's League, who made the concessions above referred to. Sheffields billed milk to Mrs. Paley at 9¾¢ per quart, collected that amount, and rebated to her in cash at the rate of ¾¢ per quart. The Dairymen's League charged her 9¢ per quart.

"64. The practices above referred to were general throughout the milk industry, and the capture of trade by price cutting is known as 'chiseling.'

"65. Certain producer dealers, with large number of cows, are not subject to the Order. The Balsam Dairy Company, selling milk in Brooklyn, sold milk to Israel Hock, a storekeeper, at 8½¢ per quart in September, 1938.

"66. It is common practice in the marketing area for storekeepers to buy milk from several dealers, varying the quantities purchased from each in accordance with the price concessions, free milk, or other concessions, which such storekeepers can obtain from one dealer as against another.

"67. *From September 1st, 1938, to January 1st, 1939, the Jetter Dairy Company lost 240 cases of daily trade to competitors by reason of concessions. It recaptured upwards of 40 cases of this trade,* but in doing so was obliged to give, in free milk, cream, and cash, several hundreds of dollars. In addition, said defendant sustained a loss on each quart of milk sold by it through the Jetter Dairy Company or the Triboro Milk & Cream Co., which sells milk received from producers delivering to the Jetter Dairy Company. In order to stop further losses of trade captured by competitors who undersold the Jetter Dairy Company and Triboro Milk & Cream Company, the said defendant was obliged to reduce the price of milk charged to all customers to prices ranging from 8¢ to 9¢ per quart, in order to meet such competition. The principal stockholders of Jetter Dairy Company and Triboro Milk & Cream Co. are identical." (Emphasis supplied.)

List of customers (known in the trade as "stops") lost by Jetter is contained in Plaintiff's Exhibit G (printed R. 651-653 incl.). Stops lost to the Sheffield Farms Company are designated "Breakstone." The Sheffield Company captured 12 customers, as follows (R. 651):

"Breakstone

504 E. 138 St., 5 cases, May.
572 E. 138 St., 4 cases, May.
785 E. 151 St., 2 cases, Nov.
542 Southern Boul., 2 cases, Sept.
167 St. Anns Ave., 3 cases, Sept.
715 Second Ave., 5 cases, Sept.
246 Columbus Ave., 2 cases, Nov.
1311 Brook Ave., 2 cases, Nov.
504 E. 174 St., 2 cases, Dec. 1.
879 Longwood Ave., 5 cases, Sept.
1425 Wilkins Ave., 3 cases, Nov."

Only one other, Adler, captured more.

In order to recapture 40 cases of trade or hold existing customers, Jetter had to make price concessions and give cash and free milk. This is the same practice indulged in by Sheffields, the League and others, as shown by witnesses Bronfeld, Paley, Lavender and Hock (R. 288-295, incl.). The concessions which Jetter had to give (through the Triboro branch of the business), are shown at (R. 653), and are as follows:

"Cost to Triboro

1938

1869 Third Ave., 30 cases, Dec.
800 Home St., $30.24.
1311 Brook, 25 cases, Nov. 28.
504 E. 138, 572 E. 138, 20 cases, 2 qt. HY, Oct. 22.
1642 Lexington, 30 cases, Nov. 14.
3805 Burg.
413 St. Anns, $100.
311 St. Anns, 34 cases, Oct. 22.
1265 Brook Ave.
1364 Washington Ave., 50 cases, Nov. 28.
328 E. 66 St., 20 cases, Nov. 14.

232 E. 108 St., 50 cases, Nov. 14.
613 E. 141, All 27.23.
222 E. 104, All in price.
167 St. Anns, 50 cases."

The Dairymen's League was the first to attack Jetter's business. It took a second customer away later on at 452 E. 146th Street (R. 394). The Sheffield Company was chiseling; Balsam Dairy Company, which was not subject to the Order, was chiseling. It was general. While widespread chiseling did not commence for about two weeks, the League and the Gold Medal Company were in the field without delay.

When Jetter's route manager, Rootstein was called as a witness, the appellee concealed nothing from the Court. Rootstein had with him, a statement of milk chiseled by other handlers than the League (Exhibit G, R. 651). He did not have the League stops which had been chiseled, for the reason that this information had been previously furnished for use in a motion herein (motion papers not printed).

A possible explanation of chiseling, by other dealers, is covered by Findings 57 and 58 (printed R. 144, 145), as follows:

> "57. The Market Administrator has no facilities for checking the actual disposition of milk reported by various handlers, nor for checking whether cream withdrawn from storage, is cream which was already in storage, or is cream delivered to the storage plant and immediately withdrawn. The size and complicated nature of utilization of milk by the large companies, their plant-to-plant transactions within their own business, and their in-market and out-of-market sales, make it impractical for the Administrator to check the accuracy of reported utilization, and disposition except from the books of such large handlers."

> "58. In the fierce competition for fluid milk business in the Metropolitan Area, hereinafter referred to, there is a strong incentive to manipulate milk between plants and in and out of the market by

> the large companies, having facilities so to do, for the purpose of obtaining a competitive advantage. Such large companies have made full use of such competitive advantage, in application of the Order to their businesses."

There was the incentive and opportunity for certain handlers, by dishonesty, to secure an unfair advantage.

Without accusing Queensboro, which concededly indulged in chiseling (R. 317) (having laid low for a few days), we illustrate how this might be accomplished. Queensboro received fluid milk at Indian Castle, Van Hornesville and Blossvale. This milk was shipped to Canastota (R. 318). If it utilized this milk in fluid form, it was obligated to pay $2.45 per cwt. If it utilized it in cream, it was obligated to pay $1.75 per cwt. in September, or $1.90 in October and November.

At Canastota it manufactured milk into cream (R. 311), reporting the same as "storage" cream, at $1.13 per cwt. (R. 315-671). Its market service payment of 23¢ reduced this price to 90¢.

Cream was being put in and taken out of storage with no checkup by the Administrator (R. 144).

Queensboro was reshipping this milk to New York (R. 311); it had a permit to ship fluid skim milk to New York City (R. 311). It could, conceivably, obtain skim milk from elsewhere.

There was nothing to prevent Queensboro from putting in and taking out of storage, the same cream at the same time, shipping the same to New York, adding the skim milk from which it had been extracted, or any other fresh skim milk, agitating the mixture, and thereby having fluid milk at 90¢ per cwt., plus some slight added cost of transportation. Or, it could ship the cream to New York and utilize it as fresh fluid cream. Its cost for milk from which the cream was made, would not be $1.75 or $1.90, but would be 90¢ per cwt.

It is noteworthy that Queensboro Farms captured six of Jetter's customers, as follows (R. 652):

"Queensboro Farms

781 Prospect Ave., 2 cases, June.
643 Wales, 6 cases.
3822 Broadway, 8 cases, 1937.
21 First Ave., 5 cases, Oct.
605 W. 158, 3 cases, Oct.
155 W. 135."

One customer was subsequently captured by Jetter from Queensboro (R. 653).

It may be argued that opportunity for dishonesty is no defense in this action. Very likely that is true. We refer to the matter, only as a possible explanation of how some dealers may be able to chisel and still stay in business.

This matter was the subject of discussion by Sheffield Producers at their November meeting. The minutes of Sheffield Producers meeting (R. 598) contain this statement:

> "The question of irregularities in the sale of fresh and storage cream during the month of September by some dealers, was considered."

In order to avoid the discriminatory provisions of the New York State Milk Control Law, the Joint Legislative Committee Report, heretofore referred to (Legislative Document, 1937, No. 81), on page 15, explains that *distributors increased their purchases from other states.* On page 16, *it refers to violations of the resale price, by dealers who had a competitive advantage.* The report says:

> *"detecting violations was very difficult, as the grocer who was receiving the rebate would not admit it, and the dealer who was also violating the law, certainly would not admit his guilt.* The means used for the rebates took several forms."

An examination of the typewritten transcript when

Witness Bronfeld was sworn, will disclose that the attorneys for the League openly ridiculed appellees' claim of rebates being given by Sheffields. Appellees' Exhibit No. 6, printed (R. 654), is a receipt form used by Sheffields in giving rebates. The customer getting the rebate signed the receipt as a voucher for the rebate received. When the receipt was produced and placed in evidence, it caused League great surprise and consternation. The original stenographic transcript should show this.

There is no valid reason for the Sheffield Company to give rebates. **There was no resale price fixed by law. It could bill customers at the actual price charged. This manner of doing business was surreptitious.** It was clandestine in nature.

It was used to cover up unfair competition made possible by the Order.

The complex operations of the League, Bordens and Sheffields; the tremendous amounts of milk handled; the intricate and multiple classifications of milk all afford opportunity for manipulation.

All three withdrew plants from approval of the New York City Health Department during September and October (R. 676). The motive for these shifts is known only to those companies. That they were coincident with the operation of the Federal Order, warrants the inference that some advantage was gained by the change.

The League and Sheffields are convicted, by the evidence, of unfair trade practices. No rebuttal was introduced to the proof that the League on September 4th, initiated the capture of Jetter's customers. The Sheffield Company may be excused for offering no rebuttal. It was not a party to the action. It was not afforded an opportunity to repudiate the testimony of Rose Paley that she was given 35 cases of free milk to induce her to cease purchasing milk from an independent dealer, Grand View Dairy, or the other testimony as to its price cutting. Its method of giving rebates could hardly have been denied.

Exhibit 6 presented documentary proof which could not well have been refuted.

K. The Order Could Have Treated All Handlers Equally or Nearly So. It Need Not Have Discriminated Between Either Dealers or Producers.

It is indeed most unfortunate that the Order, which was designed to help producers and place distributors on a basis of equality, by its provisions, has defeated the purpose and intent of Congress as expressed in the Act.

The Jetter Dairy Company paid its pool obligation to the Settlement Fund for September. If the competitive advantages to the larger companies had not been used in price cutting and unfair competition, doubtless this case would not now be before the Court.

Even with the discriminatory provisions, had the Order contained a fair trade practice clause (permitted by the Act), chiseling might have been kept to such a minimum that efficient independent dealers could have survived.

The argument that Jetter lost nothing is ridiculous. His minimum cost of milk was 9¾¢ per quart. He had to sell at from 8¢ to 9¢ per quart. A resulting loss is self-evident. Any argument to the contrary is an insult to the intelligence.

Jetter lost heavily in customers. To recapture his trade, he had to make price concessions which are set forth. Finding No. 67 (R. 146) shows the situation as follows:

> "67. *From September 1st, 1938, to January 1st, 1939, the Jetter Dairy Company lost 240 cases of daily trade to competitors by reason of concessions. It recaptured upwards of 40 cases of this trade,* but in doing so was obliged to give in free milk, cream and cash, several hundreds of dollars. *In addition, said defendant sustained a loss on each quart of milk sold by it through the Jetter Dairy Company or the Triboro Milk & Cream Co., which sells milk received from producers delivering to*

the Jetter Dairy Company. In order to stop further losses of trade captured by competitors who undersold the Jetter Dairy Company and Triboro Milk & Cream Company, the said defendant was obliged to reduce the price of milk charged to all customers to prices ranging from 8¢ to 9¢ per quart, in order to meet such competition. The principal stockholders of Jetter Dairy Company and Triboro Milk & Cream Co. are identical." (Emphasis supplied.)

Finding No. 68 refers to the absence of a fair trade practice clause, permitted by the statute, as follows (R. 146):

"68. The Order contains no provision prohibiting unfair methods of competition and unfair trade practices, as permitted by Title 7, Section 608c (7) (A)."

Appellees' defense that the statute, as applied in the Order, is being used as an instrument of private monopoly, confiscation of property, and restraint of trade, is addressed to the conscience of the Court, as well as to the law.

This will be further considered.

POINT II.

The discriminatory provisions of the order referred to in Point I, are not authorized by the Act. They are confiscatory. They take the property of appellees for (an alleged or) a public use and transfer the same to others, without just compensation, contrary to the Fifth Amendment.

None of the discriminatory provisions are authorized by the Order. There was no design on the part of Congress to allow dealer co-operatives, by exemption from regulation, to establish a private monopoly. If so, it certainly was not the intent of Congress to extract moneys from

the capital of other producers and proprietary dealers as a subsidy to the monopoly.

A. The Defense That These Provisions Are Unauthorized, is Properly Raised by Appellees in Their Pleadings.

Appellant, in its brief, page 155, urges that the appellees have no legal standing to complain of these provisions, saying at page 156:

> "* * * The answers filed by the several appellees do not allege that these provisions of the Order are not authorized by the Act. *Since a lack of authority in the Act for these payments would clearly be an affirmative defense, it follows that the issue was not before the District Court, and that the Court erred in passing on the question.*" (Emphasis supplied.)

This argument is without force.

Appellees were the *defendants* in the action. It was brought *against* them. Injunctive relief, enforcing the Order, was asked. Appellant, as plaintiff, had the burden of proof to affirmatively establish its cause of action against appellees.

In both complaints, it alleged:

> "The Secretary on August 5, 1938, issued Order No. 27 * * *, *said Order containing the terms and conditions authorized by* the applicable provisions of the Act, *and no others*" (R. 3-42). (Emphasis supplied.)

The appellees, in their answers admitted (Rock Royal and Schuyler Junction "on information and belief"):

> "That the Secretary on August 5, 1938, issued Order No. 27" (R. 63, 85).

All three appellees alleged:

> "Defendant further answering the complaint * * * denies the same and each and every allegation therein contained not hereinbefore specifically admitted or denied" (R. 64, 70, 71, 87, 88).

Appellant (plaintiff), in its complaint *anticipated a defense that certain terms and conditions of the Order were unauthorized by the Act.* It asserted that such an affirmative defense was not available to the appellees (defendants), saying

> "said Order containing *the terms* • • • *authorized by* • • • *the Act, and no others.*"

This squarely put in issue whether the terms of the Order were authorized by the Act. It is stated 49 Corpus Juris, page 182, Section 202, that

> "the mere form of a plea or answer will not be allowed to affect any substantial right, so long as it does not mislead or deceive the adverse party."

And in Section 200, on the same page:

> "So, a defendant may avail himself of a defense *disclosed by plaintiff's pleading* or proof."

Moore's Federal Practice, 1938 edition, Volume 1, page 568, says:

> *"Failure to plead matter which constitutes an affirmative defense does not preclude a party from taking advantage of the opposing party's proof, if such proof establishes the defense. Thus, although illegality is an affirmative defense, if the illegality appears on the face of the contract, or from the opening statement of plaintiff's counsel, or from plaintiff's proof, the defendant could take advantage of it by proper motion, and if necessary the Court will raise the objection itself."* (Citing *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261.) (Emphasis supplied.)

At the close of the plaintiff's case, defendants moved for a non-suit and dismissal of the several complaints on the ground

> "that the plaintiffs failed to prove the cause of action alleged in the complaint against the defendants, or any cause or causes of action against any of said defendants" (R. 270),

and on other grounds (R. 270, 271).

"The motion was denied on *all grounds except constitutional grounds, and the variance of the Order from the statute, as to which the Court reserved decision*" (R. 271). (Emphasis supplied.)

Judge Cooper referred to the provisions of Article VII, Sections 5 and 6. He said at (R. 772):

> *"The defendants make some further contentions which may be briefly considered. It is urged that no provision of the statute authorizes Articles VII, Sections 5 and 6, of the order.*
>
> "These relate to payments of 5¢ per cwt. to co-operatives and market services of 23 cents per cwt. and transportation charges, both to co-operatives and proprietary handlers.
>
> *"The Court does not find any sections of the Act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced."* (Emphasis supplied.)

Milbank v. Jones, 127 N. Y. 370, cited by appellant on its position, holds (opinion pages 375, 376):

> "* * * The answer was a general denial, and the plaintiff insisted on the trial, as he does on this appeal, that not having been informed by the answer that the illegality of the contract would be an issue on the trial, he could not be expected to be prepared nor required to meet it. *Under a general denial the rule undoubtedly is that if the illegality appears on the face of the complaint,* or necessarily appears from plaintiff's evidence, *advantage may be taken of it by defendant, who must also be permitted to controvert by evidence everything which the plaintiff is bound, in the first instance to prove, in order to make out his cause of action.* And the cases cited by the respondent in support of the ruling will be found on analysis to come within it.
>
> "In *Russell v. Burton* (66 Barb. 539) the contract, as proved by the plaintiff, was for lobby services, and void.
>
> "In *Oscanyan v. Arms Co.* (103 U. S. 261), the complaint was dismissed on the opening of plain-

tiff's counsel becau it appeared therefrom that the contract relied on was illegal.

"In *Cary v. Western Union Telegraph Co.* (20 Abbott [N. C.] 333), the plaintiff, in making proof of his contract, introduced evidence showing its invalidity."

* * * * * *

"* * * But in this case it neither appeared from the complaint or the evidence presented by the plaintiff that the contract was illegal, and as we have already shown when the plaintiff rested the evidence established a cause of action. *The general denial put in issue all matters which the plaintiff was bound to prove; nothing more. He was required to prove the contract entered into by defendant which was, on its face, valid.*" (Emphasis supplied.)

In the case at bar, the *invalidity of the Order appears "on its face," by incorporation of terms which are unauthorized by the statute.* Plaintiff was bound to prove a valid order. The authority of the District Court (8a [6] of the Act), is limited to enforcing and restraining violation of

"any Order, regulation or agreement heretofore or hereafter made or issue(d) *pursuant* to this chapter." (Emphasis supplied.)

It is academic that **plaintiff had the burden of establishing a valid Order before jurisdiction was conferred upon the District Court. As part of its case, it not only alleged the issuance of a valid Order, but affirmatively alleged there were no invalid "terms or provisions" therein.**

To deny appellees the right to urge this defense, which was anticipated by appellant in its complaint, and was argued on the trial, will be to resort to a technicality, to accomplish an injustice. This is contrary to the attitude of law courts in recent years, and to the principles of equity long established.

As will be seen, the Order is so complicated—its illegal

and discriminatory terms are not readily apparent. They were not intended to be. It took a League attorney three months to think up the first draft. Then it took from November to February before it was finally acceptable to the Bargaining Agency (R. 722, 723). The application of Article VII, Sections 1, 5 and 6, by the Administrator, was first available to appellees when they were proven on the trial. This proof was drawn from unwilling witnesses over bitter objection by League attorneys. Often, the obtaining of a single answer was the result of a half hour's argument and dispute.

The appellant desired an early trial. November 24, 1938, a motion was made by appellee Schuyler Junction for discovery, which motion was argued, opposed by appellant, November 26, 1938, and never decided, because appellees consented to an early trial.

In the stipulation of facts and evidence (R. 264, par. 62), a reservation as to validity of the Order, was made by the appellees. The paragraph says:

> *"If the Order is valid, and if the defendants are subject thereto,* the amounts due from such defendants to the Market Administrator for *payment to producers* through the Producer Settlement Fund, are as follows:" (giving figures). (Emphasis supplied.)

In this stipulation of facts, there was reserved to appellees, *the validity of the Order,* and it was also assumed that any moneys due, "were for payment *to producers* through the Producer Settlement Fund."

B. The Terms and Provisions Complained of, Are Not Authorized by the Act.

The terms complained of are *unauthorized* and *contrary* to the letter and intent of the Act.

The Act, 8c (5) (A) authorizes the fixing of minimum prices to be paid *by handlers (dealers) "for milk purchased from producers or associations of producers.* Such

prices *shall be uniform as to all handlers,* subject only to" (usual differentials).

This refers to the *total or actual price to be paid by dealers* (uniform price paid to producers or co-operative associations, plus or minus sums paid or received as a result of "handlers net pool obligation").

Section 8c (5) (B) (ii) provides for "*payment to all producers and associations delivering milk to all handlers of uniform prices* for all milk so delivered, irrespective of the uses made of such milk" (subject to usual differentials).

The clear intent of this provision is that *dealers buying from co-operatives shall pay the co-operatives the uniform price and account to the Pool for the balance.* A comparable and inconsistent illustration of application of the Order, is the method of settlement employed by Bordens and Sheffields. Bordens *pays the Dairymen's League in full for milk, reporting to the Pool, only the minute part of its transactions, had with others* (Exhibit 45, R. 674). *Bordens should have paid the League only the uniform price for all milk.*

Sheffields, however, *reported and accounted all of its milk to the Administrator* (Exhibit 43, R. 673). In theory, *it paid Sheffield Producers, a co-operative representing all milk purchased, the uniform price* (modified by negotiations covering "unpriced" milk, to arrive at *a different uniform price for all milk*) (R. 596-599, incl.).

The statute intended and *provides* that all dealers, *including co-operatives, shall actually pay the same total price for milk.* Section 8c (5) (C) provides:

> "(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (*including producers who are also handlers*), *to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices*

> *fixed, in accordance with paragraph (A) hereof.*" (Emphasis supplied.)

The provisions of the Order providing for equalization (so far as authorized) *are permitted, and must have been adopted, under the subsection quoted,* which provides that "*the total sums paid by each handler (including producers who are also handlers), shall equal the value of the milk purchased by him at prices fixed in accordance with Paragraph "A."*

There is no authority in the statute *exempting co-operatives from paying "the equal value of milk * * * at prices fixed in accordance with Paragraph A."*

The provisions of Article VII, Section 1, requiring *payment of the uniform price* by "each handler *which is not a co-operative association of producers,*" *are contrary to the provisions of Section 8c (5) (C).*

The provisions of 8c (5) (F) permitting blending of collective sales by co-operatives qualified under the "Capper-Volstead Act," obviously intends, only, to permit co-operatives such as the League, to blend the uniform price received in the area with prices received in other areas, subject to the restriction

> "provided, that it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to Paragraph (A) of this subsection (5) for such milk."

If, as a handler or distributor, the League was charged, and paid, the "total" price which Jetter has to pay, it could not sell milk at less than "the absolute minimum delivered cost of 9 3/4¢ per quart." It has no capital and has no right to make an illegal deduction of moneys due its producers, to be used in unfair competition. Such underpayments to producers are a violation of the Act.

As usual, the League takes the benefits; it has no duty to comply with the Act; its producers are penal-

ized. This is in accordance with past practices. Under the League contract, the League producer is the subject, in a realm where its supposed agent, the League, is the master. The agent is the sovereign. It is the "sole arbitrator" by the terms of its contract. The producer has waived his right to an accounting.

C. The Terms Objected to, Take the Property of Appellees for an Alleged Public Purpose and Transfer the Same to Others, Without Just Compensation.

We will first consider appellee Jetter.

We have already shown that the exaction from Jetter of a higher total price for milk than "the equal price" provided for in Section 8c (5) (A), is a violation of Section 8c (5) (C). The excess payments charged, constitute a taking of Jetter's moneys for the alleged public purpose of accomplishing the aims of the Act.

Appellees Schuyler Junction and Rockroyal, *were entitled to receive the full uniform price* in their adjustment with the Fund by means of their Pool obligation. Such adjustment *should leave in their hands, the full uniform price.*

The statute makes no provision as to handling charges, or other services performed by a co-operative for a handler. Under the Order, co-operatives could give to handlers purchasing from them, the services involved in receiving and shipping milk. There is nothing to prevent a co-operative from paying the freight, or furnishing other services, except that furnishing such "services" would actually reduce the total cost to the handler for milk purchased from the co-operative.

In any event, the two appellee co-operatives, were absolutely entitled to have the uniform price left, net, in their hands, after settlement with the Producer Fund.

The taking of large sums of money under Article VII, Sections 5 and 6, and the taking of 20¢ per cwt. from

the Fund, for producers in 18 counties under the provisions of Article VI, Section 8, reduced the net uniform price computed by the administrator.

The taking of this money from the Fund, reduced the uniform price and the total sums to be received by appellees. This constituted a taking of money, which appellees were entitled to receive under the Act.

The moneys deducted under Article VII, Section 3, were given to certain co-operatives, principally the Dairymen's League, which is a dealer or distributor.[2]

This is in the nature of a rebate to the League, on all milk sold by it as a distributor; and as a subsidy on all milk which, as a co-operative, it sells to other handlers, including all milk received by Bordens in plants owned and operated by the Borden Company. Appellant in its brief, page 156, urges that

> "these payments are simply one feature of the distribution of the burden of the surplus milk among all producers."

In other words, it is for an alleged public purpose. Actually, the payments are neither contemplated nor authorized by the Act. They are repugnant to "equalization," which the statute sought to accomplish. They were a basis of inequality.

Market service payments under Article VII, Section 6, are unauthorized and unnecessary under the Order, except as to handlers with no manufacturing facilities whatever (discussed Point I-E).

While the Act does not specifically authorize such payments, when applied to relieve handlers operating fluid milk stations, of the expense of receiving and transporting milk which it can only re-sell at the Order price to other handlers, they might be justified.

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2 It will be noted that the provisions of Section 8c (5) (C) do not consider a co-operative, as such, a handler. The obvious intent of the language employed, is that only co-operatives who are also dealers or distributors, are also handlers.

There is no authority for giving a rebate of 23¢ per cwt. to large handlers, co-operative and proprietary, on milk which is customarily handled at a profit in ordinary manufacturing operations. It constitutes a bonus to those handlers taken from the producer settlement fund, in which appellees Rockroyal and Schuyler Junction have a fixed financial interest. It takes their property for an alleged public purpose, without compensation.

These payments constitute a rebate; reduce the "total" price paid for milk by these large companies; they result in the exaction of a higher "total" price from appellee Jetter, than is charged those companies, thereby taking Jetter's money for an alleged public purpose.

That appellees receive no payment or reimbursement for their moneys, so expropriated, needs no argument. They are not paid or reimbursed.

We conclude:

1. The Act was not designed, and by its terms, does not authorize, the exemption of producers or co-operatives "who are also handlers" from regulation.

2. It does not authorize taking of moneys due producers and co-operatives for payment to other co-operatives and proprietary handlers.

3. It does not authorize exaction of a "total" price for milk from Jetter, which is higher than the "equal" price required to be charged *all handlers*, co-operative or otherwise, under 8c (5) (A) (C) of the Act.

4. It neither intended nor authorized the expropriation of such moneys from appellees and payment to appellees' competitors[3], in the nature of a subsidy in the establishment of a private monopoly.

5. The dealers receiving competitive advantages are entitled to no subsidy from the capital of ap-

[3] Appellees Rock Royal and Schuyler Junction are selling milk to dealers in competition with the League and other co-operatives.

pellees, nor from other producers or proprietary dealers in a like situation, in this scheme in restraint of trade, and in the interests of monopoly.

We have already covered at length, Point IA, IB, and IC, the discrimination resulting from regulating only part of the milk purchases by the three large groups. These reduce the price paid for milk by those groups; reduce the amounts received by the co-operative appellees, in the uniform price; and result in charging Jetter and others in a like situation, a higher total price for milk than that paid by the favored companies.

D. The Taking of Moneys of Appellees for an Alleged Public Use, and Transferring the Same to Others, Without Just Compensation, is Violative of the Fifth Amendment.

This legal proposition is based upon the theory that the government is setting a rate or price, the inevitable consequence of which is the deprivation of the property of the defendant Jetter and the analogy is based upon public utility rate fixing cases, as well as upon the taking of property from one and giving to another.

These are the propositions:

1. Jetter lost money.

2. Its loss was not due to inefficiency or competition from those who were in the same status as it.

3. The loss was the direct proximate result of this scheme of regulation.

The due process clauses of the 5th and 14th Amendments protect persons from having their property unreasonably or arbitrarily confiscated under the guise of regulation of rates or prices, and this has been recognized on innumerable occasions since public regulation began.

The earliest cases concerning deprivation of property were in the field of public utilities. They involved claims of violation of due process where rates fixed, denied a

fair return on capital investment, or would result in confiscating capital.

In the leading case of *Smyth v. Ames,* 169 U. S. 466 (1897) with citation from many previous cases, this Court held that a state could not confiscate the property of railroads by fixing arbitrary rates. On page 525 of that case, the Court quoted from *St. Louis & San Francisco Railway v. Gill,* 156 U. S. 649, 657, as follows:

> "* * * There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business and that especially may the courts of the United States treat such a question as a judicial one."

This proposition is so well established in constitutional law that there is little need to cite at great length to sustain it.

The principle that the government in its regulation of business may not establish a confiscatory rate or price is not limited to public utilities. In *Aetna Insurance Co. v. Hyde,* 275 U. S. 440, the attack of a large number of fire insurance companies upon a Missouri statute upon the ground that the rates were confiscatory in violation of due process was unsuccessful because none of the companies was willing to admit, nor did it allege, that it would itself be injured by the proposed schedule of rates. But this case clearly recognized that the rates in a proper case with proper parties would be subject to attack if they resulted in confiscation. On page 447, the Court stated:

> "*Jurisdiction of this court to set aside state-made rates as confiscatory* will be exercised only in clear cases. And the burden is on one seeking that relief to bring forward and satisfactorily prove the invalidating facts." (Emphasis added.)

In the cases in which milk-control statutes have been upheld this Court has been careful not to uphold them

without reservation. In *Nebbia v. New York*, 291 U. S. 502, 536, this Court stated:

> "It is clear that there is no closed category of businesses affected with the public interest *and the function of courts in the application of the 5th and 14th Amendments is to determine in each case whether the circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary and discriminatory.*"

In *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 167, Mr. Justice Cardozo indicated that the dealer should have applied to the Milk Control Board for relief but in this case the defect is in an order which has a provision allowing exemptions of co-operatives from the price provisions. Should this Court hold that the Act authorizes such Order, then the exemption is by the Act. No appeal to the Secretary could have been of any avail.[4] On page 170 the Court stated "the 14th Amendment does not protect a business against the hazards of competition. * * * It is from hazards of the Order, *and not from restraints of law capriciously imposed*, that the appellant seeks relief."

Jetter is not complaining because he is injured by the "hazards of competition" which are referred to in many cases. He is complaining because an Order has been imposed upon the milk industry which by its terms places the small independent dealer and small co-operatives at the mercy of Bordens, Sheffields, the Dairymen's League (and several others), which control over 50 per cent of the fluid milk marketed in the metropolitan area (R. 144, Finding of Fact 56 ([f]).

A system of governmental regulation can result in confiscation by *creating a condition* wherein the prices fixed cannot afford a return sufficient to operate, as easily as it can by fixing prices which will directly necessitate a loss. It may be, under proper circumstances, creating

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4 Discussed under Point II-E.

such a condition would be reasonable but a regulatory program which exempts the three big companies, which control 50 per cent of the fluid milk market, from its operation cannot be called reasonable. Bordens, Sheffields and the League are just as much proprietary handlers as is Jetter. There is no reason why they should be *subsidized* because of their greater size. The market administrator is able to fix prices for nine different classifications of milk sold in varying markets. There appears no adequate reason why fluid milk sold outside of the state could not be included in the pooling arrangement, nor is there a valid reason why this "unpriced" milk should be used in a blending operation at arbitrary prices in determining the actual price paid to producers.

So far as a producer is concerned, he sells so many quarts of milk and gets a return which averages a certain number of cents a quart. The different accounting devices which determine his ultimate price in terms of transportation, butterfat, and other differentials are fictions to him.

Thus when these companies "blend" their out-of-state milk at outrageously low prices, the farmer doesn't know what accounting "price" has been allocated to this milk. All he knows is that he is paid at a lower rate for all his milk than producers who sell to dealers who do not have the "advantages" of blending. With all of the other differentials involved it is unlikely that the farmer can really be sure as to how much loss this would mean to him anyway.

When these companies are allowed these devices, the record substantiates what common sense would prophesy. To make a person pay uniform prices while giving to a business competitor the power to reduce prices with impunity under the cloak of exemptions granted by the governmental regulation shocks the senses of morality.

The impossibility of surviving under these conditions is just as much a product of the government regulation as would be a fiat declaration that henceforth all railroads

shall operate for nothing, and is just as certain in its results.

Jetter is not paying a single price for his milk but is in reality making two payments. One of these payments goes into the computation of the uniform price and may be called a payment for the milk. The other payment, part of which ends in the pockets of the League or large companies which qualify for payments under Article VII, Section 6, is not a part of the price paid to producers at all. Price represents the terms of a bargain between buyer and seller and when a third person extraneous to the bargain is paid a subsidy, that cannot well be called part of the price.

Taking the property of Jetter and giving it to the League violates due process of law.

> *Railroad Retirement Board v. Alton*, 295 U. S. 330;
> *Thompson v. Consolidated Gas Utilities*, 300 U. S. 55; and
> *United States v. Butler*, 297 U. S. 1.

The *Thompson* case deals with an Act which undertakes the drastic provisions to end the waste of sweet gas. The statute, in effect, took pipe lines owned by plaintiffs for the use of others. The Court said in the opinion, pages 79 and 80:

> "Our law reports present no more glaring instance of the taking of one man's property and giving it to another. In *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196; *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340; *Great Northern Ry. Co. v. Cahill*, 253 U. S. 71; *Delaware, L. & W. R. Co. v. Morristown*, 276 U. S. 182; and *Chicago, St. P., M. & O. Ry. Co. v. Holmberg*, 282 U. S. 162, expenditures directed to be made for the benefit of a private person were held invalid, although the party ordered to pay was a common carrier. In *Loan Association v. Topeka*, 20 Wall. 655, and *Cole v. La Grange*, 113 U. S. 1, the payments ordered for the benefit of a private person

were declared invalid, although the money was to be raised by general taxation. In *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, the exaction was held lawful, though imposed under the guise of an assessment for alleged betterments. Compare *Georgia Railway & Electric Co. v. Decatur*, 295 U. S. 165. And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. See *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605, 606; *Rindge Co. v. County of Los Angeles*, 262 U. S. 700, 705. Compare *Cincinnati v. Vester*, 281 U. S. 439, 446, 449."

The case of *Railroad Retirement Board v. Alton R. Co.* 295 U. S. 330, deals with pooling of contributions of all railroad carriers in providing a retirement fund for employees attaining 65 years of age. This Court disapproved discriminatory provisions therein which are comparable to those effected in the Order, which is here litigated. They are disapproved as being arbitrary and unreasonable.

The Court points out, page 351:

> "That the Act assumes that, in fairness, both employer and employee should contribute in fixed proporations to a liberal pension. *But we find that in contradiction of this recognized principal, thousands of those in the service at the date of the Act, will at once become entitled to annuities though they will have contributed nothing to the fund.*"

The principle is applicable to this case. The Act assumes fair treatment to all handlers and all producers and associations of producers. In contradiction to that assumption, we have pointed out that the Order lacks the element of equality or fairness; that it is discriminatory as between handlers, producers and producer associations.

At pages 356 and 357 of the *Alton* case, the Court says:

> "* * * The railroads are not only liable for their own contributions, but are, in a measure made insurers of those of the employees. This appears to be an unnecessarily harsh and arbitrary imposition, if the plan is to be what on its face it imports, a joint adventure with mutuality of obligation and benefit.
>
> "This court has repeatedly had occasion to say that *the railroads, though their property be dedicated to the public use,* remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. *There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees.*"

Milk is not yet a public utility. There is not as much justification for the discriminatory provisions of the Order, taking the property of appellees and giving it to other handlers in the furtherance of private monopoly, as there was for requiring contributions to the Pension Fund, which the Court disapproved.

To the same effect, see *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 336; *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 589, 602.

The case of *Currin v. Wallace,* passing on the Tobacco Inspection Act of 1935, decided January 30, 1939, as yet unreported, makes no different ruling. The Court stated in the opinion:

> "Finally, plaintiffs invoke the due process clause of the Fifth Amendment. Plaintiffs are warehousemen and auctioneers acting as agents for the growers who own the tobacco and pay their commissions. Plaintiffs are thus in the position of contesting a regulation for the benefit of their principals because of an alleged interference with their business. *The Act does not affect their*

rate of charges and does not deprive them of any property." (Emphasis supplied.)

Appellee Jetter was deprived of its customers as well as its money. Much evidence in the record shows the cost of procuring those customers in the New York market. Free milk and other concessions had to be given to get them and retain them. Good will was a tangible asset. At any rate, loss of a customer represented a tangible loss (see cost to Jetter of regaining 40 cases of the 240 cases of trade lost, R. 653). Judge Cooper pointed out in his opinion (R. 765):

> "Co-operatives which are also milk dealers or handlers, may and do pay their producers less than the uniform price and from their payments into the Producers Settlement Fund, if any, they receive payments back for services, which proprietary handlers cannot, and do not, receive.
>
> "In fact, there is very little that a proprietary handler, who does not sell any milk outside the marketing area, and who has no plant to which he can transfer surplus milk, can do to recoup his losses. He cannot reduce his price by 'blending' a fictitious value on 'unpriced' milk with that sold in the area. He has no unpriced milk. He has no manufacturing plant, and may possess neither capital or inclination to enter the manufacturing field already principally covered by Dairymen's League, Bordens, National, and some of the larger independents."

On pages 766 and 767, the Court said:

> "*Moreover, there is nothing to prevent the Dairymen's League and other large producers from further depressing the price of milk sold in the marketing area in order to capture the customers of competitors and thus forcing the Jetter Dairy Company and others in like situation, out of business at an even more rapid rate.*
>
> "The Dairymen's League Co-operative, however, could go on indefinitely for the statute and order are greatly discriminatory in favor of co-operatives, especially large ones, which can take advantage of all the opportunities it presents.

"The property of the Jetter Company and, of course all other proprietary handlers and smaller co-operatives is thus taken by operation of statute and without the due process of law required by the Fifth Amendment.

"This brings us to the consideration of the questions of law here involved, apart from the misrepresentations to producers in connection with the referendum.

"The two most important questions of law are these:

"1. Does this statute as applied in the order, in its operation under the conditions here existing, violate the Fifth Amendment to the Federal Constitution prohibiting the taking of property without due process of law or the taking of private property for public use without just compensation?

"2. Can the discriminations in favor of co-operatives be upheld under the circumstances here existing on the ground that producer co-operatives may legally receive the special preferential treatment provided in order 27?

"It is held by high authority that even though a statute may be constitutional on its face, and may be valid when enacted or when given a particular application, it may be invalid under changed conditions or when given an application which results in arbitrary and prejudicial discrimination or when its operation results in the taking of property of one without compensation and transferring it to another.

Concordia Insurance Company v. Illinois, 299 U. S. 535, 545.
Borden Company v. Baldwin, 293 U. S. 194, 210.
See also *Airway Corp. v. Day,* 266 U. S. 71, 85.
Nebbia v. New York, 291 U. S. 502, 537.
Great Northern Ry. v. Washington, 300 U. S. 154.
The Acts of Congress under the commerce clause are subject to the Fifth Amendment.
Currin v. Wallace, supra." (Emphasis supplied.)

Futher discussion on this subject or citation of authorities is unnecessary. It would be cumulative.

E. No Relief Was Obtainable by Application to the Secretary for Review of the Order.

Argument that application should have been made to the Secretary of Agriculture for modification of the Order, is discussed by Judge Cooper (R. 764) as follows:

> "It is quite true, as urged, that the defendants might have applied to the Secretary of Agriculture for a modification of Order No. 27 in some or all of the respects in which they are aggrieved thereby.
>
> "But it is not to be supposed that there could be quick action upon such an application for modification of the order and in the meantime great detriment might result to the handlers.
>
> "The handler must comply with the order during such time as it takes for the Secretary to entertain, hear, and decide the application for modification of the order and for such further time as it takes for a Court to decide whether modification should have been granted.
>
> "The statute also provides."

Section 8c (15) (B) states:

> "The pendency of any proceeding instituted pursuant to this subsection (15), shall not impede, hinder or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to Section 8a (6) of this Title."

Such review would have afforded no relief to appellees. Moneys in excess of the total equal price which they were obligated to pay, were being distributed monthly to producers and handlers. Once distributed, they could not be recovered.

F. The Dairymen's League, as a Co-operative Was Not Entitled to the Discriminatory Benefits Allowed by the Order.

The Government's brief, pages 131 to 142, urges, in effect, that discrimination in favor of a co-operative now has approval of the Courts. We disagree with any

such theory. It is proper that the Government should encourage and aid co-operatives in all legitimate respects. We do not believe there has been any change in the principle announced in the case of *DuPlex Printing Co. v. Deering*, 254 U. S. 443. In construing the Clayton Act, 38 Stat. 730, 15 U. S. C., Sec. 17, and its exemption in favor of labor organizations and co-operatives (cited by appellant on page 135 of its brief) the Court said, at page 469:

> "* * * The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. *But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.*"

However, appellees again urge that the discriminatory provisions are not authorized by the Act. In interpreting the provisions of the Act, it is elementary that the Court shall interpret it within the Constitution, if possible. For this reason, the terms criticized should be considered outside the Act. We have pointed out that even if the Court considers the provisions constitutional they are unauthorized under the language of the Act (Point II B).

Co-operatives in General.

There is no single economic definition which can include the varying types of co-operatives which exist. Similarly, it is not possible to treat all so-called co-operatives equally in the eyes of the law. Both the majority and dissenting opinions in the case of *Frost v. Corporation Commission*, 278 U. S. 515 (1929), talked in terms of economics. The majority held that a discrimination in favor of co-operative cotton-ginning could not be upheld since the organization was financed by private capital which was allowed to get a return on its investment.

The opinion held:

> "A classification to be valid must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced, shall be treated alike."

The Order here litigated, does not even treat co-operatives alike. The minority opinion pointed out that a large sum of money was necessary to finance such an organization and therefore felt that the discrimination was valid and that a genuine co-operative was involved. It is important to note that this case involved a co-operative which would be merely running *one* ginning establishment. Also the protest which was upheld in that case was being made by a company which maintained that it should not be subjected to the competition of a co-operative and that its property rights in its franchise were being invaded. Jetter does not maintain that he has a franchise in the milk business. The property which he claims is being invaded is his capital which is being absorbed as a direct result of the arbitrariness of this Order. On fair terms of competition, he could survive on the basis of efficiency as against the Dairymen's League. He is complaining because he is not allowed to compete with the Dairymen's League, Bordens and Sheffields on anywhere near equal terms. He is compelled

to pay a fixed price to his producers while they are exempted from paying such a fixed price and in addition he is forced to make payments into the Producers' Settlement Fund which are arbitrarily distributed among his competitors to be used in destroying his business.

The point is that a farmers' co-operative of two or three hundred farmers which is formed for purposes of collective bargaining and removing the individual farmer from his position of individual helplessness is a far different proposition from a colossus which at its base, controls twenty thousand producers and which handles 34 per cent of the milk which is sold in the metropolitan milk market.

Differences in size may make a tremendous difference in the realities of the situation. The League possesses its own milk stations, its own manufacturing plants; it has a large-scale contract with Bordens which is a national figure in the milk industry. It controls milk from the producer to the store. Over the producers at the base there is erected a vast organization of others whose interests are an important part of the organization and may easily not be identical with those of the producers.

The directors may remain producers nominally by their continued ownership of farms which they run as a business by employing others to manage them but they are now men of the business world regardless of their origins. Large numbers are hired to run the country receiving stations and to take care of transportation, to act as officers in the hierarchy of management, to provide suitable publicity and public relations, to run the manufacturing plants and work in them, and to handle the details of marketing in New York and elsewhere. The business of handling milk which amounted to 163 million pounds even in the short month of November, 1938, is big business. Although the producers are members of the co-operative they can hardly be said to be the only ones interested in its operation.

The directors are little more amenable to the dictates of an individual farmer than would be a director of a large steel company to one of its shareholders. The nature of the contract between the producer and the co-operative has elsewhere been pointed out in Appellee's brief. The co-operative has control of a sufficient number of milk stations so that in many areas producers have no choice but to sell milk to the League or else not sell it at all. To call an organization of this huge nature, which is a vertically integrated big business, by the same name as a small co-operative organized within a small area is to tend to confuse the great distinctions between them. The form of an organization does not always reveal the dominating forces behind it. This organization has a much greater analogy to a proprietary corporation than it has to a small group of farmers acting jointly to protect themselves from exploitation.

The *directors* of this co-operative *have secured a milk control Order wherein the co-operative is paid subsidies* out of the Producers' Settlement Fund but *they have also secured* an order *whereby the co-operative is enabled to pay* back to its *producers less* than the uniform price even after its profits on out of state milk and subsidies from the Producers' Settlement Fund are included.

It has been maintained by the Government that a co-operative could not long continue to pay a less price than others because it soon would lose its producers. The fact that many producers have no choice but to accept such less price has been previously pointed out.

But there is another intangible factor which must be reckoned with. The *word "co-operative" produces an immediate favorable emotional response on all who hear it. Producers are often persuaded to accept lower prices than is being paid to others because they are duped into believing that they are making a sacrifice in order to attain an ideal of fair treatment for themselves some time in the future. It is a vain hope but it possesses a powerful appeal.*

In chain store tax cases this Court has recognized differences in size as being a reasonable basis of classification and this is also recognized in our income tax and monopoly laws. Similarly this Court may agree that differences in size may compel as well as allow distinctions between different businesses. What is reasonable legislative benevolence toward a small co-operative formed to protect its individual members from external menaces may well become arbitrary discrimination when the advantages are conferred upon a large-scale business which already controls over 34 per cent of the giant milk industry of New York State and which is intimately connected with Bordens.

(Cf. *Great A. & P. Tea Company v. Grosjean*, 301 U. S. 412.) Where size is a permissible ground for discrimination *against* a company it is hard to feel that discrimination *in favor of* a gigantic organization such as this is justified.

G. There Is No Decision of a Lower Court Passing on the Questions Here Raised, Except the Case at Bar.

The Act, insofar as it regulated milk, contains specific provisions relating thereto, which are different from those passed on by this Court in *Currin v. Wallace, supra.*

The questions here raised differ from those in the *Currin* case, in two respects:

1. Here, it is claimed that the application of the Act is unauthorized, contrary to its express provisions, and violative of the Fifth Amendment.

2. That the equalization features operated through a market-wide pool, are discriminatory as between dealers, co-operatives, and producers.

3. That the provisions are an unlawful delegation of legislative power to co-operatives.

The cases cited by appellant, pages 150-153 of the brief on this subject, to the extent we have been able to examine the same, do not raise the issues presented under

appellees' Points I and II. In the *Boston Order* case, reviewed in *U. S. v. Whiting Milk Co.*, 21 Fed. Supp. 21, and the case of *U. S. v. H. P. Hoods & Sons*, decided February 23, 1939, now on appeal to this Court, and to be argued immediately following this case, no similar issues appear to be raised.

In those cases, there is a great challenge to the validity of the Act, and to the provisions authorizing equalization. Those decisions do not in any manner, pass upon the questions here raised.

In the case of *U. S. v. Krechting*, an Ohio case, unreported, cited on page 153 of appellant's brief, the Court said:

> "There was also evidence that some producers and their handlers were in a preferred position because their business consisted principally of the distribution of Class 1 milk (bottled milk), at contract prices lower than the proposed prices; that other handlers were at a disadvantage because they were being forced to take a disproportionate share of the surplus milk to support the market, and that if and when the order became effective the first group would not only lose their favorable status but would be forced to assume a share in the distribution of surplus milk, to the advantage of the large users of Class III milk (milk products)."
>
> * * * * * *
>
> "It may be conceded that defendants will lose their present favorable status, by reason of Order No. 22, but unless they assume their proportionate share of the burden of the orderly disposition of the surplus milk, their present favorable position is only temporary, as they are always vulnerable to attacks of price cutting and unfair competition."

In that case, we assume that there was actual equalization; that there were no competitive advantages to anyone and that the defendants obtained the benefits of immunity to price cutting and unfair competition intended by the Act.

We do not have the unreported decisions in the case of *U. S. v. Babcock Dairy Co.*, or *U. S. v. Beraneck*, and accordingly are not familiar with the issues raised. They are cited on page 153 of appellant's brief, but no issues raised in any of the five milk cases there referred to, are discussed in appellant's brief, as being the same as the issues in this case.

H. The Court Properly Refused to Grant the Injunction.

Section 8a (6) under which this action is brought, vests the several district courts with jurisdiction to enforce and restrain violation of "any order, regulation or agreement heretofore or hereafter made * * * pursuant to this Chapter" (the Act).

There is no duty resting upon the Court to enforce an invalid regulation or any agreement which was illegal. The Court should grant such an injunction only "in an appropriate exercise of the equity powers of the Court," *Virginian Ry. v. Federation*, 300 U. S. 515. In that case, the Court reviewed the powers and duties of a court of equity. It said at page 552:

> "* * * Courts of equity may, and frequently do, go much farther both *to give* and *withhold relief in furtherance of the public interest* than they are accustomed to go when only private interests are involved." (Emphasis supplied.)

The Court also said on page 551:

> "* * * But the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the Court. *Willard v. Tayloe*, 8 Wall. 557, 565; *Joy v. St. Louis, supra*, 47; *Morrison v. Work*, 266 U. S. 481, 490; *Curran v. Holyoke Water Power Co.*, 116 Mass. 90, 92."

Section 8a (6) was not mandatory or conclusive upon Judge Cooper, nor was the Order. Congress could not thus transform the equity jurisdiction of the Court into a mere ministerial formality. Nor did it attempt to do so.

Before granting the relief asked, the conscience of the Court should be satisfied. Judge Cooper considered this proposition, saying at (R. 759) of the record:

> "Should the conscience of the Court be satisfied that the order should be enforced when it was adopted on such a referendum and under the circumstances here shown? Manifestly not unless the Secretary's finding is binding on the Court, despite the fact that some of the misinformation was contained in departmental literature sent to producer voters.
>
> "It is said that the Secretary cannot be held responsible for the acts of the Bargaining Agency and the Dairymen's League. There can be little doubt of the co-operation between Federal and State Agents with the co-operatives to bring about a favorable vote for the order in the referendum. Of this, the Secretary himself was probably unaware and relied on his subordinates."

POINT III.

The referendum, on which the Order is predicated, is a nullity.

Appellees pleaded as a defense, that prior to the referendum the terms and effect of the Order were misrepresented to producers. It was represented that under the Order, *all handlers would pay the same cost for milk and all producers would be paid at a uniform rate. The Order in effect, was directly contrary to the representations.*

Appellees contended that *a vote* by producers *to the effect that they favored an Order which treated all handlers and all producers alike, would not warrant* the finding of the Secretary *that the producers favored an Order which charged* handlers *different* prices for milk *and returned very few producers, the so-called "uniform" price.*

The clear intent of the Act is that the true wishes of the producers, are binding on the Secretary. To them (supposedly) is given the power to permit or prevent issuance of the Order by the Secretary. Surely, it is a legal defense in this action to assert that the referendum was a sham; that the votes cast were obtained by deliberate fraud and in no way reflected the true "favor" or "disfavor" of producers which Congress has made binding on the Secretary.

Appellees in their answers assert that less than two-thirds of the producers expressed themselves in favor of the Order, as explained, and that the "Finding" by the Secretary is without probative evidence to support the statement, and amounts merely to an expression of opinion by the Secretary as to the matters purported to have been found.

The Secretary was not at liberty to "find" that two-thirds of the producers favored the proposed Order, without some definite basis on which to predicate the "Finding." In the case of *Butler v. United States*, 78 Fed. (2) 1, affirmed 297 U. S. 1, the Court said at page 11:

> "It cannot be said that the Secretary's judgment that his acts will tend to effectuate the general policy laid down by Congress can be called a finding, as his judgment involves merely his opinion as to the general effect of the agreements he executes to equalize the purchasing power of the commodity in question with that of the five-year pre-war period."

And in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, in pointing out that the President's power to formulate codes under the National Industrial Recovery Act, left him free to "roam at will," the Court said at page 538:

> "That is the precise effect of the further finding that the President is to make—that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a

statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws."

The producer referendum took place long after the public hearings, and no claim either can be, or is made, that the Secretary's "Finding" of favor, resulted from those hearings. The (Rock Royal) complaint, paragraph IX (R. 3) alleges that the terms of the Order were predicated "upon the evidence introduced at the said hearing." Paragraph IX of the complaint states:

> "Pursuant to the provisions of Section 8c (19) of the Act, the Secretary conducted a referendum of producers for the *purpose of ascertaining* whether the issuance of the Order was approved or favored *by at least two-thirds of the producers.*"

Paragraph X states:

> "After conducting said referendum and after the refusal or failure of handlers * * * to sign * * *, the Secretary on the 24th day of August, 1938, determined * * * (C) that the issuance of the Order was approved or favored by at least two-thirds of the producers who * * * *voted in the above mentioned referendum.*"

The producers voted upon the question presented to them. The question as presented, was whether the producers favored an Order which required equal payments to all producers, and payment of the same price for milk by all handlers.

The "Finding" of the Secretary that two-thirds of the producers favored the Order, is wholly unsupported, and amounts only to an expression of opinion by the Secretary which is contrary to the opinion of producers reflected in the referendum. Jetter's first and third defenses state the facts supporting this contention. The producers' (and co-operatives') vote that they favored an Order requiring equal prices to all producers and equal prices to be paid by all handlers, *may reasonably be interpreted as a vote that they would not approve an*

Order which did not require equal prices to all producers, and the same price to be paid by all handlers.

The findings set out in detail the wide-spread misstatements above quoted. The publicity issued by the Bargaining Agency, Exhibits 22, 23, 23A to 23H, 23AA to 23II (R. 459 to 549), contains a part of its program of propaganda. Much which was received in evidence is among the exhibits not printed.

The publicity issued by the Dairymen's League is printed (R. 555 to R. 594). Department of Agriculture News Releases and releases by Holton V. Noyes, as Commissioner, are printed (R. 599 to 640). Judge Cooper, in his opinion, has referred to a few of them, as follows (R. 755, 756, 757):

> "'The Order (27) requires handlers to pay the uniform pool or blanket price, calculated by the market Administrator, to all producers delivering milk during any month unless the handler has received milk and sold it as Class I Milk outside the marketing area * * *.
>
> "'*Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to all producers at uniform rate except for the transportation and other differentials.*'
>
> "The last above paragraph quoted from the Government pamphlet is identical, word for word, with a paragraph contained in the Dairymen's League News of August 16, 1938, on page 5.
>
> "*These statements were incorrect. There is nothing in the Order requiring payment of a uniform price to all producers or that the uniform price or any stated price or any price determinable under the Order be paid to producers of the co-operative associations even for milk sold in the marketing area.*
>
> "About this time a pamphlet issued by the Bargaining Agency was entitled 'Mr. Dairyman—Save This Booklet.' The Plan it explains may save your farm.' On page 1 under the heading 'Principles Upon which the order is Based' appears this:

"'The fundamental requirements of the industry which the Order seeks to establish are five in number, viz:

"'1. *An equal purchase price to be paid by all dealers, for milk for the same use.*

"'2. *An equal share to each producer of the benefits of the fluid market.'*

"These are not accurate statements, for the Dairymen's League and other co-operatives are not required to pay a price equal to that paid by proprietary dealers.

"Had this order been prepared by and for the Dairymen's League and other large co-operatives, it could hardly have been more favorable to them.

"The Dairymen's League and Metropolitan Bargaining Agency publications were sent broadcast to producers urging them to vote for the order and assuring that they would receive a higher price than they had before received, and radio addresses to like effect were made.

"Following this and on August 19, 1938, and for several days thereafter the Secretary conducted a referendum. The State Commissioner of Agriculture conducted a referendum on State Order 126 at the same times and places.

"The referendum was held at the times and places set forth in a schedule of polling places issued by the Secretary prior to the referendum, 308 polling places were designated, of which 233 were in New York, 35 in Pennsylvania, and 16 in New Jersey.

"Prior to the referendum there was sent to each known eligible producer a copy of the proposed order as issued by him on August 5th, the schedule of polling places, and a pamphlet prepared by him entitled 'Questions and Answers on the Federal and State Milk Program for New York,' and another pamphlet also prepared by him entitled 'New York Milk, Explanation of Federal State Marketing Plan, contained in Order 27.'

"About 70,000 copies of these documents were sent through Federal and State Agencies to such producers.

"The Metropolitan Bargaining Agency, whose

largest and most influential member was the Dairymen's League, spent $108,637.91 to promote the adoption of this order covering salaries, publicity, printing, radio, etc., of which $12,385 was for radio addresses, $7,979, of which $12,385 was spent during the period between June 1 and September 1, during which time took place the last of the hearings and all the efforts to obtain signatures to the agreement by 50% of the handlers and to procure two-thirds of the producers to vote favorably on the referendum.

"Prior to the referendum, a list of co-operative associations entitled to vote for their members was complied. There were about 22 co-operatives found entitled to vote for their members. A letter was sent to each declaring the requirements for voting for their members. *The 22 co-operatives cast 24,903 votes, of which 24,580 were in favor of the order and 323 were against it.*

"On the referendum held August 19th for several days, 45,664 votes were cast out of a total of 60,220 producers qualified to vote, but 7,017 of the 45,664 were rejected as invalid, leaving 38,627 valid votes. Of these 38,627, 33,663 votes, or 87.1% were in favor of the issuance of the order. *Of this 33,663 favorable votes, 22,397, or slightly more than two-thirds, were cast by the Dairymen's League, Inc., alone* as a corporation for its members and other producers delivering milk to it. *It had only about 19,500 members.*

"Of the 7,017 votes rejected as invalid, 5,110 votes were in favor, and 1,437 against the order, making a total of 6,547. These were rejected because either the voters were members of co-operatives which had voted for their members or because they were not qualified to vote. 470 voters, of 7,017 rejected, failed to mark their ballots for or against the order.

"*Had it not been for these misrepresentations the order might not have had the approval of two-thirds of 38,627 votes counted as valid. 12,876 negative votes would have defeated the order. No one knows how these producers, not voted by the co-operative associations, would have voted had they but been correctly informed of the terms and effect of the order, nor how many of the 14,576*

voters who did not vote at all, nor the 7,017 whose votes were declared invalid, would have voted had there been no misrepresentations of the terms and effect of the order.

"The statute (Section 8 [c] [12]) is mandatory that the—

"'Secretary shall consider the approval or disapproval by any co-operative association * * * as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such co-operative association of producers.'

"That this applies to approval upon a referendum is made clear by Section 8 (c) (19).

"So great was the power and voting strength of the Dairymen's League that no order which it opposed could be approved, for it controlled more than one-third of the entire number of producers entitled to vote.

"This, urges the defendants, may explain why the order contains so many provisions claimed to be discriminatory in favor of large co-operatives and against proprietary handlers and small co-operatives."

Judge Cooper has pointed out that of all this, the Secretary of Agriculture was probably unaware (R. 759). He has to leave these things to his subordinates. The campaign carried on with an expenditure of over $100,000 by the Bargaining Agency alone, independent of the League expenditures, and the expense of sending 70,000 copies of various misleading documents through Federal and State agencies, was one of the highest "high-pressure" efforts put forth in any line recently.

The time available to appellees to brief this case is wholly inadequate. In order that it may go to the printer before argument, no adequate review can be made of the documentary evidence. If the Court should read the extracts from the Dairymen's League (printed R. 555 to 595), and of the Bargaining Agency "Market News" (R. 511 to 546), it would have an insight into the high pressure methods employed.

For instance, at (R. 560), Lloyd C. Anderson, an attorney of Binghamton, who appeared for the Crowley Producers Association, was ridiculed and abused. During the hearings, persons in favor of the Order were praised, and those opposed, held up to ridicule and abuse (R. 562, 564, 565). We quote from pages 564-565:

> "Many Producers Testify After Hearing Master Calls Halt on Lawyer Spouting Contest
>
> Opponents of the proposed federal-state milk marketing agreement sent their wrecking crew into action at the third hearing, which was held in Syracuse, May 18.
>
> A crowd of 1,500 dairy farmers turned out for the Syracuse hearing. Half of them walked out in disgust in mid-afternoon after lawyers spouting for the opposition had wasted most of the afternoon vying with each other in what appeared to be a contest to see which could grab the most publicity."

It will be seen that the meetings were packed by the proponents of the Order.

In the Dairymen's League News of May 31st, extracts printed (R. 568, 569), we find the following:

> "Cooke Demands End of Obstructive Tactics
>
> Sensing that opponents would fight for long delay, Edmund C. Cooke, former Buffalo Congressman, who, as counsel for the Metropolitan Co-operative Milk Producers' Bargaining Agency, had skillfully woven into the record the story of farmer need for help, laid down a strenuous bombardment in the last 30 minutes of hearing. In a brunt attack he sent a trio of concluding witnesses led by Charles H. Baldwin, former state commissioner of agriculture and markets, to the stand. Next was J. C. Treat, head of the Conesus Co-operative.
>
> Last witness was E. C. Bardin, of West Winfield, veteran dairy farmer and leader of the Sauquoit Valley co-operative. Stern visaged and speaking in a calm but forceful voice, Mr. Bardin shattered the labyrinthine logic that had been woven by the adroit dealers' lawyers to gain delay.

Bardin Says Farmers Won't Wait Long

'I've been listening to these dealers—the middlemen—opposing this attempt to obtain a living price for milk,' said Mr. Bardin.

'I think when we go back and tell the farmers up in the country about this opposition by the dealers they will be all the more for this plan.

'I've never seen such a scramble by any group for an imaginary hole as has been going on here.

'I believe in this order, and I'll fight for it to the last ditch.

'I think this is the best thing for the dealers that has come up in years. They are always telling us that all they care for is that all dealers pay the same price for milk. Well, here is something that assures just that, and I can't see any harm in their all paying producers the same price. But that isn't what they want. *They want advantages.* They want to chisel. *Well, farmers aren't going to stand for it. These dealers down here are sitting on a keg of dynamite and don't know it.*'" (Emphasis supplied.)

It will be noted that Mr. Baldwin was executive secretary of the Bargaining Agency; J. C. Treat was its secretary; E. C. Bardin was its treasurer. These things are not mentioned.

These are only a few instances of the rabble-rousing propaganda with which producers and the public were bombarded.

It was carried on in the Bargaining Agency paper; in the League News; in much literature and in personal letters sent to producers; over the radio and in the public press.

It was calculated to prevent dealers, producers or co-operatives who were opposed to discriminatory provisions of the Order, from appearing and obtaining a fair hearing.

The appellees stayed away from the hearings.

Nevertheless, memorandums filed by persons who did

attend, and in evidence, as part of Exhibit 3 to the stipulation herein, contained the arguments here advanced. They were unavailing. The League and Bargaining Agency were in control. They swept everything before them. Even in the voting, co-operatives opposed to the Order were prevented from voting their total membership.

Appellee Schuyler Junction, by its president, attempted to vote for its producers (R. 757, 758); could not do so. This co-operative, operated by producers, had failed to "qualify." Only 22 of 193 co-operatives in the area "qualified" (R. 757, 758). A letter with instructions was sent out July 8th, to the co-operatives, instructing them to qualify by not later than July 16th. Judge Cooper said at (R. 758):

> "Here we have the co-operatives required to give information and determine within eight days, less time out for transportation of mail from Washington and to country districts and back to Washington, whether they favored an order not yet definitely known and whether they wished to vote as a co-operative for or against such order.
>
> Assume four days for transportation (two days each way) that leaves four days for the collection of the information, calling meetings of directors, and determination whether the co-operative would vote for its members on an unknown order and in a Referendum not yet called and not held within a month thereafter."

Appellee, Rock Royal, made a similar attempt. It was not "qualified" as it had only had its plant in operation during August, 1938 (R. 255).

We respectfully urge that the referendum did not in any sense reflect the approval or disapproval by producers of the Order.

There are two other Points which should be made on behalf of appellees, but which cannot be included in this brief for want of time. On the argument, appellees will ask permission to file a short supplemental brief, cover-

ng these points, as well as to reply to briefs of appellants Dairymen's League and Bargaining Agency, if and when received, and the brief of appellant Noyes, to the extent necessary.

The judgment and decree of the lower Court, should be affirmed.

Respectfully submitted,

WILLARD R. PRATT,
Attorney for Appellees, Schuyler Junction New York Milk Shed Co-operative, Inc., and Jetter Dairy Company, Inc.,
Counsel for Appellee, Rock Royal Co-operative, Inc.,
Office and P. O. Address:
201-202 U. G. & E. Bldg.,
Utica, New York.

APPENDIX A.

THIS AGREEMENT, Made this.....day of .....193....., between DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., hereinafter known as the Association, a corporation incorporated by and under the laws of the State of New York, and having its principal office and place of business at Utica, N. Y., party of the first part, and.....hereinafter known as the Producer, party of the second part, for the purpose of performing services for him connected with the production, manufacture, preservation, drying, canning, storing, handling, utilizing, marketing and selling of all the milk and milk products produced by him.

WITNESSETH:

That in consideration of the outlays, and expenses incurred and to be incurred by the Association in providing means for handling, manufacturing and marketing the milk and dairy products of the Producer as mentioned herein, the said parties have agreed to, and do hereby agree as follows:

1. The Producer, wishing to avail himself of the facilities to be furnished for marketing his milk and dairy products when the Association is equipped for same hereby appoints the Association his sales agent and as such grants to it full power and authority to sell said milk in the fluid state, or in its discretion to manufacture the same into such products as it may from time to time determine, and to sell such manufactured products, the proceeds of all such sales to be blended in one fund and distributed as hereinafter provided.

2. The producer covenants and agrees to and with the Association that if he at any time refuses or neglects to deliver such milk or the manufactured product thereof produced or manufactured by him to the Association or upon its order, at such time and place as the Asso-

cation may direct, then and in that event in every such case the Producer neglecting or refusing so to do will pay to the Association for such refusal or default, the sum of Ten Dollars ($10.00) per cow for.....cows, and if such default or refusal shall continue for more than one month, an additional sum of Three Dollars ($3.00) for each cow per month, for the same number of cows, so long as such default or refusal continues, none of which payments are to be construed to be a penalty or forfeiture, but as stipulated liquidated damages as prescribed by Section 37 of the Co-operative Corporations Law of the State of New York, and it is hereby agreed that the Association will suffer by reason of such refusal or default, it being agreed by the parties hereto that this agreement is one of a series of agreements with producers of milk, depending for its true value upon the strict adherence of each and of all of said producers to each and all of said agreements.

3. Such milk shall be delivered by the Producer to such shipping stations or other plants as the Association may from time to time direct, and to be of such test and quality, delivered at such hours and produced under such sanitary and hygienic regulations as may be required by the rules and regulations of the Association and the Board of Health, the City and the Laws of the State where the milk is produced and is to be finally marketed. If the Producer under the direction of the Association manufacturers such milk, the products thereof to be cleanly and wholesome and in good marketable condition.

4. The Producer will endeavor to follow the instructions of the Association as to the proportionate quantities of milk produced during the several months of the year, in order that an adequate supply for consumers at all seasons of the year may be assured.

5. It is further agreed that in case the Association fails to sell the milk of the Producer as herein stated, that the Producer will in each and every such case manufac-

ture such milk into such products as he may desire and deliver said manufactured product to the Association upon its order for sale, or if directed by the Association, will deliver such milk at such station or manufacturing plant as said Association may direct.

6. It is mutually agreed between the parties hereto that the Producer shall have the right to give away or retain for his own use such of his milk or other dairy products as he may wish, but the Producer shall not sell directly or through any agency any products contracted to the Association, to any outside party, except such products only as are offered to the Association as herein provided, and rejected by it, or upon written consent of said Association.

7. It is further mutually agreed that if the Producer is offered a price for his milk or dairy products in excess of the price then obtained by the Association, said Producer will turn over such offer to the Association.

8. For direct loans made by the Producer to the Association to provide initial capital, the Producer shall receive a certificate of indebtedness, one-fifth of which with interest shall be retired each year from the special fund herein mentioned to be created.

9. The proceeds of all sales made by the Association for the Producer shall be paid for by the purchaser or purchasers thereof to the Association, which proceeds, together with the proceeds of sales made by the Association for other producers, shall be blended into one general fund; the Association to make distribution thereof after making the deductions hereinafter stated, and pay over such funds to the Producer and to other producers in the same proportion that the quantities delivered by the several producers to the Association for sale shall bear to the whole, so that the price received by the Producer shall be uniform with that paid other producers, regardless of any variation or differences in the price received by the Association from such sale for the

several producers, subject to such equitable differentials as said Association may from time to time establish. The Association shall deduct from the proceeds of such sales such uniform percentages as they charge others for like services and which the said Association may deem necessary to meet the expenses already incurred, together with such other sums as may be necessary to cover interest, overhead, depreciation, guarantees and all such other expenses as may be reasonably estimated as essential to be incurred by the Association in conducting its operations, for which no certificates are to be issued.

10. The said Association shall also make further deductions to create a special fund to retire loans; to be used in building warehouses or other necessary buildings; to purchase land and buildings; to secure necessary equipment; to provide such working capital as said Association may deem necessary; such deductions for the special fund to continue as long as the Producer delivers milk or milk products to the Association for sale. After the close of each fiscal year, each producer shall receive a certificate in such form and payable at such time or times and at such rate of interest as such Association may from time to time determine for all moneys which he has contributed that year to the special fund from the percentages levied on his milk and dairy products, as herein provided, it being further agreed that the maturity of such certificates shall not exceed ten years and one month from the date thereof, and that the rate of interest thereon shall be not less than four per cent. per annum, nor more than six per cent. per annum.

11. The Producer agrees that said Association may also receive the proceeds of sales of other producers, and that said deductions as herein specified shall be uniform as to each producer, so that each producer will receive the same price per unit subject to such equitable differentials as may from time to time be established by the Association, distribution to be made by the Association

which is hereby appointed by the Producer sole arbitrator of the distribution of said sums, and such distributions when so made shall be final and conclusive and binding upon the parties hereto. The Producer, in the absence of fraud, hereby waives all his rights in law or in equity to an accounting thereof, and this contract shall act as a bar thereto in any proceeding taken by the Producer therefor.

12. All of the aforesaid distributions as herein provided are to be distributed to the Producer on or before the 25th day of each and every month for approximately the amount realized from the milk and dairy products sold and paid for during the previous month, after the aforesaid deductions have been made; and as soon after the fiscal year as all of said milk and dairy products handled as aforesaid have been sold and pay received therefor, full settlement is to be made to the producers thereof.

13. The Producer hereby authorizes the Association from time to time and at all times when in its judgment such action will promote its efficiency, to borrow money in its name and to secure repayment thereof to pledge part or all of any unsold milk and dairy products, accounts receivable, notes receivable and trade acceptances in which the Producer has any interest as owner or otherwise, the pledgee to be first paid from the proceeds thereof.

14. It is further mutually agreed that the Association may deduct from the proceeds of sales as herein provided, a further sum of One Dollar ($1.00) for each year, which shall be subscription to the *Dairymen's League News*.

15. The Producer agrees to execute an order directing the person or persons to whom any of his milk, cream or dairy products are now or hereafter delivered to pay the gross proceeds thereof to the Association and in the event of change of such buyer from time to time to execute such other and further orders as may be req-

nisite to enable the Association to make such collection, and receipt therefor, and hereby authorizes the Association, at any time when this contract is in effect, to change the name of the buyer named in any order executed under it, heretofore or hereafter, to the end that this contract may be performed. Also it is agreed that delivery to any buyer to whom Producer shall deliver milk produced by him during the term of this agreement of a copy thereof (certified by the Association to be a correct copy) shall be sufficient authority and direction for such buyer to pay all moneys due or to become due for such milk to the Association and shall constitute an assignment of such moneys to the Association.

16. The Producer hereby applies for membership in the Association, agrees to comply with all the requirements of the by-laws of said Association, and authorizes the Association in case this contract is cancelled, as herein provided, to deem such cancellation a withdrawal from the membership in this Association.

17. It is further mutually agreed that this contract shall run continuously unless cancelled by notice of either party to the other between the 12th and the 28th day of February, both inclusive, of any year, which notice shall be in writing and become effective on the 1st day of April then next ensuing, subject to any right or lien which the Association has against the Producer or his property until his indebtedness to the Association is fully paid, and subject to the rules and regulations prescribed by the by-laws of the Association.

IN WITNESS WHEREOF, the parties hereunto subscribed their names and affixed their seals, the.....day of.....193....

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

By .....

President

..... (Seal)

Producer

.....

(Witness to Producer's Signature)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 771 (826, 827, 828).

UNITED STATES OF AMERICA,
Appellant,

v.

ROCK ROYAL CO-OPERATIVE, INC., *et al.*,
Appellees.

On Appeal from the District Court of the United States for the Northern District of New York.

SUPPLEMENTAL BRIEF

for

ROCK ROYAL CO-OPERATIVE, INC.,
JETTER DAIRY COMPANY, INC.,
and
SCHUYLER JUNCTION, NEW YORK, MILK SHED CO-OPERATIVE, INC.,

WILLARD R. PRATT,
Attorney for Appellees, Jetter Dairy Co., Inc., Schuyler Junction, New York, Milk Shed Co-operative, Inc.;
Counsel for Rock Royal Co-operative, Inc.,
Office and P. O. Address,
201-202 U. G. & E. Bldg.,
Utica, New York.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1939

Index.

Page

Supplemental Point I 2

The Diseriminations complained of, are prohibited by the Fifth Amendment. Their use in restraint of Trade and in the creation of a private monopoly, is illegal, outside of the constitution 2

A. A marketing Order is exempted from operation of the Anti Trust Laws, only if issued in strict compliance with the Act 2

B. The provisions of the Capper-Volstead Act do not permit the discrimination in favor of co-operatives provided for in the Order. Nor do the provisions of Section 608c (5) (F) permit the discriminations present in the Order 4

C. As yet, the taking of private property for an alleged public purpose, without due process, contrary to the Fifth Amendment, has not been authorized in favor of co-operatives, or otherwise 10

D. Payments to co-operatives under Article VII, Section 5 and to co-operatives and proprietary handlers under Article VII, Section 6, are not authorized by the statute. Those to co-operatives under Section 5 are arbitrary and bear no true relation to actual costs. If they are payable to co-operatives, they should equally be payable to proprietary handlers, but in any event, would constitute a subsidy 10

Page

E. The discriminatory terms of the Order, are contrary to the representations made by the Dairy Section, U. S. Department of Agriculture, at the opening of hearings on Order No. 27 12

Supplemental Point II 14

The Order regulates only part of the Marketing Area, and thereby makes possible, the tremendous competitive advantages to the largest handlers through the medium of "Unpriced" milk 14

A. The exemption of the New Jersey part of the Metropolitan Market from the Order was more unfair, since re-sale prices were fixed and maintained in New Jersey, while they were not fixed in New York 16

B. The League, Bordens and Sheffields were entitled to no subsidy by way of market service payments because of their manufacturing operations 18

Supplemental Point III 27

The Provisions of Section 8c (12) of the Act, permitting co-operative associations to cast the votes of "Producers who are members of, stockholders in, or under contract with such co-operatives association" in a producer Referendum constitutes an unlawful delegation 27

A. As applied to the Jetter Dairy Company, the Section delegates to its chief competitor, the power to regulate the Jetter Company, while exempting itself from regulation 27

Page

B. As applied to appellees Rock Royal and Schuyler Junction, the Section is discriminatory, and an unlawful delegation 29

Supplemental Point IV 30

The order is the culmination of almost twenty years of attempts by the League to establish itself, a private monopoly 30

A. The Dairymen's League instituted its program to dominate all producers and dealers in 1922 31

B. The League did not wish this scheme to to be tested in the Courts. It attempted to prevent the Appellees from resorting to the Courts for an adjudication of their rights 43

Supplemental Point V 56

Judge Cooper's decision is amply supported by the law and the facts, and the judgment granted thereon should be affirmed 56

Cases Cited.

	Page
Adam v. Saenger, 303 U. S. 64	4
Baldwin v. Seelig, 294 U. S. 511	35
Burns v. Dairymen's League, 220 A. D. 624	31, 33
Carter v. Carter Coal Co., 296 U. S. 238	28
Consolidated Textile Co. v. Gregory, 287 U. S. 90	4
Dairymen's League v. Holmes, 207 A. D. 429	31
First National Bank v. Maine, 284 U. S. 332	4
Hegeman Farms v. Baldwin, 293 U. S. 163	17
McNulty v. Mediation Board, 18 Fed. Supp. 494	57
Moore v. Texas & N. Orleans R. R. Co., 297 U. S. 101	57
Parker v. Dairymen's League, 222 A. D. 341	34, 35
Schechter Poultry Corp. v. U. S. 295 U. S. 495, 553	29
Seaboard A. Railway v. Watson, 287 U. S. 90	4
Smith v. Cahoon, 283 U. S. 567	4
Truax v. Corrigan, 257 U. S. 312	3

Statutes:

U. S. C. A. Title 7, Ecs. 291, 292	4
Federal Trade Commission Report, H. D. No. 95	14, 42
New York Legislative Document (1937) No. 81	36
New York Milk Control Statute (1933)	35
Rogers-Allen Law, Chap. 383, Laws 1937	38, 39

IN THE

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UNITED STATES OF AMERICA, *Appellant*,

v.

ROCK ROYAL CO-OPERATIVE, INC., *et al.*, *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR ROCK ROYAL CO-OPERATIVE, INC., JETTER DAIRY COMPANY, INC., AND SCHUYLER JUNCTION NEW YORK MILK SHED CO-OPERATIVE, INC.

Points Covered in Brief.

This brief is intended, insofar as the very limited time available will permit, to cover the following:

1. Include Points which were not included in the main brief, in case No. 771, for want of time.

2. Reply to Points raised in the brief of appellant Dairymen's League Co-operative, Inc., in case No. 827.

3. Reply to argument of the Solicitor General in the oral argument before the Court.

SUPPLEMENTAL POINT I.

The discriminations complained of, are prohibited by the Fifth Amendment. Their use in restraint of trade and in the creation of a private monopoly, is illegal, outside of the constitution.

A. A Marketing Order is Exempted From Operation of the Anti-Trust Laws, Only if Issued in Strict Compliance With the Act.

The Act, 8b which provides for marketing agreements, says:

> *"The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful:* Provided, That no such agreement shall remain in force after the termination of this Act."

Section 608c, referring to "orders" *contains no such provision.* Section 608c (8) (9), which provides for issuance or promulgation of Orders, contains no such provision either. *It was probably the intent of Congress to exempt Orders,* as well as agreements from the anti-trust laws, *and the Act may be so construed.*

However, the *exemption* would apply *only* to an *order* or marketing agreement which *complied* with the Act. It would not extend to any *provisions* of an *order* which are *unauthorized.* Of course, if this Court should hold that the Act itself authorized discrimination in favor of co-operatives, and that the terms in the Order which are here complained of, were within the fair intent of Congress and the Act, then the Anti-Trust Laws are, in effect, repealed so far as the Order is concerned.

In either event, it is unnecessary to discuss at length the various exemptions of co-operatives from operation of the Anti-Trust Laws.

Order No. 27 was complementary to and dependent up-

on the issuance of a State Order (Order No. 126) (Art. X of the Order). Thereby, in theory, intrastate milk, as well as interstate milk, would be governed by the Order.

In the case of *Truax v. Corrigan*, 257 U. S. 312, 27 A. L. R. 375, the Court considered due process as applied in the Fourteenth Amendment, to which the complementary Order, Official Order No. 126, is subject. The Court said (27 A. L. R. 382, 383 and 384, 385):

> "Plaintiffs' business is a property right (*Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 465, 65 L. Ed. 349, 356, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172), and free access for employees, owner and customers, to his place of business, is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. *Pettibone v. United States*, 148 U. S. 197, 203, 37 L. Ed. 419, 422, 13 Sup. Ct. Rep. 542."
>
> • • • • • •
>
> "A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the 14th Amendment."
>
> • • • • • •
>
> "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all remedy, is wholly at variance with those principles."
>
> • • • • • •
>
> "'*All men are equal before the law;*' '*This is a government of laws, and not of men;*' '*No man*,

> *is above the law'—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws.*" (Emphasis supplied.)

While the Fifth Amendment contains no equal protection clause (*Currin v. Wallace, supra*), the principles involved in the due process clauses of the Fifth and Fourteenth Amendments are practically the same.

The *Truax* case has been followed by this Court in many instances, *Smith v. Cahoon*, 283 U. S. 567; *First Nat'l Bank v. Maine*, 284 U. S. 332; *Seaboard Airline Railway v. Watson*, 287 U. S. 90; *Consolidated Textile Co. v. Gregory*, 289 U. S. 86; *Adam v. Saenger*, 303 U. S. 64. If the doctrine there expounded has been overruled, we have been unable to find any such decision.

B. The Provisions of the Capper-Volstead Act Do Not Permit the Discrimination in Favor of Co-operatives Provided for in the Order. Nor Do the Provisions of Section 608c (5) (F) Authorize the Discriminations Present in the Order.

The Capper-Volstead Act authorizes the creation of co-operative associations and marketing of farm products (U. S. C. A. Title 7, Section 291). This statute provides:

> "Persons engaged in the production of agricultural products as farmers * * * dairymen * * * may act together in associations, corporate or otherwise * * * in collectively * * * preparing for market, handling and marketing in interstate and foreign commerce"; such authority being conditioned upon the co-operative organizations meeting specified requirements.

> Sec. 292 (U. S. C. A.) provides that: "if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve notice on such association a complaint

> * * * requiring the association to show cause why an order should not be directed to cease and desist."

Section 292 specifically disapproves use of the Act in unlawful monopoly or restraint of trade. While the section permits only the Secretary to take affirmative action by issuing an order to "cease and desist from monopolization or restraint of trade;" any reasonable interpretation of the (Capper-Volstead) Act does not give co-operative associations any right to engage in monopolistic acts or restraint of trade in the absence of an Order of the Secretary to the contrary.

The basis of the League's present claim of exemption, is contained in Paragraph 8c (5) (F) of the Act, which is as follows:

> "*Nothing* contained in this subsection (5) is intended or *shall be construed to prevent a co-operative* marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended (Code, Title 7, Secs. 291, 292), known as the 'Capper-Volstead Act,' engaged in making collective sales or marketing of milk or its products for the producers thereof, *from blending the net proceeds of all* of its *sales in all markets in all use classifications,* and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.*" (Emphasis supplied.)

This section merely permits the blending of receipts for milk. It does *not* exempt co-operatives from the provisions of Section 608c (5) (C), which require that

> "the total sums paid by *each handler* (including *producers,* who are *also handlers*) shall equal *the value of the milk purchased by him at the prices fixed in accordance with Paragraph A hereof.*" (Emphasis supplied.)

The subsection (F), far from authorizing underpayment for milk received, and sold in the area, specifically provides that a co-operative "shall *not sell* milk * * * *in any market* at prices *less* than the prices fixed pursuant to Paragraph A of this subsection (5) for such milk."

The Secretary has no authority to allow the League to blend proceeds of milk sold in other markets "*at any price he* (it) *sees fit*" for the actual purpose of *evading* provisions of *8c (5) (A), which requires* that *prices* to be paid for milk "*shall be uniform as to all handlers,*" which provision is repeated in Section 8c (5) (C), above quoted. His only authority is the Act.

Section 8c (13) (B) provides:

> "No Order issued under this Title shall be applicable to any producer *in his capacity as a producer.*"

This does not exempt *a producer, who is also a handler,* from paying the same total price as any other handler. The Court *will not read into the Act,* an *exemption* of *co-operative* associations, *which has not been placed in the Act by Congress.* We find no such exemption. Judge Cooper found none. The appellant, Dairymen's League, points out none. It bases its argument, pages 57 to 69, inclusive (Brief in Case No. 827), on the following claims:

1. On pages 57-58, it is claimed Section 608c (5) (F) which we have just discussed "treats co-operative marketing associations in a different manner." It does not point out *in what manner* it claims *this Section exempts it* from the requirements of Section 608c (5) (A) (C) requiring *all handlers* to pay the same *uniform* or *equal* price.

2. On page 58, it asserts that Congress and the Legislatures have for many years, followed a policy of exempting co-operatives "from many provisions of the law applicable to ordinary business corporations." *In the absence of any such provision in the Act,* this argument is pointless.

3. On pages 59-65, inclusive, the argument is advanced that exemption from Federal and State Anti-Trust Laws authorize the exemption found in the Order. We can only repeat that *authority* for the exemption *must be found in the Act itself.* There being none, *exemption* of co-operatives from payment of taxes, from compliance with sanitary laws, health laws, anti-trust statutes, or any other statute, *will not extend to the act in which no such exemption is granted.*

4. Pages 65-69, inclusive, consist principally of quotations from a bulletin issued by the U. S. Department of Agriculture, and which contains general statements concerning co-operatives. This statement by the Department in 1929, will not add to or detract from the language of the Act.

We have already pointed out the evidence, conclusive the League, that the *absolute minimum* cost of a bot- of milk delivered in New York City in the whole- le trade, is 9 3/4¢. In the Dairymen's League state- ent on this subject, printed in the Dairymen's League ews, November 15, 1938 (Exhibit 24-H to the Stipula- n, printed R. 594), we find the following statement, eviously printed page 58, appellees' brief.[1]

"To meet prices established under the federal-state milk marketing order milk should sell to stores at 9 3/4¢ per quart. *A good many dealers are selling at 9¢ and soliciting new business.* * * * To pay established prices, pay for full butter fat content and all other charges, 9 3/4¢ is figured as the *absolute minimum* at which *handlers* can sell milk to stores *and make full payment to producers.*" (Emphasis supplied.)

This "absolute minimum" cost *is assumed to be the ne for all handlers.*

At least no different costs are pointed out.

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1 The quotation contained on page 58, inadvertently makes it ap- that the same was contained in the League News for May 17th. statement quoted from that issue, Exhibit 24 to the stipulation, rred only to the fact that half of all milk sold in New York City, andled through stores, as wholesale milk.

Sales by the League at less than 9 3/4¢ per quart, implies payment of *less* than the *uniform* price *for milk at its source,* since transportation, labor, fuel and things of that character are fixed by tariffs, market conditions, etc. (discussed hereafter). *Absolute minimum implies efficiency* and *economical operation.*

When the League on November 15th said that many dealers were "selling at 9¢ and soliciting new business," its officials must have had their tongues in their cheeks. *It was the League which led the raid on Jetter's business on September 4th, four days after the Order became effective* (Finding No. 62, R. 145).

Sheffield's also captured Jetter's business.[2] League officials knew that the resale price of all milk sold by dealers, such as Jetter (who paid top prices), was below their cost. It had very early engaged in this unfair price cutting and again, it used this situation, created by itself and others with competitive advantages under the Order, to injure Jetter and others in its position, in their business. The League News, of November 15th, also says (R. 594):

> "There is apprehension in some quarters as to what this situation may lead to in the future. If history repeats itself, and it usually does, further price cutting may be expected. Some day some dealer who loses business to one of the price cutters will lower his selling price below the quotation of his rival. It takes only a few such instances to launch a wave of price cutting and soon the foundation has been knocked from under the price structure.
>
> "Remedy for the present condition is in the hands of the producers supplying handlers who are trying to wreck the market. By insisting that they receive full payment for all of their milk in accord with all of the regulations of the federal-state program, they can make it practically impossible for dealers to destroy their market."

2 Details, pages 59-61 inclusive of appellees' original brief.

Dealers with competitive advantages were destroying the less fortunate, and the League News was slyly mocking them.

This was followed out in the visits made to Jetter's patrons by League representatives, who intimated that the Jetter producers might not be paid (R. 284, 287, 288); that they should quit Jetter and go to League, where they were sure to get their money.

In the stipulation of agreed facts in evidence, Paragraphs 78, 79 and 80 (R. 268), it is *stipulated* that the statement contained in the Dairymen's League News of November 15, 1938, to the effect that 9 3/4¢ is the absolute minimum at which milk could be sold to stores, is the "opinion of a substantial number of other and competing milk dealers distributing milk to the wholesale trade in the Metropolitan area to the minimum delivered wholesale cost of milk bottled in glass per quart."

It also stipulated "that the affidavit of Paul Grossman, verified November 25th (Exhibit 43 to the stipulation) may be considered as the evidence of said Paul Grossman with the same force and effect as if said Grossman had testified to the matters therein stated (R. 268).

Grossman's affidavit is printed (R. 645, 646). He reviews the costs which enter into the delivered cost of milk, and finally states his opinion as an accountant of many years' experience in the milk business, that "deponent believes it to be *utterly impossible for any dealer, by any means of saving, to deliver such milk for less than 9½¢*, and the cost to *many dealers is more than 9¾¢ per quart* * * * in glass bottles."

These things were *stipulated in advance of the trial. No evidence to the contrary was offered. Argument now to the effect that the delivered cost of milk was less than 9¾¢, is unworthy of consideration.*

C. As Yet, the Taking of Private Property for an Alleged Public Purpose, Without Due Process, Contrary to the Fifth Amendment, Has Not Been Authorized in Favor of Co-operatives, or Otherwise.

There is no exemption from the Fifth Amendment in the Constitution, which permits the taking of property from one citizen, to be given to co-operatives under the guise of an alleged public purpose.

Even if the language of the Act exempted co-operatives from compliance with its provisions, and thereby took the property of appellees for an alleged public purpose, it would be violative of the Fifth Amendment. As yet, the Fifth Amendment remains unchanged in that respect. Argument or citation of authority should be unnecessary in this regard.

D. Payment to Co-operatives Under Article VII, Section 5 and to Co-operatives and Proprietary Handlers Under Article VII, Section 6, Are Not Authorized by the Statute. Those to Co-operatives Under Section 5 Are Arbitrary and Bear No True Relation to Actual Costs. If They Are Payable to Co-operatives, They Should Equally be Payable to Proprietary Handlers, and in Any Event, Would Constitute a Subsidy.

This proposition has already been referred to by appellees' brief, pages 25 to 31, inclusive. The League brief, pages 69 to 70, inclusive, argues that these payments were contemplated by the statute and that appellees have no standing to question them. We will take these propositions up separately:

1. On pages 69 and 70, the League argues that these payments come from the Producer Settlement Fund and "therefore come out of producers." We have already pointed out, pages 31, 32, 75, and elsewhere, that the price paid by Jetter was made up of two items; one payment was made to the administrator, and the other payment to producers. The total price which Jetter

paid, was higher than that of its competitors. A part of its excess price was distributed to these same competitors and constituted a taking of its money by exaction of a discriminatory and excessive price.

2. On pages 70 to 76, inclusive, the League reviews various reports and general statements to the effect that surplus milk presents a serious problem. On page 74, it is argued that a co-operative which has no manufacturing facilities, should get the 5¢ payment for bargaining for its members. On page 75, it argues that co-operatives with manufacturing plants, should receive the subsidy. No facts or figures are given, nor is any reason shown why a proprietary handler with manufacturing facilities should not receive the same payment as a co-operative handler. No facts or figures appear to have been presented to the Secretary, showing any actual extra expense by a co-operative either with or without manufacturing facilities.[2]

3. On pages 76 and 77 of its brief, the League points to Section 608c (5) (B) (ii) which refers to an adjustment "which equitably apportions the total value of the milk among producers and co-operatives." This section provides:

"(ii) *For the payment to all producers* and associations *of producers delivering milk to all handlers of uniform prices for all milk so delivered,* irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for * * * (d) *a further adjustment,* equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, *on the basis of their production of milk during a representative period of time.*"

This subsection makes no provision for "service" payments or special payments to co-operatives. Obviously, it refers to the quota plan in effect in the Boston market, the Pittsburgh market and elsewhere, and refers to the ratio which the quan-

2 See Supp. Point II—B.

tities of fluid milk produced during the short season, bears to that produced in the surplus period.

4. Again on page 77, the League seeks to justify the payments under Section 10 (b), which provides:

"The Secretary in the administration of this chapter shall accord such recognition and encouragement to producer-controlled co-operative associations as will be in harmony with the policy towards co-operative associations set forth in existing acts of Congress and as will tend to promote efficient methods of marketing and distribution."

Surely this section does not authorize taking of moneys either from producers or handlers to be given to co-operatives. It does not extend to taking money from Jetter by way of extracting a higher price from it or from the producers delivering to appellees, Rock Royal and Schuyler Junction, in order to pay the League 5¢ per cwt. on its milk and all milk purchased by the Borden Company in its own plants. So far as appears in the record, the League never receives or comes in contact with that milk.

5. On page 78, the argument is made that these payments to certain co-operatives from the funds of appellees, does not deprive them of their property without due process of law. The argument defeats itself.

The same argument applies to preferential payments to Sheffields and other large handlers of 23¢ per cwt. on milk manipulated in their own plants, as well as to trucking charges, which we have already pointed out, run into large sums of money.

E. The Discriminatory Terms of the Order, Are Contrary to the Representations Made by the Dairy Section, U. S. Department of Agriculture, at the Opening of Hearings on Order #27.

The original stenographic transcript of the hearings on the Order, pages 31 to 33, contain the testimony of Paul L. Miller, principal Agricultural Economist, Dairy Section of the Agricultural Adjustment Administration at

rst hearing at Albany, N. Y., May 16th, 1938. Mr. r produced what is known as the "Economic State-" of the Government. Actually, it is entitled:

"STATEMENT CONCERNING THE
NEW YORK METROPOLITAN MILK MARKET
AND THE
PROPOSED MARKETING AGREEMENT
AND PROPOSED ORDER

Prepared by the Dairy Section, Division of Marketing and Marketing Agreements, Agricultural Adjustment Administration."

s statement was received in evidence, page 34 of anscript (hearings on the Order), as Exhibit No, 9. at time, Mr. E. O. Mather, principal attorney for epartment of Agriculture, said (pp. 33, 34, original ript of hearings):

"I might say that a limited number of the copies of this statement are available for those persons who are actively interested in either proposing or opposing the marketing agreement."

document, which is part of Exhibit 3 to the stipula-on pages 110 and 111 contains the following state-

"*One of the major objectives of this proposed marketing agreement and proposed order is to place all handlers on a comparable basis with respect to the price they are required to pay producers for milk sold in the several use classes.* In order to do this all *competitors* in the market *must be regulated to the same degree* so that the market operates efficiently *and losses engendered by unrestrained, unfair competition are eliminated.* In order that this major purpose may be accomplished *all persons* involved in the handling of milk and its products must be subject to the proposed marketing agreement and proposed order. *All*

> *types of business organizations are* found in the market, making it necessary that the definition of a 'handler' be broad enough to include all of them *so that no provision of the proposed marketing agreement and proposed order will be discriminatory with respect to different firms or persons.*" (Emphasis supplied.)

That statement is contrary to the provisions of the Order as adopted.

SUPPLEMENTAL POINT II.

The Order regulates only part of the marketing area, and thereby makes possible, the tremendous competitive advantages to the largest handlers through the medium of "unpriced" milk.[3]

The Federal Trade Commission Report, House Document No. 95, 75th Congress, First Session, which is a part of Exhibit 3 to the stipulation, *describes* both the *Production area* of the *New York milk shed*, and the *New York Metropolitan market*. It lists the markets outside of the Metropolitan Area, and then describes the Metropolitan market, *as including New Jersey*. It also describes the population of the area, showing that about 22% reside in New Jersey. We quote the report, pages 6 and 7, which states:

> "The New York milk shed includes New York metropolitan area and not less than 10 other relatively large cities, of which Buffalo, Rochester, Syracuse, Utica, Albany, and Binghamton, N. Y., and Scranton and Wilkes-Barre, Pa., represent markets of considerable magnitude. In addition to these there are more than 30 municipalities having populations in excess of 10,000 persons. The production area of these secondary markets necessarily overlap the area shipping milk to the metropolitan market.

3 Details discussed Point I—A-B-C—pp. 10-23 original brief.

"New York metropolitan market.—*The New York metropolitan area lies in two States, New York* and *New Jersey,* and as sometimes defined includes a small part of Connecticut. The report of the joint legislative committee to investigate the milk industry in New York described the New York metropolitan area as including New York City and the Counties of Nassau, Suffolk, Rockland, and a part of Westchester County in New York, and Hudson County and a part of Bergen, Essex, Middlesex, Monmouth, Passaic, Somerset, and Union Counties, N. J. The *total population* (1930) of the area was estimated at about *10,093,000,* of which *New York City* represented about *6,930,000, other municipalities* in the New York area *901,000,* and *New Jersey* about *2,262,000* persons. It was stated in the report referred to above that it required nearly *'100,000 forty-quart cans* of whole milk *daily,* plus *half again as much* milk *'in the form of cream'* to supply the New York metropolitan area.

"During January, 1936, officials of the Department of Health for New York City estimated that it would require approximately 10,000,000 quarts of milk a day to supply New York City alone with milk for all purposes, including fluid milk, sweet cream, sour cream, buttermilk, and for manufacturing. These officials also estimate that about 2,900,000 quarts of fluid milk were consumed in New York City daily. *There were approximately 350 licensed dealers operating* in the city about *9,000 milk-wagon routes.* Of this number, it is estimated that the *Bordon Farm Products Co., Inc.,* operated *2,900 routes* and the *Sheffield Farms Co., Inc., 3,000 routes.*" (Emphasis supplied.)

t will be seen that the New Jersey milk, which the der permits to be blended at any price a dealer "sees " is just as much a part of the Metropolitan milk rket as any other milk. It would be just as fair and t as feasible to say that dealers selling in both Man- tan and the Bronx, could blend their sales in either mmunity, at any price which they "see fit." Large mpanies such as Bordens and Sheffields, which, operate both Manhattan and the Bronx, would have a com-

petitive advantage over the dealer whose business was confined to just one of the Boroughs. Or, Brooklyn and Long Island could be excluded. Such exclusions would be just as justifiable (and just as unfair) as the exemption of the New Jersey portion of the Metropolitan Area.

The *Order* was manifestly *designed to fit the markets supplied by the League, Bordens* and *Sheffields*, as well as *to fit* the *manner of their operations.* The *regulation* of *all* business of small handlers *dealing only* in the part of the Metropolitan Area to the *north of the Hudson River,* while *regulating* only *part* of the *enormous businesses* of the *League, Bordens* and *Sheffields* in the same marketing area, constitutes an arbitrary and discriminatory regulation, as applied to the small handlers.

A. The Exemption of the New Jersey Part of the Metropolitan Market From the Order Was More Unfair, Since Resale Prices Were Fixed and Maintained in New Jersey, While They Were Not Fixed in New York.

We have already pointed out that New Jersey statutes fixed the resale price of milk (wholesale) at 11¢ per quart in rural districts of New Jersey and 12¢ per quart in the more populous districts (p. 15 original brief).

Had there been a resale price fixed, either by statute or by a fair trade practice clause under Section 608c (7) (A), of *even 10¢* per quart *in the New York market,* Jetter could have complied with the Order and continued to stay in business. He could have operated at a possible profit of ½¢ per quart. His more fortunate large competitors, *League, Bordens,* and *Sheffields,* were *protected in the New Jersey market. They would have made substantial profits even if they had accounted to the producers settlement fund for their New Jersey milk at $2.76 per cwt. instead of at less than $1.60 per cwt.*

However, there was no such regulation in the New York market. On the contrary, the *resale prices* of milk *were reduced* far below Jetter's cost *by* the *handlers who were given large competitive advantages under the Order.*

And this was *rendered possible by the Order* which had the force and effect of a statute. Judge Cooper pointed out at (R. 769), that this was a case of "statutory *disarming of one set of competitors and sending (them) into competitive battle with another set to whom the same statute supplies arms.*"

He discussed the application in the case of *Hegeman Farms v. Baldwin*, 293 U. S. 163, which is substantially relied upon by the appellant, in his opinion, at (R. 769), saying:

> "*Hegeman Farms Corporation v. Baldwin*, 293 U. S. 163, upon which some of the plaintiffs rely, has little application here.
>
> "There was *no* producers' *settlement fund* nor *other pooling arrangement for payments by one of the beneficiaries to another. The decision* was influenced there by the *failure of any showing* by the plaintiff that his *handicap in competition* was *not* due to his *own inefficiency.*
>
> "There is no question of inefficiency, as has been shown.
>
> "It is said that the losses suffered by Jetter Dairy Company and others are caused by the competitive conditions in the marketing area and not by reason of the statute and order. *It is the order* under the statute *which compels the proprietary handlers to make fixed payments to producers and other payments into the milk producers' settlement fund* and *causes these large losses,* while permitting co-operatives to pay what they please to producers and giving such co-operatives, especially large ones, other discriminatory preferences, both as to the amount paid into and withdrawn from the producers' settlement fund. *These grossly discriminatory provisions permit in such a competitive market, by means of the settlement, the taking of the property of some and transferring to others without compensation and thereby eliminating them entirely from the competitive field.*
>
> "This *competitive condition was known* when the statute was enacted and the order was issued, for *it had long existed* and could not be cured by any and all the previous attempts at remedy.

These *defendants have no* power or *control* over *these competitive conditions. Efficiency is not a factor.*

"This is not a case of 'protecting a business against the hazards of competition' as plaintiff's counsel assert, citing *Hegeman Farms Corp. v. Baldwin,* 293 U. S. *supra.*

"This is more like a case of statutory disarming of one set of competitors and sending into competitive battle with another set to whom the same statute supplies arms.

"*Neither the order nor the statute made any attempt to remedy the competitive conditions and the operation of the order must have been foreseen. In any event the statute as applied* in the order *brings the arbitrary discrimination and disaster hereinbefore shown.*" (Emphasis supplied.)

B. The League, Bordens and Sheffields Were Entitled to No Subsidy by Way of Market Service Payments Because of Their Manufacturing Operations.

The appellees, in their answers (Jetter R. 95), alleged that *the Order,* by *preferential low prices* charged *for milk* in *the lower brackets, gave a competitive advantage to the three large handlers,* which advantage, applied to reducing the price of fluid milk, would enable large handlers to destroy the smaller handlers.

Proof to this effect was introduced by witness Mills, as applied to cheese (R. 301-305); witness Barber testified (R. 295-299) that the actual market price for cream to be used in butter, was approximately equal to the price of the whole milk equivalent. In other words, the price fixed under the Order for whole milk, ultimately used in butter, was only equal to the value of the cream, leaving the skim milk unpaid for. The value of the skim milk was proven by witness Bullock (R. 363-364), and its value when manufactured into milk powder and other products, was testified to by witness Miller (R. 312-).

We have already pointed out that this proof was not completed for lack of time, because of the filibustering

tactics of the intervening plaintiff Dairymen's League, and the closing of appellees' case at the insistent request of the Government.

However, the report of Hon. John J. Bennett, on the milk industry of the State of New York, dated March 8th, 1938, referred to on page 73 of the League brief, as being a part of Exhibit A-3 (to the stipulation), reviews the actual facts with reference to surplus milk.

His report completely explodes the entire argument of appellant's to the effect that handling of surplus milk warrants the payment of subsidies both to co-operative and proprietary handlers. The report states on pages 114-115:

> "In connection with the manufacture of these surplus products it is important to realize that the milk purchased for use by these various companies was purchased at a price far below the fluid milk prices.
>
> "Table 6, in an earlier part of this report, shows the different types of surplus use and Table 10 shows the declining rate of return to the producers for the milk used in these surplus brackets.
>
> "As will be seen later in this portion of the report, profits on the sale of ice cream, condensed milk and other by-products of milk are large.
>
> *"The result of the low prices paid for surplus milk is that milk sold in the lowest price classification results in the greatest return to the distributor."*
>
> . . . . . .
>
> "Naturally, the *milk purchased for use in surplus manufacture operations is acquired mainly in the surplus months of spring and early summer."* (Emphasis supplied.)

And at page 116 it is stated:

> "Profits of Companies Engage in the Manufacture of Products from Surplus Milk.
>
> "Ten typical companies in this business were analyzed.

"One company in the business of manufacturing milk into dry milk powder, casein, milk sugar and similar products made a net profit of $349,500 on sales of $1,246,000 for the year 1936. Profits amounted to 32.9% on sales before taxes and 28% on sales after taxes.

"*Based on return of net tangible assets this company made 108.66% profit on net tangible assets.* For the first six months of 1937, the return of this company was 22% on sales and 57% on net tangible assets. As the 57% just mentioned was only for six months there can be no question that its 1936 return will be duplicated in 1937.

"*Another company doing business in condensed milk alone* made a profit in *1936 of 69%* on net tangible assets after deducting Federal taxes. This same company made a profit of 10% on sales after the deduction of taxes. The profit amounted to $829,500 on total sales of $8,071,000.

"The consolidation of three ice cream companies affiliated through a common holding company showed that on net sales of $4,650,000, the profit made was $931,000, or approximately 20% on sales before taxes for the year ended December 31st, 1936." (Emphasis supplied.)

On pages 99 and 100 of the report, we find a frank discussion showing manipulation of milk back and forth between Bordens and National Dairy, and their subsidiaries, prior to the promulgation of the Order. We print these extracts for the reason that they shed light on the practices of these two large companies in this repect and also in issuing misleading statements concerning their operations. The report states on pages 99 and 100:

"In *December of 1937* the *Borden Farm Products Division of the Borden Company* issued a *statement* to its customers and *to the press* which indicated that *for the six months ending September 30th, 1937, 'for every dollar you spent* for Borden's milk' *they lost 1.02 cents. Sheffield Farms Co., Inc.,* a subsidiary of National Dairy, also issued a *statement* in the Spring of 1937 entitled 'Where the Milk Dollar goes,' which showed that *for the*

year 1936 its profit averaged less than 1/8 of 1 cent per quart 'on all milk handled.' Those statements and the conclusions of this investigation appear to be inconsistent. Actually they are not comparable. An analysis of those statements reveals the following facts:

"In the first place, *neither statement is representative of profit or loss on the sales of fluid milk at retail and to stores.* The Sheffield statement specifically says that it is on the basis of 'all milk handled.' In the first place, Sheffield Farms does not sell all of the milk it handles to the public. In 1936 the Sheffield Farms Company sold in excess of 111,000,000 quarts of milk to affiliated companies. While this 111,000,000 quarts of milk may properly be included in a statement of the amount of milk handled, it is by no means a statement of the amount of milk sold to the public. For the first nine months of 1937 the volume of milk sold to affiliated companies was nearly 63,000,000 quarts. This amount of 174,000,000 quarts was 'handled,' but sold to its affiliates at an average price of 3.5 cents per quart. If, for example, Sheffield Farms sold this milk to its subsidiary or affiliate at a price below cost, the affiliate would make a larger profit because it bought its raw product at a low price, but the Sheffield Farms Company would lose money on that 174,000,000 quarts. *This supposition is not fanciful. Investigation into the affairs of the Sheffield Condensed Milk Company, an affiliate of the Sheffield Farm Products Company,* showed that in the first nine months of 1937 it purchased 61,126,612 quarts of milk equivalent, in the form of milk and cream, from Sheffield Farms Company at the rate of 3.225 cents per quart. The total purchases of the Condensed Milk Company from all sources amounted to 85,688,798 quarts. The total price paid for the 85,000,000 quarts was 3.41 cents per quart. It is apparent, then, that the price to the Sheffield Condensed Milk Company, as charged by the Sheffield Farms Company, was approximately 8/10 of a cent per quart below the price paid by the Condensed Milk Company on the open market. Without a complete audit of the subsidiary companies and investigation into

other factors, there is no way of determining whether or not this sale was below cost. However, it is interesting to note that the Sheffield Condensed Milk Company made a profit of 68% on its net tangible assets after payment of taxes in 1936, and an estimated profit of 28% on net tangible assets after payment of taxes for the year 1937. It is also to be noted that in August, 1937 Sheffield Condensed Milk Company stopped its practice of buying the major portion of its supply of milk from its affiliated company, Sheffield Farms, Inc." (Emphasis supplied.)

There are many interesting facts contained in the Attorney-General's Report. For instance, he points out that all handlers are subject to the same basic costs. He discusses freight differentials intended to make the delivered cost of milk in New York City the same to all distributors.[4]

The Report says pages 70 and 71:

"The distributor pays substantially the same for the milk, regardless of location, for, if the distance is less than 200 miles—he pays more to the producer—but his freight rate is lower. And conversely if the distance is greater he pays less to the producer—but spends more for freight. In addition to the differentials just mentioned there are numerous other differentials such as location differentials, volume differentials and the like.

"The operations involved in the handling and distribution of milk after it leaves the farm have been grouped in all financial reports and statements submitted by distributors and their accountants in the course of this investigation, into the following major items:

"1. Country plant operations.

"2. Freight and hauling from the country to the city plant or to the pasteurizing plant.

"3. Pasteurizing, bottling and city plant costs.

4 The findings show that freight differentials under the Order, are discriminatory (see Finding No. 49, R. 141).

"4. Selling and delivery.

"(a) wholesale, *i. e.,* to stores, restaurants, hotels, institutions and to other dealers.

"(b) retail, *i. e.,* delivery to the door of the consumer.

"5. Administration, general and overhead expenses.

"6. Container costs.

"In our analysis, we have followed standard practice and used the elements generally used in such studies. In the tables that follow, code letters are used to indicate different distributors. This is done to avoid unfairly disclosing confidential business information to competitors.

1. Country plant operations.

"As has been indicated earlier in this report when milk leaves the farm *it may either go to the country plant of the co-operative* which acts as agent for the producer *or it may go to the country plant owned or operated by the distributor.*

"The country handling costs found by this investigation consisted of the following items:

"Labor
"Repairs to buildings
"Repairs to machinery
"Coal
"Light & Power
"Supplies
"Ice
"Automobile repairs and expenses
"Automobile gasoline and oil.
"Insurance
"Depreciation
"Taxes
"Telephone
"Miscellaneous expenses."

The Attorney-General found no difference between country plant costs in either "the *country plant* of the *co-operative*" or the "*country plant owned* and operated *by the distributor.*"

There are many more things in the Attorney-General's Report. These are enumerated pages 1 to 5 inclusive. Statements and page references contained on pages 1 to 5 inclusive, are as follows:

"(1) Two companies, Bordens and Sheffields, sell 76% of all fluid milk sold at retail in the New York metropolitan area (p. 10).

"(2) With the addition of four more companies whose prices are invariably identical with those of Bordens and Sheffields, these companies sell 90% of all of the milk sold in the retail market of the New York metropolitan area (p. 11).

"(3) Bordens and Sheffields sell 50% of all of the milk sold at wholesale in the same metropolitan area (p. 10).

"(4) Bordens and Sheffields sell 58% of all fluid milk sold in the metropolitan area (p. 10).

"(7) In the wholesale prices of advertised brands of fluid milk, we find no competitive price variation in existence in the New York metropolitan market (pp. 15-16, 92).

"(8) In the non-advertised brands of fluid milk there is found in the wholesale prices evidences of substantial, severe and at times destructive competition (pp. 15, 93).

"(9) Milk is the most important farm product produced in New York State (pp. 18, 19).

"(10) At least 50% of the milk produced in New York State is utilized in milk products other than in fluid form (pp. 19, 20).

"(11) Only 65% of the fluid milk used in the metropolitan area comes from New York State farms, despite the fact that New York State produces more than sufficient milk to supply the requirements of the entire New York metropolitan area (pp. 22-25).

"(15) The Dairymen's League, a farmer co-operative, has 35,155 members whose milk is marketed by it (p. 34).

"(a) This organization sells almost half of its entire supply of milk to Bordens (p. 34).

"(16) The Sheffield Producers Co-operative Association has 13,000 members (p. 42).

"(a) The entire supply of the co-operative is supplied to Sheffields (pp. 41, 42).

"(17) Both co-operatives sell their milk at prices which vary according to the use to which the milk is put (pp. 37, 43).

"(18) *There has never been made an audit by the Dairymen's League, Sheffield Producers, or any other co-operative association of the records of the distributors showing the use of milk in its various price classifications* (pp. 38, 39, 43, 44).

"(a) The audit of these use records of distributors by the New York State Department of Agriculture and Markets has in the case of Sheffield Farms alone resulted in the restitution and savings to farmer producers of about $250,000 over a four-year period (p. 44).

"(19) The prices agreed upon by bargaining agencies formed pursuant to the Rogers-Allen law are, in effect, dictated by the distributors (pp. 49, 51-56).

"(20) *The Borden Company since 1919 has absorbed 54 companies formerly engaged in the production and sale of milk and milk products in the metropolitan area* (pp. 57-60).

"(21) *National Dairy Corporation, the parent of Sheffield Farms, has absorbed, since 1923, 102 companies formerly engaged in the production and sale of milk products in the metropolitan area* (pp. 61-65).

"(22) Analysis of cost was made only on Grade B milk in bottles, since Grade B milk represents the necessity item in the milk business (p. 65).

"(23) The total cost of a quart bottle of Grade B milk delivered to the door was 11½ cents as of February, 1938. The price received by the distributor was 13 cents. The profit was 1½¢ per quart (pp. 97, 98).

"(24) The total cost of a quart bottle of ad-

vertised brands of Grade B milk delivered to the store was 9 cents in February, 1938. The net price received by the distributor was 10½ cents per quart. The profit was 1½ cents per quart, or 16% (p. 98).

"(25) In non-advertised brands, the total cost of a quart bottle of Grade B milk delivered to the store is 8½ cents (pp. 86, 87).

"(a) Due to variations in selling price, profit also varies. In some instances, there is a loss (p. 113).

"(26) The spread between raw milk costs and retail selling price on quart bottles of Grade B milk was greater by 12% in November and December of 1937 and in January and February of 1938 than at any other time in recent years (pp. 110-112).

"(27) In up-state cities the price of Grade B milk delivered to the door was generally lower than in New York City, despite the higher cost of raw milk (pp. 94-97)

"(28) Statements of profits recently issued by both Bordens and Sheffields are misleading in that they do not relate to fluid milk alone (pp. 99-106).

"(29) The prices paid to farmer producers for surplus milk are lowest, whereas the profit which the distributors receive from by-products made from such surplus milk is the highest (pp. 27, 114-117)."

The report on page 88 contains a table showing costs in the wholesale and retail trade. Following the table it says:

"As further proof of the accuracy of these figures of cost it is interesting to note the experience of *two companies selling milk* at retail at 12½¢ per quart in November of 1937 and at *9 3/4 cents per quart wholesale* in that month. *On the basis of those prices these two companies came out without loss. Where discounts or rebates from those prices were given, a loss resulted.*"

The Economic Statement (Exhibit 9 to hearing record, which is Exhibit 3 to stipulation herein), shows that the fluid milk price for November, 1937, was $2.42 per cwt. Accordingly, the Attorney-General's report confirms the Dairymen's League claim that, under the order, 9¾¢ is the absolute minimum delivered cost of a quart of milk in the wholesale trade.

SUPPLEMENTAL POINT III.

The provisions of Section 8c (12) of the Act, permitting co-operative associations to cast the votes of "producers who are members of, stockholders in, or under contract with such co-operative association" in producer referendum, constitutes an unlawful delegation.

The delegation to co-operatives contained in Section 08c (12), constitutes an unlawful delegation of power to co-operatives, and, as applied in the Order, is a violation of the due process clause.

A. As Applied to the Jetter Dairy Company, the Section Delegates to its Chief Competitor, the Power to Regulate the Jetter Company, While Exempting Itself from Regulation.

Jetter and the Dairymen's League both operate country plants; both sell milk to other dealers; both sell milk at wholesale to stores; both *purchase* milk from their producers.[5]

1. The Order *regulates* the *total price* to be *paid* by *Jetter.*

2. The Order *does not regulate* the *total price* to be *paid* by the *Dairymen's League.*

3. The Order does *not regulate* the total *price* to be paid by *Bordens,* which purchases from the

[5] The Dairymen's League is a dealer and purchaser of milk, see page 32 of appellees' original brief.

League, *nor by Sheffields*, which purchases from the Sheffield Producers Co-operative.

4. The Dairymen's League receives special payments of 5¢-23¢-30¢ per cwt. for large quantities of milk under certain conditions. This, under the regulation of Jetter's business, is derived from payments charged Jetter, in excess of total prices charged his chief competitors.

5. To the League *is delegated* the right to cast the votes of producers from which it purchases milk.

6. To the Jetter Dairy Company *is denied* the right to cast the votes of producers from which it purchases.

The general delegation to *producers* of the sole right to vote on an Order may be warranted and might be sustained on the theory that *producers* have a right to fix the prices at which their milk shall be sold.

No such support will be found for *delegating* to a large *distributor*, the *right* to *regulate* the *business* of its *competitors, and*, at the same time, *exempt itself from regulation.* Nor will support be found for a regulation which is so framed as to discriminate in favor of large proprietary companies.

It was this type of situation which this Court had in mind, when it said in the case of *Carter v. Carter Coal Co.*, 296 U. S. 238, at page 311, 56 S. Ct. 855, 873, 80 L. Ed. 1160, at page 1189:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form. * * * A statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question."

The provisions of the Act for the issuance of marketing orders are asserted by appellee, Central Co-operative, to be invalid in that legislative power is delegated to the Secretary of Agriculture, an administrative officer.

But the Act goes even further than this, and makes the effective promulgation of a marketing order dependent, not only upon the exercise of discretion by the Secretary of Agriculture, but ultimately upon the whims of a limited group of private individuals whose action is required to conform to no prescribed standards whatsoever. It delegates to that group, the power to regulate the activities of other individuals who have different and opposing economic interests. We submit that this, in the language of Mr. Justice Cardozo, is "delegation running riot." *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 553.

While the Dairymen's League, according to various government reports, has a large number of members, it was stipulated by all parties that the *League had only 19,500* producers *in the marketing area* (R. 263). Nevertheless, *it cast more than 22,000 votes for the Order* (R. 219). *This was no accident.* The League cast votes in excess of the number of producers with which it had contracts, as a safety margin to put across its program.

B. As Applied to Appellees, Rock Royal and Schuyler Junction, the Section is Discriminatory, and an Unlawful Delegation.

These appellees are co-operatives. The power delegated to the League, affects the co-operative appellees in two ways, as follows:

1. It enables the larger co-operatives to regulate the affairs of the unwilling smaller co-operatives.

2. It permits the Dairymen's League, as a distributor, to discriminate against its own producers; to underpay them and use such underpayment to engage in destructive price cutting, to the general demoralization of the market. *League producers*

have no vote. Their votes are delegated to the League.

These appellees cannot and do not complain of discrimination against League producers, as such. They complain of use of such discrimination to break down the market, thereby affecting appellees.

Were a League producer a party to this action, he could complain of the discrimination on his own behalf. Appellees have a right to urge this discrimination because the same act discriminates against them.

The motives of Congress in passing legislation *cannot* be inquired into. Very likely, the Dairymen's League was instrumental in procuring passage of this provision, which was designed to fit its purposes, even as it was the actual proponent of the Rogers-Allen Law.

However, this Court *can* inquire into the *legality* and effect of the Section, regardless of the sponsor or motive back of its passage. We urge that it constitutes an unlawful delegation of powers, contrary to the actual intent of Congress that *producers should, themselves, approve or disapprove* an *Order*, and *contrary* to the *intent* that *distributors should have no vote thereon.*

SUPPLEMENTAL POINT IV.

The order is the culmination of almost twenty years of attempts by the League to establish itself, a private monopoly.

The League, in its brief, pages 12 to 31, gives the Court a bland portrait of the League as a true co-operative and benefactor of producers. It outlines its alleged charitable and co-operative acts and aims down to the adoption of the Order. Such a picture has always been before the public. The record in this case shows conclusively, the widespread and well organized publicity and propaganda bureaus of the League and its child,

However, let's look at the record. It is a history of oppression of producers and an aim at private monopoly.

A. The Dairymen's League Instituted its Program to Dominate All Producers and Dealers in 1922.

On April 1st, 1922, the Dairymen's League presented to all dealers in the Metropolitan Area, a proposed contract which discriminated against any producer who did not sign the League contract. *Producers were contractees* of the League, *not members* (*Dairymen's League Co-operative Association, Inc., v. Holmes,* 207 A. D. 429, affirmed N. Y. Court of Appeals, 239 N. Y. 503). This program was the subject of litigation in the case of *Barns v. Dairymen's League Co-operative Association,* reported (N. Y.) 220 A. D. 624, 222 N. Y. S. 294. The plaintiff, Barns, was a producer selling milk to Bordens, where he had been a patron for many years. He refused to sign the Dairymen's League pool contract, and was excluded from selling to the Borden Company.

In that case, the Borden Company urged, and finally required, its producers to sign League contracts. The activities of the Bordens were held not to be illegal, and the discriminatory practices of the League were held to be exempted from operation of the State Anti-Trust Law. The case did not go to the Court of Appeals, and remains the State Law on the subject of legalizing discriminatory and monopolistic practices by co-operatives, which are challenged here. In the *Barns* case, the Court said at pages 301, 308, 309, 310, 22 N. Y. S. 294:

> "*These contracts gave the Co-operative a monopoly of the highest priced classifications to the extent that it was able to fill the same by its deliveries, and to the extent of the market controlled by its several contracting distributors.* This contract was entered into by a large number of the members of the New York Conference Board, although a good many of them declined to accept it and bought from outside sources. The defendant the Borden Company signed this contract in March, 1922.

"*It is true* that the *Dairymen's League Co-operative Association has contracted with the Borden Company* and other distributors *in such a manner that all the milk but that produced by its members is excluded from the New York market, so far as it is controlled by the purchasers from the league.* This does not, however, pre-empt the entire market by any means. The association does not control more than 50 per cent of the milk produced in the New York milk zone, nor do its distributors control more than 50 per cent of the fluid milk sold in New York City. There are other very important distributors, who are buying non-pooled milk.

"The plaintiff complains that he has been shut out of this market. *It does not appear that he has been actually shut out, but, even if he has, it is a question whether he has any vested right to enjoy this preferential market.*

* * * * *

"If the plaintiff here were absolutely cut off from reasonable access to any market whatever, even the cheese factory, I think the law might properly intervene; but as it is it seems to me that such restriction as is caused by the Co-operative Association and its contractees is well within the limits permitted by law.

* * * * *

"It does not appear in the evidence that any producer has been put out of business or deprived of a market, although the plaintiff and doubtless many others have been compelled to change their market, and possibly have been put to some inconvenience and some loss. It may be that some of them have been deprived of the opportunity of selling in the New York market, and have had to sell for manufacture at a less price; but as it has been before pointed out this is a burden which must be carried by somebody, because there is a large surplus over and above what can be consumed as fluid milk.

* * * * *

"A month or more prior to April 1st it was apparent that a large majority of the regular Bor-

den patrons had become members of the Co-operative Association, and that 80 per cent of its Grade A milk purchasers were members; grade A milk being an important feature of the Borden business. It had the alternative of either shutting off such of its old patrons as did not join the pool, or else shutting off those that had joined and going out after new ones. The great preponderance of poolers among its patrons seemed to settle the matter, and it made its contracts with the pooling association.

"To the extent that the Borden Company urges its patrons to join the pool, it was perhaps taking sides in the controversy; but it does not appear that it did this until a large majority of its patrons had already joined, and it does not seem unreasonable that it might try in this way to keep all of its old patrons that it could." (Emphasis supplied.)

The object of the agreement under attack in the *Barns* se was to put all dairymen into a market-wide pool der domination of the League.

In the case of *Dairymen's League v. Holmes, supra,* e League, with the co-operation of the dealer to whom olmes Brothers delivered, had forced them to sign the ol contract. From May 1st, 1921, to March 31st, 32, the dealer (Clover Farms, Inc.), paid the League ,207.77, for Holmes Brothers milk, of which they re-ived only $3,329.45.

When they found another market and left the League, e month before the expiration of the year the contract s to run, the League withheld payment to them of 77.23 then due them for milk (at reduced League ices) and in addition, sued them for $1,200 penal-s. The Court in the opinion pointed out that the over-ad cost of the League pro-rated against their milk r 11 months, was only $73.03. The Appellate Divi-on reversed the judgment of the lower Court against e Holmes Brothers, and directed judgment in their vor for the amount of $377.23, the amount due them r their milk. The Court of Appeals sustained the Ap-

pellate Division *on the ground* that Holmes Brothers, under the League contract, *were not members* of the League.

The League then included in its contract, paragraph 16 (printed page 11 of appellees' original brief), which recites that

> "the producer hereby applies for membership * * * in case this contract is cancelled * * * to deem such cancellation a withdrawal from membership in this Association."

After such change, the League was able, by the extreme penalties provided by the contract, to keep producers whipped into line.

Wherever they could force producers to sign a League contract, the penalty of escape was so severe that they remained in line, or suffered severe loss.

In the case of *Parker v. Dairymen's League*, 222 A. D. (N. Y.) 341, 226 N. Y. S. 226, the League was sustained in collecting these penalties on the theory that the producer was a member. In that case, when Parker found an avenue of escape, he was obliged to forfeit $503.48 which was then due him for milk. The case never went to the Court of Appeals. No doubt, the Court in rendering this judgment, was largely influenced by the policy of "encouraging co-operatives." It refers in the opinion to the fact that these penalties are inflicted as liquidated damages authorized by Section 209-a of the Membership Corporations Law of New York State. The Court said in that connection (quoting from 226 N. Y. S. 231):

> "* * * It was provided by section 209-a of the Membership Corporations Law *that the by-laws of such a corporation* as the defendant *might fix* as liquidated damages specific reasonable sums, in amounts fairly related to the actual damages ordinarily suffered in like circumstances, to be paid to the corporation to reimburse it for any damage which it or its members might sustain

by the failure of any member to perform any obligation to the corporation under the certificate of incorporation, the by-laws, or any contract with the corporation, and that any such provisions should be valid and enforceable in the courts of this state. This provision is now contained in section 37 of the Co-operative Corporations Law. The stipulation for liquidated damages contained in the contract was also covered by a by-law of the defendant."

We have already pointed out that the producer who finds himself obliged to sign the League contract, by the provisions of that contract, *"agrees to comply with all the requirements of the By-Laws of said Association"* (paragraph 16 of contract, appellees' brief, page 111).

These By-Laws were made before producers were allowed to become members. Their chance of changing them is very remote.

This Court may recall that a few years ago, the Rockefeller family sought to remove the head of one of the Standard Oil corporations. The Rockefellers controlled many shares of stock. They found it most difficult to remove an officer who was guilty of a breach of trust. The owner of a hundred shares of Standard Oil would have found it impossible. So here, a producer would find it impossible to remove a single director or officer of the League or to amend its By-Laws in any respect not approved by the directors and officers in control.

The *Parker* case was decided in 1927.

In 1933, we had the Milk Control statute of the State of New York (Chap. 158, Laws 1933, as amended). By its provisions, it exempted co-operative corporations. To meet competition of co-operatives which were exempted, milk was, in increasing quantities, imported from other states, not subject to this regulation. In the case of *Baldwin v. Seelig,* 294 U. S. 511, this Court held that such milk imported from foreign states was not subject to the New York State Control Law.

The *Seelig* case, and lack of control of interstate milk, has been blamed for failure of Milk Control. Conceivably, interstate milk might have eventually destroyed the Milk Control Law. However, *the exemption of co-operatives under that law, was the inducement which led dealers to buy additional milk from foreign states*, and thereby increase the surplus in the Metropolitan market.

As anyone knows, a competitive advantage, whether gained by exemption of co-operatives or by exemption of interstate milk, was bound to defeat New York Milk Control.

In the present situation, a competitive advantage, whether by "unpriced" milk (which occupies the same position as interstate milk did in the *Seelig* case); by exemption of co-operatives; by preferential payments from the capital of certain handlers to other handlers, or otherwise, was bound to defeat the Federal-State regulation, which amounts in reality to Federal and State control.

The report of the Joint Legislative Committee to investigate the Milk Control Law (New York Legislative Document, 1937, No. 81, dated March 22, 1937), in discussing failure of Milk Control, contains the following statements (pp. 14, 15 and 16):

> "INTERSTATE MILK NOT BEING GOVERNED BY THE MILK CONTROL LAW HAS CAUSED NEW YORK STATE PRODUCERS TO LOSE THEIR FLUID MARKET TO A CONSIDERABLE EXTENT.
>
> Producers always seek to market their milk in the area where it is used for fluid purposes. This is very obvious as the return to the producer in this field is the most lucrative. Therefore, the New York metropolitan market dominates the marketing situation for all milk produced in New York State.
>
> With the enactment of the Milk Control Law and the fixing of minimum prices, the delivery of milk from without the State to the metropolitan area increased. Some of the distributors pur-

chasing from without the State complied with the prices set by the control board whereas others did not. *The practice of not paying control board prices gradually increased.*

* * * * *

This situation, which was getting progressively worse, was being tolerated until a bombshell struck which caused the paralysis of the New York State producers fluid market. It was the decision of the United States Supreme Court in the case of *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511. The Court held, in substance, that New York State could not fix the price for milk coming into this State from another state.

Immediately the importation of milk into the metropolitan area produced in other states or produced and shipped through another state to give it the status of interstate milk increased tremendously and came into this valuable market like an avalanche, crowding out the intrastate milk governed by control board prices. It has reached such great proportions today, that at least 40 per cent of the fluid milk consumed in the metropolitan area is interstate milk and is not governed by the Milk Control Board.

* * * * *

The Milk Control Law has Broken Down Completely in the Metropolitan Area and is Incapable of Effective Enforcement.

The influx of interstate milk into the metropolitan area has increased from 30 per cent until it approximates at least 40 per cent of the fluid market. This has been the primary cause in the breakdown of the enforcement of the Milk Control Law. The State of New York is attempting to control prices in the market where it has control over the price of only 60 per cent of the product supplying that market. *Obviously, any dealer who can buy his milk supply outside the State of New York at prices less than those fixed by the State Control Board will benefit financially* by bringing the product into the State and selling it at the same price or lower than the control price under

which legitimate dealers of the State are operating.

Retail dealers and grocers in the metropolitan area have been purchasing their milk from four or more dealers at the same time. Included among the dealers were those purchasing their milk from without the State. *These dealers in interstate milk were able to sell their milk to the grocers at below milk control prices and yet make a handsome profit.* The other dealers who dealt in intrastate milk were threatened with a loss of this business unless they met the price set by the dealers in interstate milk. Faced with the dilemma of losing their market or violating the law, the dealers chose the latter. The means used was by charging the milk control price on the bills and then giving the grocers rebates for the difference." (Emphasis supplied.)

Accordingly, *failure of Milk Control, is now accredited to competitive advantages held by dealers purchasing interstate milk, which was not subject to the price fixing regulations of New York State.*

The complexity of League operations in many markets, with plants in many states, as well as its exemption, was unquestionably a leading factor in the break-down of Milk Control.

The Legislative hearings above referred to, were held during the pendency of the Rogers-Allen Law before the Legislature (Chap. 383 of the Laws of 1937).

The Dairymen's League was undoubtedly in charge of the legislative program and subsequent promulgation of Order No. 27. Indeed, appellant's brief, page 43, says:

"It was conceded by appellant that the League actively sponsored and supported the passage of the Rogers-Allen Law (New York, Laws of 1937, Chapter 383) (R. 374), and that the Bargaining Agency submitted to the Secretary and to the Commissioner the proposed Orders on which hearings were held (R. 263, 273). The League and the Sheffield Producers' Co-operative are both members of the Bargaining Agency (R. 263). *One of the attorneys for the League drew the first draft*

of the proposed Order and submitted it to a lawyers' committee consisting of four members, one of whom was attorney for the League, and one of whom was attorney for the Sheffield Producers' Co-operative" (R. 374). (Emphasis supplied.)

Milk Control was ended on the theory that price fixing as an evil. The Legislative Report above referred to, tated on page 15:

> "*The majority of producers marketing their milk in the metropolitan area favor the abolition of the price fixing:* They anticipate that there will be a temporary price war when the law is repealed, *but they feel their distributor will be able to recapture their lost percentage in the fluid market, and pay the producers a better blended price.*" (Emphasis supplied.)

The Rogers-Allen Law was signed and in effect May 9th, 1937. The Bargaining Agency, which was sponsored y the Dairymen's League, was incorporated June 7th, 937 (R. 128), and shortly after its incorporation, the airymen's League and Sheffield Co-operative became embers thereof, *id.*

The following month, July, 1937, E. M. Harmon (pres-nt administrator of Order 27), then employed by the airy Section of the U. S. Department of Agriculture, ddressed the Agency with reference to "government aid a marketing program" (R. 147).

This was followed by preparation, between said time nd November, 1938, of a proposed marketing order by llen Miller, attorney for the Dairymen's League. This as the proposed marketing agreement, which he proaced and submitted to a committee of attorneys apointed by the Bargaining Agency on October 25, 1937 (R. 47).

In other words, the Dairymen's League procured the assage of the Rogers-Allen Law and abandonment of tate Milk Control, on the theory that "the majority of roducers * * * favor the abolition of price fixing."

Actually, its purpose was to procure discriminatory price fixing through a Federal Order, and to effectuate the same so that independent dealers had no means of meeting competition of those receiving preferential treatment and competitive advantages under the Order.

The Rogers-Allen Law was sold to Governor Lehman and his signature obtained by a representation that "this Bill (Rogers-Allen Law), returns milk control to the milk industry, where it belongs." Such declaration was contained in the Governor's memorandum made upon his signing the bill. The Governor said:

> "This bill was substantially modified during the course of its consideration and passage by the two houses of the Legislature. It places upon producers themselves the duty and responsibility of doing something to stabilize the industry and of devising machinery to assure the producer a reasonable price for his milk."
>
> • • • • •
>
> "It does not *give distributors control* of the industry. Control under this bill is kept with the producers."
>
> • • • • •
>
> *"The bill permits collective bargaining between distributors and producers. It affords opportunity for the industry to demonstrate that it is again competent to manage its own affairs.*
>
> It is, however, evident to me that *successful operation under the bill will depend largely on the degree of co-operation that is given by producers and distributors alike.* A spirit of understanding and of *fair dealing* will go a long way to improve conditions in the milk industry. A spirit of *obstruction* or *of individual self-interest* will render the bill largely ineffectual.
>
> • • • • •
>
> "The bill is approved.
>
> (Signed) HERBERT H. LEHMAN."

(Emphasis supplied.)

e industry was practically given to the Dairymen's eague; the purpose of the measure was not to abolish rice fixing, nor to return "milk control to the milk ndustry, where it belongs." The Governor's signature as hardly dry on the bill, when the machinery was arted to create discriminatory price fixing, with a re-ultant private monopoly in the Dairymen's League, Bor-ens and National Dairy, with a probable later struggle etween those three for supremacy in the field when the naller independent proprietary handlers and co-opera-ves had been forced out of business.

The proposed marketing order was in preparation by airymen's League attorneys almost immediately. Doubt-ss, the groundwork had been schemed out and accom-lished prior to the Legislative Report of March 22nd, nd the subsequent enactment of the Rogers-Allen Law.

The history of the Order discloses a continuation of he 17-year old program by the Dairymen's League, to ut all producers under its domination and all distributors bject to its will.

By preferential payments to itself out of the Producer ettlement Fund, and by exemption of itself from com-liance of the Order, it has its competitors at its mercy. hose whom it does not choose to destroy, must eventually bandon their present sources of supply (including all ppellees) and producers delivering to them, will have to o into the League or out of business.

If any escape, they will have to contribute to the sub-dy paid the League, Bordens and Sheffields under Article II, Sections 5 and 6, and to producers in 18 preferred ounties (mostly in the League or Sheffield Producers As-ociation) under Article VI, Section 8, to whom the chief enefits of the fluid market have been bequeathed.

All of this is in the name of co-operation. The League roclaims that it may now, by statute take unto itself, as co-operative, the property of others and to take away eir personal liberty.

The tenor of the League brief is in effect—"*certainly we enjoy these competitive advantages. We are entitled to them.*" In the language of the street, "so what?"

The Federal Trade Commission Report, *supra*, page 38 states that the Sheffield Producers Co-operative is controlled by the Sheffield Company. Concessions to Sheffields, is sharing with it the market service payments and the benefits of "unpriced" milk, may account for the presence of Sheffield Producers in the Bargaining Agency.

This new found friendship may account for the Sheffield Producers promptly receiving upwards of $16,000 in payments under Article VII, Section 5 (R. 137, details our original brief, page 25), whereas the Clinton County and Worcester bona fide farmer-owned co-operatives could not get either the 5¢ provided for under that Section, or the service payments for milk actually diverted in the coercive program of the League (R. 305-378-9).

This program has become a *League-Borden-Sheffield Axis,* comparable to the recently formed *Rome-Berlin-Toyko Axis.* It is a triple play—"Tinker—to Evers—to Chance."

In the high pressure propaganda to put over this program, we find terms which have recently become of daily use. We find that farmers are "angered" by the appearance of anyone in opposition to the Order; their "patience is exhausted"; "they won't wait long" (R. 560, 568, 569).

Two years ago, Mussolini was "angered" by the Ethopians; his patience was exhausted; more recently Herr Hitler has been frequently "angered." His "patience is exhausted." He is championing the cause of oppressed minorities. The League, to an equal extent, and no more, is championing the cause of the producer.

B. The League Did Not Wish this Scheme to be Tested in the Courts. It Attempted to Prevent the Appellees From Resorting to the Courts for an Adjudication of Their Rights.

Surprising, even in this day, has been the program of the Bargaining Agency and the League. Fearful that the Courts, if the true facts concerning the Order were uncovered, would invalidate it, means were taken to prevent, by physical force, if necessary, any handler litigating this matter in Court.

The details of this program are partly set out in the Findings, which quote to a very limited extent, the activities of the League, Bargaining Agency and their associates to accomplish this end (Findings 86-95, R. 153-158, inclusive), which are as follows:

> "86. The purpose and effect of said program and Order was to give to the Dairymen's League a competitive advantage over its competitors, including the defendants, and to create in said Dairymen's League and in the Bargaining Agency, and in handlers buying milk from them, to the exclusion of the defendants and all others, the control of fluid-milk business in the marketing area. To that end, the Dairymen's League, Bargaining Agency, and *E. Manning Gaynor (herein referred to as Gaynor), who was personal representative of intervening plaintiff Noyes, entered into a conspiracy to establish* in said Dairymen's League, Bargaining Agency, and dealers purchasing milk from Bargaining Agency members, including Dairymen's League, *an illegal monopoly* in the purchase and sale of milk in said marketing area.
>
> "87. One Charles H. Baldwin, acting individually and as Executive Secretary of the Bargaining Agency herein called "Baldwin," one Homer Rolfe and one Jay C. Treat, acting individually and as President and Secretary, respectively, of the intervening plaintiff Bargaining Agency and intervening plaintiff Dairymen's League, uttered and published certain letters, pamphlets, official newspapers, to wit: The Bargaining Agency News and the Dairy-

men's League News, *which said letters and other printed statements contained threats against any dealers who might appeal to the Courts for any adjudication of its rights, and entered upon a campaign to compel distributors and dealers of milk in the same position as defendants to sign contracts which surrendered their rights to due process.* Said printed utterances were circulated among producers.

"88. Gaynor procured one Faulkner, a producer delivering milk to defendant Jetter, to visit said Gaynor at Leonardsville, N. Y., and there requested Faulkner to arrange for withholding milk of the defendant Jetter unless it signed a marketing agreement; said Gaynor requested one Dake to withhold delivery of substantial quantities of milk from Eisenberg Farms, Inc. Said Dake withheld said milk until said Eisenberg signed, and then released the milk. Gaynor told Eisenberg that his milk would be released when he signed a marketing agreement in the Administrator's office. Eisenberg signed at the Administrator's office, and his milk was released.

"Baldwin, executive secretary of the Bargaining Agency, solicited one Dumont, who had been active in a milk strike during 1937, to apply to the Market Administrator for a "job," which was to include visiting localities where dealers "refused to go along with the Order" and "drying up" the milk stations of such dealers by withholding milk until they complied.

"89. Said Gaynor, in public speeches and privately over the telephone, threatened and caused to be threatened, all dealers, with summary withholding of their milk supplies, unless they signed marketing agreements.

"90. On August 29th, 1938, E. H. Baldwin, acting individually and as executive secretary of defendant Bargaining Agency, caused to be issued and distributed to producers delivering milk to defendant Jetter and to other producers in the marketing area, a letter, which letter contained the following:

" 'Dear Producer: Before you receive this letter, a Federal-State Milk Marketing Order covering

the Metropolitan New York Milk Market, will have been signed by the President. This Order will, no doubt, become effective September 1st.

"'To the casual observer, a wonderful battle has been won, but we, who have known the opposition, realize that the real battle is ahead.

* * * * * *

"'As you know, the dealers in Boston took the Boston Order into Court and have held up its full operation for over a year. Over two million of the farmers' money has been held up by the dealers.

* * * * * *

"'*This producers can stop by inducing dealers to consent to the operation of the Order as an agreement. Your dealer, by such consent, voluntarily refrains from using the Courts to block the Order. * * * We want results throught compliance with Order, not law suits.*

* * * * * *

"'You will be contributing greatly towards that end if you singly or collectively with other producers *insist that your dealer co-operate with others in signing this order at once.* If you have not already done this, won't you please take care of it immediately?

"'Won't you also co-operate with me by giving your advice on questions that you will find on the enclosed page?'

"Attached to said letter was purported questionnaire, which in part contained the following:

"'Questionnaire to be returned to C. H. Baldwin, Ex. Sec., Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., Room 118, Onondaga Hotel, Syracuse, N. Y.

"'1. Can you stand continued low prices while dealers argue this matter out in the courts?

"'3. *In your opinion are farmers in your community ready for a movement to compel the buyers to sign the Order, pay the price and live up to its terms?*

"'6. Will you support the Bargaining Agency in that move if others will?

"'7. In Boston the dealers tied up over two million dollars of the farmers' money in the courts. Do you think farmers will work together to prevent dealers here from doing this?

"'NOTE.—The information on this questionnaire will be held in the strictest confidence by me, and your name will no tbe used in any way.'

"91. On September 21st, 1938, Jay C. Treat, individually and as an Officer of the intervening plaintiff, Bargaining Agency, issued a letter which was circulated throughout the New York Milk Shed, and among producers delivering milk to defendant Jetter. This letter stated in part:

"'almost every dealer in the Metropolitan Market has signed the agreement. In some instances, it has been necessary to exert producer pressure and the willingness of producers to co-operate in withholding or offering to withhold their milk until their dealer signed has been encouraging and gratifying.'"

"92. During the early part of September, 1938, Gaynor was principally engaged in directing producers and co-operative associations in a program of withholding milk from dealers who refused to sign the proposed agreement, or who did not make reports and comply with the Order. Milk which was so withheld was chiefly diverted to the intervening plaintiff Dairymen's League, which acted in concert and in co-operation with said Gaynor.

"In the weekly newspaper of the plaintiff Dairymen's League, known as the 'Dairymen's League News,' and particularly in the copy thereof dated September 6th, 1938, on the first page thereof, was contained the following statement:

"'DEALERS SIGN UP

"'Fred H. Sexauer, president of the Dairymen's League, estimated the new program would raise League members' September returns $1,000,000 over what they receive for August milk.

"'More than 75 per cent of New York's milk supply was under voluntary agreement when the plan began operating. Included were distributors buying from the Dairymen's League. They handle

40%—approximately 50,000 cans daily—of the market's supply.'"

"On page 14 of said issue, was the following statement:

"'NO FOOLIN',' Say Sub-District 17-A Members

"'At the August meeting of sub-district 17-A, held in the Congregational Church at Kiantone as guests of Kiantone and Fresburg Locals, delegates and associate delegates informed Director Grout in no uncertain terms that the membership of the sub-district will not allow dealers to nullify the benefits of the new marketing Order, by passing unanimously the following resolution:

• • • • • • •

"'Whereas, in Boston with a similar order dealers have tied up the cream of the milk check in court litigation, and threats of similar actions are circulated in this area: Therefore be it

"'Resolved, that sub-district 17-A in regular meeting ask and demand that our Association and officers insist on our full rights from the start of the State and Federal Marketing Order, and be it further

"'Resolved, that all dealers be required to give satisfactory proof of the acceptance of the terms of the order, or no milk be sold them and in carrying out this plan, we pledge our officers our cooperation and support in agreeing to any diversion necessary to accomplish their purposes.'"

"On page 15 of said issue, the *M'rket Administrator, Harmon,* was quoted as saying:

"'It is my duty to administer the rules and regulations that have been formulated and approved by producers. It is my purpose to do just that, and to do it to the best of my ability. *This may at times not be to the liking of some people, some may be made unhappy.*'"

"93. In the issue of the Dairymen's League News of September 20, 1938, the following item appeared on the front page:

"'Producers Ready to Divert Milk from Non-Complying Dealers

"'League Gets Vote of Thanks from Bargaining Agency for Its Offer of Marketing Facilities.

"'Volunteer enforcement agents—100 strong—were riding the roads last week explaining to farmers how they could convince recalcitrant metropolitan milk handlers of the advantages of complying with the law by obeying the rules and regulations of the new federal-state marketing program.

"'This action followed a meeting of delegates of the Metropolitan Co-operative Milk Producers' Bargaining Agency in Syracuse, September 10. *The delegates voted to have 100 farmers go out as volunteer enforcement agents to 'crack down' on dealers who have not signed the marketing agreement.* They were to explain to producers delivering to such dealers that they could divert their milk and not lose money. Such diversion it was believed would quickly bring the few New York holdouts into line.'

"The same article on pages 1 and 2 quoted Gaynor as follows:

"'*In a spirited speech, Mr. Gaynor told the dairymen that they 'need not think about dealers for two minutes.'* He explained the provisions for diverting milk from dealers who fail to comply with the regulations. 'The Dairymen's League plants are open—and others too,' said Mr. Gaynor. *'Call me up, I'll tell you where to put the milk. You won't have to divert very long before these dealers will be ready to sign up.'*"

"The Dairymen's League News of September 27th, 1938, on the front page thereof, contained the following statements:

"J. C. Treat, secretary of the New York Metropolitan Co-operative Milk Producers Bargaining Agency, made the prediction in Syracuse that all the larger dealers would be signed up by the end of last week. Except for a few small handlers, Mr. Treat predicted the sign-up would be almost 100 per cent. None of these smaller dealers handle more than 50 or 75 cans a day and practically all of them are in the 'spot buyers' class, he said.

"Mr Treat also reiterated a former statement made by the Bargaining Agency *to the effect that the squad of 100 producer volunteers were still on duty in the milk shed and that shipments of milk would be diverted from those buyers who declined to pay full prices* as called for by the order or

who might attempt through court action to obstruct administration of the order."

"The foregoing quotations constitute only a small part of the program of propaganda carried on by the intervening plaintiffs Dairymen's League and Bargaining Agency.

"94. In the October 11th issue of the Dairymen's League News, on the first page thereof, was contained the following:

"'Producers Stop Dealer's Milk—He Signs Up

"'Buffalo Milk 70% Under New State Order—Bargaining Agency Puts Pressure on Procrastinators.'

* * * * *

"'Producers Prepared for Non-Compliers

"'N. Y. C. Marketing Order Calls for Dealers' Reports Oct. 10

"'Preparations to apply "farmer pressure" to any milk handlers who fail to comply with requirements of the federal-state milk marketing agreement were being formulated last week by the Metropolitan Co-operative Milk Producers' Bargaining Agency.'

"On page 2 of said issue, was contained the following statement:

"'The farmer's opportunity lies in mass action through business co-operative organization. Farmers today depend more and more on their own responsible leaders for information. Elected co-operative leaders must know reasons for low prices and be prepared with constructive plans.'

"95. In the 'Milk Producer's Market News.' the official paper of the plaintiff Bargaining Agency, for the month of October, 1938, published prior to October 15th of said month, and copies of which were distributed generally to the producers delivering milk to defendant's (Jetter's) plants, were contained among others, the following statements:

"'Please bear in mind that our able Secretary,

J. C. Treat, who is in charge of the "MINUTE MEN," is doing a fine job and these men, who are distributed throughout the milk shed, are on the watch at all times for disturbances, chiseling and other items that are not for the best interests of your producers.'

"Page 18:

" 'Remember that in the last issue of the Market News, on the front page, your writer advised you producers to watch out for the small minority of trouble makers and see to it that they are kept in their place. *We also suggested that whenever you find one of them sticking their nose in the picture and trying to disrupt what you have approved, then a good idea is to swat the nose and talk afterwards.*'

"Page 24:

" 'Pressure Is Put on Milk Dealers

" 'Syracuse, N. Y., October 13 (A. P.).—Milk producers supplying the New York City markets began withholding milk today from dealers failing to abide by provisions of the federal-state marketing agreement.

" '*The producers diverted 1,300 cans from a New York dealer who, E. M. Harmon, administrator of the agreement, said, failed to file the first monthly report of milk sales.*

" 'Homer S. Rolfe, president of the Metropolitan Co-operative Milk Producers Bargaining Agency, said the agency ordered the milk diverted from the dealer to cheese plants. The agency, he added, will pay the difference between the cheese plant price and the price they would have received from the dealer.'

* * * * *

" 'Some mighty fine work has been carried on at Bridgewater * * * by the leaders in the past few weeks.

" 'An orchid to Eddie Gaynor, of Leonardsville, who is doing some mighty fine work in assisting the groups working for the success of the Federal

Order. We want to welcome the Young-Maybery Co-operative Association, one of the new members of the Bargaining Agency. They start off with over 200 members.'

"Page 25:

"'The Bargaining Agency, plus, Treat, plus Baldwin, plus Andover Co-operative, created a headache for what large New York dealer?

"'Secretaries of all Co-operatives—We have added nearly 2,000 names to the individual mailing lists since the last issue was sent out. If you have not already sent in your list, do so at once and you will no longer be bothered with the bundles of Market News and the troubles of distributing same.'

"Page 28:

"'Hot Stuff.'

* * * * *

"'We farmers are like the tramp who stopped at a lady's door and asked for something to eat. She gave him some bread and said: "Now, I don't give you this bread for your sake, but for the Lord's sake." The tramp looked to the dry bread and turning to the woman, said: "Then for Christ's sake put some butter on it." Now, if the dealers won't give us a living price for milk for our sake, perhaps they will for Christ's sake. Not bad!'

"The reference to the 'mighty fine work' alleged to have been carried on at Bridgewater refers to activity among patrons delivering milk to the defendant Jetter.

The Jetter Company was obliged to institute suit to estrain interference with its milk supply, in order to ave its rights adjudicated in the U. S. District Court. his is referred to in the Dairymen's League News and lso in Findings Nos. 96 and 97 (R. 159) *as follows:*

"96. Sub-district president of plaintiff Dairymen's League (Dist. No. 11), has canvassed producers delivering to defendant Jetter, since Sep-

tember 1st, 1938, and represented to such producers, that payments for their milk were in danger; that said producers should leave Jetter and deliver milk to the plaintiff Dairymen's League before such procedures sustained loss of payment for milk delivered.

Plaintiff Dairymen's League, with knowledge that the defendant Jetter and other similarly situated, could not survive continued enforcement of the Federal Order when accompanied by the destructive competition of the League, the National Dairy and Borden subsidiaries and affiliates, in the October 11th issue of the Dairymen's League News, printed the following statement:

"How Can the 'Cheap Milk' Dealer Pay!

"Apprehension was felt in some quarters that some producers may receive something of a shock when they get paid for their milk.

"This uneasiness was due to the fact that it is well known that a lot of milk is being sold to stores in New York City at less than cost. There is a considerable question as to whether some of the firms selling this milk cheap will have money with which to pay producers at the rates established by the market administrator."

"97. The Market News issued by the Bargaining Agency for December, 1938 (Exhibit 23 to stipulation), states on page 30:

"'Syracuse, Nov. 21.—There will be no let up in activities of the Metropolitan Co-operative Milk Producer's Bargaining Agency to obtain full compliance with the Federal-State milk marketing program, declared Charles H. Baldwin, Executive Secretary today.

"Mr. Baldwin made this statement following a conference with his attorney, Edmund F. Cooke, and other lawyers who argued against an application by Jetter Dairy Company to restrain Mr. Baldwin, the Bargaining Agency and the Dairymen's League Co-operative Association before United States Judge Frank Cooper in Albany Saturday.

"'The Jetter Dairy sought to restrain these de-

fendants and Metropolitan Market administrator E. M. Harmon and officials of the State Department of Agriculture and Markets from enforcing the marketing program which was instituted September 1 under The Rogers-Allen law and the Agricultural Adjustment Act.

* * * * *

"'The Jetter case marks a new milestone in the progress of New York Milk Shed dairy farmers. Never before have dealers sought to enjoin farmers, although there have been cases where dairymen have had to seek protection of the courts from the acts of dealers. Starting of this case seems to indicate the desperate desire of dealers to wreck this program and frighten producers into acceptance of less money for their milk. The effect, however, will be the opposite. *Indignation is running high* among farmers all through the State, and I believe they will now be more insistent than before that every dealer comply in every respect with this marketing program, which has already added more than $2,500,000 to dairymen's income.'"

Notwithstanding the order granted against the Bargaining Agency and the League to restrain those activities, attempts were made to put Jetter out of business just the same. This is shown in the testimony of witnesses Wilson (R. 283) *and Faulkner* (R. 287).

The Jetter complaint and restraining Order in that case, are not in evidence in the case at bar.

Dairymen's League had progressed so far with its program of coercion, that one milk handler was ordered to deliver his milk to the Dairymen's League without so much as consulting him (R. 378). While the handler declined, at the instance of Mr. Gaynor, he later diverted the milk, in order to compel another dealer to sign a marketing contract (R. 379).

Witness Dumont testified that Mr. Baldwin, executive secretary of the Bargaining Agency, offered him a job with the Administrator. He went 200 miles to Syracuse

for this conference. Mr. Harmon was there, but had no talk with the witness. The job was to "dry up" milk plants of dealers who did not "go along" with the Federal Order. He refused the job; received $20 for his trip, paid by check of the Bargaining Agency (R. 396, 397). Judge Cooper agreed that this testimony was not binding on Administrator Harmon or the Government, but allowed it to stand as showing the general situation.

Attorney Walter Kohn testified (R. 333) that he went to Administrator Harmon's office in New York City. There he saw Mr. Treat, Secretary of the Bargaining Agency, and Mr. Mather, Sr., attorney for the Department of Agriculture (R. 333). Kohn discussed threats of closing up plants belonging to a handler client of his for refusal to sign a marketing contract.

Kohn was about to file a petition for review as provided by Section 608c (15). He detailed his conversation in the Administrator's office, as follows (R. 334):

> "This was the conversation. I said, 'Mr. Mather, I represent these gentlemen, the Cooperdale, and *we would like to test out the question*—I would like to test it out as they did in Boston. *I have my petition ready for filing with the Secretary of Agriculture, and following the precedent set down in Boston, I would like to know if you will* begin the action, because I can't begin the action until after there is a hearing on my petition.' He replied that the Department of Justice took care of that, 'but I can tell you now that that won't be for quite some time.' Then Mr. Treat said, *'It won't take very long you will get no milk.'* I said, 'Well, Mr. Mather, that was one of the things that I wanted to speak to you about because we received word from the Co-operative that was supplying us with milk that *if we tested out this question or went to court, they would stop giving us milk.' Mr. Treat said, 'That's right.'* Then I said, 'Mr. Mather, would you stand by and permit a thing like this to be done, merely because we

wanted to test out the question to see whether we had—whether legally it was good, or not?' He said, *'Not only would I stand by, but I would stand up and cheer.'*'' (Emphasis supplied.)

Treat was at Gaynor's house when diversion was talked (R. 378).

The League and Bargaining Agency had very close co-operation from the Dairy Section of the Department of Agriculture and Commissioner Noyes' personal representative, Gaynor.

Solicitor Jackson on the argument, said in substance that Judge Cooper had found the Secretary of Agriculture guilty of conspiracy. Mr. Jackson was misinformed on this subject. Judge Cooper made no such statement in his opinion. He did point out that these matters very likely never came to the attention of the Secretary (R. 759) as follows:

"* * * There can be little doubt of the co-operation between Federal and State Agents with the co-operatives to bring about a favorable vote for the order in the Referendum. *Of this the Secretary himself was probably unaware and relied on his subordinates.* Indicative of co-operation is the misleading statement in the Department's published statement of August, 1938, taken verbatim from the Dairymen's League News of August 16, 1938.

"After the order became effective on September 1, 1938, strenuous efforts were apparently made to persuade or coerce proprietary handlers to sign the marketing agreement, every handler signing the agreement estopped himself from any legal attack on the order after signing and for a period of 31 to 59 days after he should withdraw from the marketing agreement.

"Specific instances of diversion of withholding of milk from dealers until they signed the marketing agreement appear in the record and some of them were the result of official pressure, *but not directly by the market administrator.*'' (Emphasis supplied.)

All of these things bear out the defense that the Bargaining Agency and Dairymen's League have carried out a scheme to use the Act as a means of granting an unlawful private monopoly; that the Order is unauthorized by the statute; that it is discriminatory, contrary to the language and intent of the Act, is illegal and unenforceable.

SUPPLEMENTAL POINT V.

Judge Cooper's decision is amply supported by the law and the facts, and the judgment granted thereon should be affirmed.

In deciding this case, Judge Cooper followed no new and unheard of theory of law.

This case was in equity. The Act by Section 608a (6) had legislated a method of collecting debt which has been disapproved since the granting of Magna Carta. By the granting of a mandatory injunction, the debtor could be imprisoned for contempt of Court if he did not pay. Actually, he would be imprisoned for non-payment of a civil debt.

The appellees did not raise any legal objection to this method of procedure. They chose to rely on the merits of their case.

The appellees are subject to other penalties of not less than $50.00 or more than $500.00 for each violation of the Order (Section 608c [14]). In any event, an adverse decision of this case would put them all out of business. If not immediately, within a short time.

Proceeding on the theory that a mandatory injunction is properly authorized by the Act, the granting of such an injunction, rests in the sound judicial discretion of the Court:

Moore v. Texas & New Orleans R. R. Co., 297 U. S. 101 (105).

The case of *McNulty v. Mediation Board*, 18 Fed. Supp. 494, tried before Judge Cooper, and decided December 28th, 1936, presented some of the questions raised in the case at bar.

The action was brought by a railroad employee on behalf of himself and 193 other employees to enjoin the D. & H. Railroad Corp. from treating with the Order of Railway Telegraphers.

The action also sought to compel the National Mediation Board to hold a new election among employees to determine who should represent them in collective bargaining. The case involved an election of a bargaining agency or union, comparable to the producer referendum in the case at bar. Judge Cooper pointed out pages 497-502, that the election held, did not present the real issue to the employees voting; that they had no real opportunity to properly express their actual wishes. Judge Cooper said in his opinion:

> "How they would have voted had the real issue before them been presented by the ballot, no one knows or can know until another ballot presenting that issue is taken.
>
> • • • • • •
>
> "(2) Shall the court by mandatory injunction compel these men to have collective bargaining when they may not want it and compel the road to treat with the O. R. T. as representative in collective bargaining in such circumstances as here exist. Clearly not, unless the court has no other alternative. The defendant O. R. T. says there is no alternative. That defendant contends, if the court understands the argument, that, since the record of the proceedings before the Board are not in the record here, the court cannot go behind the certification of the Board and may only issue mandatory injunction for carrying the certification into effect.
>
> • • • • • •

"The statute provides (Section 2, subd. 4, 45 U. S. C. A. Sec. 152, subd. 4) that the railway shall treat with the representatives certified by the Board and provides elsewhere (Section 2, subd. 10, 45 U. S. C. A. Sec. 152, subd. 10) for penalties for noncompliance.

"*But no authorities have been cited by the defendant O. R. T. and none have been found by the court holding that the court's conscience must be stifled and its discretion must be destroyed.*

"On the contrary, the authorities hold that the court's order must be made in the exercise of sound discretion. *Texas & Pacific Railway Co. v. I. C. C.*, 162 U. S. 197, 16 S. Ct. 666, 683, 40 L. Ed. 940; *Duncan Townsite Company v. Lane*, 245 U. S. 308, 38 S. Ct. 99, 101, 62 L. Ed. 309; *Morrison v. Work*, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394; *Moor v. Texas & N. O. Ry. Co.*, 297 U. S. 101, 104, 56 S. Ct. 372, 373, 80 L. Ed. 509; *East Tenn., Va. & Ga. Ry. Co. v. I. C. C.*, 181 U. S. 1, 21 S. Ct. 516, 45 L. Ed. 719.

"When the order of such a body (I. C. C.) is sought to be enforced, the Supreme Court said in the *Texas & Pacific* case, *supra*: '*The court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the commission to be lawfully proceeded in.*'

"In the *Duncan* case, *supra*, the Court said: 'Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion.'

"(3) A mandatory injunction is like a mandamus in all essential respects, though the latter is directed to a public officer to compel him to perform an administrative act as to which he has no discretion.

"In *Morrison v. Work*, 266 U. S. 481, at page 490, 45 S. Ct. 149, 153, 69 L. Ed. 394, the Court said: 'A mandatory injunction, like a mandamus, is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion.'" (Emphasis supplied.)

In the case at bar, Judge Cooper has followed his reasoning in the *McNutt* case. His decision is consistent with the principles of equity which are well settled. The Dairymen's League, which actually intervened at its own instance, sought to be a party plaintiff in order to enforce the Order against appellees (par. 5, League complaint, R. 114).

It sought the same general injunctive relief as the Government did in its complaint (R. 119, 120). The Court properly received evidence of its activities.

We respectfully urge that the Court's sound discretion as exercised is amply justified by the law and the facts. The judgment should be affirmed.

Respectfully submitted,

WILLARD R. PRATT,
Attorney for Appellees, Schuyler Junction New York Milk Shed Co-operative, Inc., and Jetter Dairy Company, Inc.; Counsel for Appellee, Rock Royal Co-operative, Inc.,
Office and P. O. Address,
201-202 U. G. & E. Bldg.,
Utica, New York.

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Supreme Court, U. S.
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NO. 771

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, *Appellant*

v.

ROCK ROYAL CO-OPERATIVE INC., ET AL., *Appellees*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

CLAUDE T. RENO,
Attorney General.

HARRY POLIKOFF,
Deputy Attorney General.

State Capitol,
Harrisburg, Pa.

INDEX

Summary of Argument 1

Argument 3

1. Interest of the Commonwealth of Pennsylvania 3
2. The State has no authority to act herein 5
3. The Federal authority should be sustained 13

Conclusion 16

CASES, STATUTES AND AUTHORITIES CITED

Baldwin v. Seelig, 294 U. S. 511 (1935) 7

Hartford Accident and Indemnity Co. v. Illinois, 293 U. S. 155 (1936) 8

Hegeman Farms Corporation v. Baldwin, 293 U. S. 163 (1935) 13

Merchants Exchange v. Missouri, 248 U. S. 365 (1919) 8

Milk Control Board v. Eisenberg Farm Products, Inc., 59 Sup. Ct. 528 (1939) 5,7

Rohrer v. Milk Control Board, 322 Pa. 257 (1936) 4

Welch Co. v. New Hampshire, 59 Sup. Ct. 438 (1939) 8

Act of April 30, 1935, P. L. 96 (Pa.) 5

Act of April 28, 1937, P. L. 417 (Pa.) 6,8

Act of May 12, 1933, 48 Stat. 31 (7 U. S. C. A. Sec. 601) 7

Act of June 3, 1937, 50 Stat. 246 (7 U. S. C. A. Sec. 601) 7,8

Bulletin, Almanac (1936) 124 4

Farm Credit Administration, "Supply and Utilization of Milk in the Northeastern Milksheds" (1938), Bulletin 24 9

Federal Trade Commission, "Summary Report on Conditions with Respect to the Sale and Distribution of Milk and Dairy Products" (1937) 14

Opinion of the Attorney General of Pennsylvania, No. 277 (1939) 8

Pennsylvania State College, "Supply and Utilization of Milk in Pennsylvania" (1936), Bulletin 327 9

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SUMMARY OF ARGUMENT

Pennsylvania has a great stake in the outcome of the instant case: over 10,000 of its dairy farmers are suffering grievous financial losses in excess of $3,000,000 annually as a direct result of the decision below; and the great surplus problem of the New York market adversely affects the dairy industry of the entire Commonwealth.

Equalization of proceeds from the sale of milk is a means of alleviating the surplus problem. This, a fundamental action of the Secretary of Agriculture in Order No. 27, is beyond the jurisdiction of the State

in the multiple-state milkshed supplying New York City. Although Pennsylvania may prescribe minimum producers' prices for milk purchased within its borders and shipped to that market, the Commonwealth of Pennsylvania cannot equalize those prices by also regulating transactions in five other states; this is a field wherein the Federal authority alone can act.

Great national and (indirectly) domestic purposes are to be accomplished by Order No. 27 throughout the New York milkshed, and in each of the states serving that great metropolis. Strained interpretation of words, and failure to recognize natural factors inherent in a competitive industry, should not be permitted to defeat these great purposes.

ARGUMENT

1. Interest of the Commonwealth of Pennsylvania

The Commonwealth of Pennsylvania is directly affected by the instant case. In the first place, many Pennsylvania inhabitants and a great portion of the milk industry of Pennsylvania are included in the New York milkshed. In the second place, such portion of the dairy industry of the Commonwealth does in turn directly affect the remainder of its dairy industry, and indirectly the entire agricultural welfare of the Commonwealth.

The court below has found (R. 755) that 60,220 milk producers supply the New York milk marketing area; that these producers are situate in the States of New York, Pennsylvania, New Jersey, Massachusetts, Connecticut and Vermont; that 506 receiving stations supply the New York market. The record also discloses (R. 3989) that at least 10,570 milk producers located in Pennsylvania supply the New York market through at least 68 plants or receiving stations; that during the year November, 1936, to October, 1937, these Pennsylvania producers supplied a total of 788,122,000 pounds of milk or milk equivalent to this market comprising 16.8% of the total shipments thereto.

The extent to which the New York market affects the dairy industry of Pennsylvania is readily realized by the fact that 26 of the 67 counties in Pennsylvania are in the New York supply area; that 31.2% of the

farms in these counties receive over 40% of their total income from dairying (R. 3989).

The diary industry supplies more income to Pennsylvania farmers than any other branch of agriculture. In 1934 over 47% of the entire income of all persons engaged in agriculture in Pennsylvania was derived from dairy products; Bulletin Almanac (1936) 124; appellant's brief, page 58, in ROHRER *v.* MILK CONTROL BOARD, 322 Pa. 257 (1936).

Thus, the Commonwealth of Pennsylvania has a real stake in the outcome of the instant case.

Before Order No. 27 became effective the prices paid to the Pennsylvania farmers whose supply was shipped to the New York market averaged about $1.30 per cwt. for milk of 3.5% in the 201-210 mile zone (August, 1938). In the last month for which said order was effective (January, 1939) prior to the invalidation thereof by the court below, the price averaged about $1.84. Thereafter the average dropped to $1.35. The situation is comparable to a reduction of wages in a paramount industry of the Commonwealth by 27%, since the amount received for milk is the wage of the Pennsylvania dairy farmer. The practical consequences of the decision of the court below will mean the bankrupting of an important segment of the dairy industry of Pennsylvania—not only of producers whose supply reaches New York, but of producers whose supply is sold entirely intrastate in markets affected by the New York price.

As a direct result of the opinion of the court below the Milk Control Commission of Pennsylvania was required to reduce from $2.60 to $1.85 the Class 1 price paid to thousands of milk producers in Pennsylvania (f. o. b., 3.5% butterfat content) shipping to the Scranton (Pennsylvania) Milk Marketing Area[1].

Other respects in which the outcome of the present case affects the dairy industry of Pennsylvania will be noted below.

2. The State has no authority to act herein

In MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., 59 Sup. Ct. 528 (February 27, 1939) this Court held that the Commonwealth of Pennsylvania may enforce its Milk Control Law (Act of April 30, 1935, P. L. 96, as partially repealed and reenacted by

[1]The Milk Control Commission of the Commonwealth of Pennsylvania, upon March 8, 1939, promulgated Official General Order A-37 reducing minimum prices in the Scranton Milk Marketing Area. In the "Findings of Fact and Reasons" filed with said order the Commission made, inter alia, the following determinations:

"Testimony of the main dealer witness also pointed out that by trade custom a direct relation exists between the price of milk shipped into the Scranton Market and the price of milk shipped into the New York City Market, (N. T. 28). Virtually the same production area supplies both markets (N. T. 30, 77). It was testified that increased production in the New York Area, and the recent court decisions invalidating Federal Order No. 27, would cause a lower price on the New York Market (N. T. 30). * * *

"Although some producers objected to a reduction in price (N. T. 75), claiming that they were producing milk at a loss (N. T. 86), their testimony did not contradict that above quoted with respect to the basic economic conditions surrounding the dairy industry in the Scranton Area. Furthermore, the manner in which conditions surrounding the market in New York affect Scranton conditions, may be administratively noticed by this Commission. * * *"

the Act of April 28, 1937, P. L. 417), including the licensing, bonding and minimum producers' price requirements thereof, against certain milk dealers purchasing milk from producers within the Commonwealth for shipment and sale without. Said the court:

> * * * But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its over-riding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. * * *
>
> The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.
>
> * * * These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress.

The brief filed by the Commonwealth in MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., pointed out (pp. 60-62) that the Agricultural Adjustment Act of 1937, (Act of June 3, 1937, Public No. 137, 75th Congress, 7 U. S. C. A. Sec. 601) has not authorized the Secretary to require licenses or bonds of milk dealers; and the statute only authorizes price regulation under certain conditions where price disparity tends to interfere with interstate commerce. The record in MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., did not disclose whether such conditions existed, or whether any order in correction thereof had been promulgated by the Secretary pursuant to the discretion vested in him by Congress. Nor did it show whether the respondent therein, or any part of the milk purchased by it, was affected by or included within any order through which the Secretary may have exercised his authority. In fact, no such order existed at the commencement or at the conclusion of the proceedings[2]; and, in fact, the respondent corpora-

[2] The proceedings in MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC. had been instituted by the Commonwealth August 21, 1936, prior to enactment of the Agricultural Adjustment Act of 1937 (Act of June 3, 1937, Public No. 137, 75th Congress, 7 U. S. C. A. Sec. 601). The decision of the Supreme Court of Pennsylvania therein (332 Pa. 34) was rendered June 30, 1938, prior to the promulgation of Order No. 27 (effective September 1, 1938) by the United States Secretary of Agriculture, pursuant to the Act of Congress. The decision of this Court therein was rendered February 27, 1939, after said Order No. 27 had been declared invalid in the United States District Court in the instant case (Feb. 23, 1939), and subsequent to the date (Feb. 1, 1939) as of which said Order No. 27 was rescinded (upon March 14, 1939) by the Secretary.

Thus, as in the case of BALDWIN *v.* SEELIG, 294 U. S. 511 (1935) (See Agricultural Adjustment Act of 1933, 48 Stat. 31), this Court considered an authority exercised by the State in relation to a federal authority partially granted but not exercised. See also cases cited below, footnote 3.

tion denied that it was a milk dealer subject to federal or state regulation.

In the case at bar, however, it is clear that Order No. 27 directly affects and includes milk dealers, milk producers and milk which—**by reason of the exercise of federal authority in such order**—are not subject to certain price regulations of the Milk Control Commission of the Commonwealth of Pennsylvania under the Milk Control Law[3].

Order No. 27 does more than prescribe minimum prices to be paid to certain Pennsylvania milk producers: It provides for "equalization" of the proceeds of the sale of milk at the prescribed prices. This is **completely beyond State authority in a multiple-state milkshed such as that supplying metropolitan New York.** Hence if this type of regulation, **deemed the most effective for this milkshed,** is to be had at all the industry must look to federal authority for it. These assertions will be amplified in the remainder of this brief.

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[3] Both the State and the federal statute authorize and direct that the respective officials cooperate with each other to achieve uniformity in the formulation, administration and enforcement of Federal and State programs. See Milk Control Law of Pennsylvania, Act of April 28, 1937, P. L. 417, Section 311; see also Act of 1935, as amended June 3, 1937, c. 296, Sec. 1, 50 Stat. 246 (7 U. S. C. A. Sec. 610). Where there is such intention to cooperate with rather than to supersede state authorities, state regulation is not superseded in absence of actual conflict: HARTFORD ACCIDENT & INDEMNITY CO. *v.* ILLINOIS, 298 U. S. 155 (1936); MERCHANTS' EXCHANGE *v.* MISSOURI, 248 U. S. 365 (1919); H. P. WELCH CO. *v.* NEW HAMPSHIRE, 59 Sup. Ct. 438 (1939). See also formal opinion of the Attorney General of Pennsylvania, No. 277, (March 13, 1939) to Howard G. Eisaman, Chairman of the Milk Control Commission.

Recent studies[4], and the record in the present case, disclose that the New York City milk market differs from every other market to which Pennsylvania producers' milk is shipped, in the enormous amount of "surplus" which that market must bear during certain periods of the year.

The "desirability of compelling an equal sharing of the burden of the surplus milk by all producers and distributors" is noted in the opinion below (R. 769) without refutation.

In studying the Pennsylvania surplus problem, the Pennsylvania State College survey[5] drew the following conclusions (at p. 67):

> The division of the surplus burden among the unorganized producers in the fluid industry was very uneven. Some producers had 90 per cent or more of their milk used for fluid purposes, while others had less than 10 per cent so used. The cooperatives have largely eliminated such inequalities among their members.

This was later emphasized (at p. 81) as follows:

> * * * There was, however, an unequal distribution of the fluid market among the farmers in the state. Some farmers sold practically all of their milk at fluid prices, while others in the same community supplied a

[4] Pennsylvania State College, SUPPLY AND UTILIZATION OF MILK IN PENNSYLVANIA (1936), Bulletin 327; Farm Credit Administration, SURPLUS PROBLEMS IN THE NORTHEASTERN MILKSHEDS (1938), Bulletin 24.

[5] See footnote 4, supra.

> manufacturing market. Approximately one-fourth of the producers who sold milk did not participate in a fluid market. This condition may lead to a more general use of market-wide pools.

From the same source it is learned that more milk is shipped out of Pennsylvania to New York than to any other extra-state market (Table 47, p. 78); that the seasonal variation in the utilization of milk shipped extra-state is greater than that of any intra-state non-manufacturing supply (Table 34, p. 56); that with respect to milk used for manufacturing the seasonal variation in volume used by dealers located in the Pennsylvania counties of the New York milk-shed differs 120% of the daily average for the year, as between the high month and the low month, whereas the State average is only 84% (Table 35, p. 58). Thus, it is apparent that Pennsylvania producers supplying New York contribute to the high seasonal surplus in the New York milkshed.

Under the circumstances, Pennsylvania milk producers and milk dealers should be participants in any plan to effectuate "equal sharing of the burden of the surplus" (R. 769) in the market which their supply reaches.

Especially is this true when it is realized that the great surplus of the New York milkshed **jeopardizes the intra-state market of Pennsylvania.** The Farm Credit Administration survey[6] determined (at p. 36):

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[6] See footnote 4, supra.

The facts presented in this section of the report show that wide differences exist as to the actual and relative amounts of surplus milk in the several milksheds of the northeast region. It is evident that the surplus problem is far more serious in the New York milkshed than in any of the others.

The effects of the large surplus in the New York milkshed have not been limited entirely to its own markets. In recent years a large proportion of the surplus milk in this area has been disposed of as cream, to manufacturers of ice cream and cream cheese, both within and without the milkshed, and to cream buyers in Boston, Philadelphia, and other outside markets (appendix, tables 41 and 42). At times the sale of this cream has had a depressing effect upon cream prices in those markets. Since nearly all the surplus milk produced in the other milksheds is utilized as cream, producers' returns have been affected to some extent by this situation.

The relation between the New York City surplus and the milk market of Scranton, Pennsylvania, has also been officially recognized by the Milk Control Commission of Pennsylvania[7].

Obviously, the availability of loose, cheap "distressed" milk supplies, induces unfair competition among all producers and dealers in the industry, to their detriment and to the obstruction of fair commerce, and to the jeopardy of the public health. Howard G. Eisaman, Chairman of the Milk Control Commission, has recommended to the General Assem-

[7] See footnote 1, supra.

bly of the Commonwealth now in session that express authority to equalize returns in intra-state markets be conferred upon the Commission; letter to House Committee on Dairy Industries, January 31, 1939. Thus, it is of immediate concern to the entire dairy industry of Pennsylvania that the surplus problem of the New York milkshed be solved.

Is any solution permissible by State action, under the Milk Control Law of Pennsylvania, or under similar statutes of the several states supplying New York City? This question compels an answer in the negative.

Equalization of surplus among persons in several states is clearly one of the subjects "of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority" (MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., 59 Sup. Ct. at 530).

There is a vast distinction between prescribing a minimum price to be paid producers for milk acquired by a dealer **within** the State (MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., supra) and requiring such price to be pooled with the proceeds of similar transactions between **producers and dealers in other states** (BALDWIN *v.* SEELIG, 294 U. S. 511). In the latter instance, "weighing the nature" of the activities of the persons beyond the jurisdiction of the State, and "the propriety of local regulation of them", (MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., 59 Sup. Ct. at 531), one is forced to conclude that **Pennsylvania cannot and should not attempt to act**; that such "regu-

lation must be prescribed by a single authority" (supra).

3. The Federal authority should be sustained.

The Commonwealth is informed that other briefs filed in this cause deal fully with the legal aspects of Order No. 27, including the equalization feature thereof. However, because certain considerations of the court below directly affect all milk control regulation it is deemed necessary and desirable to comment here upon one salient feature of the case.

The court below held, inter alia, that since cooperative associations could continue to deduct certain operating expenses prior to making returns to their producer members, and since certain handlers, including such associations, were able to sell milk outside the marketing area, Order No. 27 was confiscatory in its application to the defendants. This conclusion was reached notwithstanding the express finding that these competitive conditions "had long existed" prior to the Act of Congress and the order promulgated thereunder. The court swept aside the principle of HEGEMAN FARMS CORPORATION *v.* BALDWIN, 293 U. S. 163 (1935) with the following declaration:

> This is more like a case of statutory disarming of one set of competitors and sending into competitive battle with another set to whom the same statute supplies arms.

It is submitted that the court below somewhat confused the "arms" and the shield in the competitive battle.

Merely because the injuries inflicted through some malpractices obstructing interstate commerce, and jeopardizing producers and handlers, can be minimized or prevented by the shield of a statute or order issued thereunder, is no reason for invalidating an order which either cannot or does not remove all other competitive differences.

No law or administrative order ever operated alike on all persons affected thereby, because few persons do business in an identical manner. The court below, in failing to recognize this simple truth, holds unconstitutional any regulation which marks certain lanes of fairness or reasonableness for all to follow in the economic race, merely because it does not also give courage to the fair and unfair who are weak, or deprive the tall of the advantage of their stride.

Thus, some handlers resell in distant markets—and all have the same opportunity to seek such markets, although smaller handlers or timid ones may find it more profitable to seek business at home than abroad.

Similarly, merely because certain cooperative associations are permitted to deduct certain operating expenditures before making returns to producer members, is no reason for the "discrimination" asserted in the opinion below. The Federal Trade Commission "Summary Report on Conditions with Respect to the Sale and Distribution of Milk and Dairy Products," filed January 4, 1937, in response to House Con. Resolution 32, 73d Congress, 2d Session—approved June 15, 1934, included the following final conclusions and recommendations:

> Where adequate and satisfactory markets are not otherwise available, it is recommended that cooperative marketing associations be prepared to make arrangements to lease or acquire and operate such plants and equipment as may be necessary to process and handle all milk produced by members that can not be satisfactorily disposed of otherwise.
>
> It is recommended that cooperative organizations be operated on a nonprofit basis, and that all receipts, after deducting only necessary expenses, and making provisions for reasonable operating reserves, be returned to producer-members in the nature of an equalized price for all milk handled.

Order No. 27 does no more than continue to permit this practice, engaged in long before its promulgation. Milk price regulation is not—and could not be—designed to make all handlers alike.

CONCLUSION

Neither the principle of, nor the need for, equalization has been attacked by the court below. This, a fundamental action of the Secretary in Order No. 27, is beyond the jurisdiction of the State in the multiple-state milkshed supplying New York City. Although Pennsylvania may prescribe minimum producers' prices for milk purchased within its borders and shipped to that market, the Commonwealth of Pennsylvania cannot equalize those prices by regulating transactions in five other states; this is a field wherein the federal authority alone can act.

Great national and (indirectly) domestic purposes are to be accomplished by Order No. 27 throughout the New York milkshed, and in each of the states serving that great metropolis. Strained interpretation of words, and failure to recognize natural factors inherent in a competitive industry, should not be permitted to defeat these great purposes.

Respectfully submitted,

CLAUDE T. RENO,
Attorney General of the Commonwealth of Pennsylvania.
HARRY POLIKOFF,
Deputy Attorney General.

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OLIKOFF,
Attorney General,

No. 771.

IN THE

Supreme Court of the United States

October Term, 1938.

UNITED STATES OF AMERICA,
Appellant,

against

ROCK ROYAL CO-OPERATIVE, INC., and others,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF, ON BEHALF OF NEW YORK STATE GUERNSEY BREEDERS CO-OPERATIVE, INC., AND JOHN R. MacELROY, ON BEHALF OF HIMSELF AND OTHER MEMBERS.

HENRY S. MANLEY,
100 State Street,
Albany, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

No. 771.

IN THE

Supreme Court of the United States

October Term, 1938.

UNITED STATES OF AMERICA,
Appellant,

against

ROCK ROYAL CO-OPERATIVE, INC., and others,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

May it please the Court:

The undersigned, as counsel for New York State Guernsey Breeders Co-operative, Inc., and John R. MacElroy, on behalf of himself and other members of such Co-operative, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

April 24, 1939.

HENRY S. MANLEY,
100 State Street,
Albany, N. Y.

Brief, Amicus Curiae.

On January 9, 1939, suit was commenced in the Northern District of New York by New York State Guernsey Breeders Co-operative, Inc., and John R. MacElroy, on behalf of himself and other members of the aforesaid co-operative, plaintiffs, against Henry A. Wallace, Secretary of Agriculture. The plaintiffs claim jurisdiction under provisions of the Act now involved, section 8-c, subdivision (15), which may be found on page 10 of the copy made Appendix A to the Brief of the United States herein. A motion to dismiss parts of the complaint has been argued and is undecided.

If relief is not otherwise obtained plaintiffs in that suit expect to present to this Court, probably at its 1939 Term, their grievances arising from Order No. 27, the same Order which is now involved. Their grievances relate to the equalization of prices received for Guernsey milk sold by Guernsey Breeders, with prices received for substantially all other milk sold in or available for the New York City market.

The nature of their grievances can be made sufficiently clear for present purposes by comparing two quotations from the Brief of the United States in the present suit. At page 126 it presents a general justification of the equalization provisions of the Order, as follows:

> "The equalization payments are essentially fair because they provide for a mutuality of burdens and benefits. Their effect is to give all producers a share of the valuable fluid milk market commensurate with the quantity of milk they deliver and at the same time to enable all producers to bear

equally the burdens incident to the inevitable and necessary surplus. A statutory provision which treats all producers with equal fairness, assures them a stable price, protects them from the hazards which have proved so harmful to their welfare in the past, and distributes the necessary burdens of the business equally and fairly among them all does not violate the due process clause of the Fifth Amendment."

But at pages 60-61 of the same Brief is a justification of payment of something more than the equalized price to producers in 18 counties near the marketing area, in the following language:

"The milk of producers in those counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential."

It is the claim of Guernsey Breeders that they also, "have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages", and hence that a wrong is done them when the market of their product is equalized and they are left with no more than, "a share of the valuable fluid milk market commensurate with the quantity of milk they deliver."

The outstanding natural advantage of Guernsey Breeders is the peculiar quality of Guernsey milk, and

the public preference for it as a table milk. In some findings made by Secretary Wallace on January 3, 1939, relative to this claim, he said in part:

> "Milk produced by Guernsey cows, on the average, is richer in butterfat, protein and mineral elements, yellower in color and probably higher in carotene content and Vitamin A activity than milk produced by cows of the Ayrshire and Holstein breeds under similar conditions * * *"

Guernsey Breeders have added substantially to that natural advantage. One such factor is stated by Secretary Wallace in those same findings, as follows:

> "The fluctuation of milk production seasonally in the herds of petitioner's [Guernsey Breeders'] members is less than that of milk producers generally in the State of New York, and in that respect approaches the seasonal evenness of the nearby market producers in the counties near New York City."

In brief, Guernsey Breeders claims that it and its members should not have put upon them the same burden of seasonal surplus milk put upon others, because they themselves limit the production of any surplus of their Guernsey milk. Other factors alluded to in the Secretary's findings, and relied upon in Guernsey Breeders' suit, are identification of their milk by the trade name "Golden Guernsey", the extensive advertising it has been given by them for many years, its greater cost of production, and the extensive fluid markets built up for it, some of which are under contract to Guernsey Breeders for several years in the future.

* * * * *

We appreciate that the present is not the appropriate time to argue whether these facts justify an invocation by Guernsey Breeders of the Due Process Clause. Sufficient has been said to indicate that Guernsey Breeders is presenting to a lower court and may later present to this Court, questions which are not immediately before this Court but are closely related to those now presented.

That the facts involved in the Guernsey Breeders' suit and suggested in this brief may cast any light upon the questions now before this Court, we are not so bold as to affirm. We do not urge one decision or another upon those questions. The prayer of this petition and brief is merely that nothing be said by this Court in the present suit, by inadvertence, which may be thought by lower courts to be controlling upon the somewhat different facts to be presented in the suit of Guernsey Breeders.

Respectfully submitted,

HENRY S. MANLEY,
100 State Street,
Albany, N. Y.
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

Nos. 771, 826, 827 and 828.—October Term, 1938.

The United States of America, Appellant, 771 *vs.* Rock Royal Co-operative, Inc., et al.	Appeals from the District Court of the United States for the Northern District of New York.
Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Appellant, 826 *vs.* Rock Royal Co-operative, Inc., et al.	
Dairymen's League Cooperative Association, Inc., Appellant, 827 *vs.* Rock Royal Co-operative, Inc., et al.	
Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., Appellant, 828 *vs.* Rock Royal Co-operative, Inc., et al.	

[June 5, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

These appeals involve the validity of Order No. 27 of the Secretary of Agriculture, issued under the Agricultural Marketing Agreement Act of 1937,[1] regulating the handling of milk in the New York metropolitan area.

On October 27, 1938, the United States of America filed a complaint against the Rock Royal Co-operative, Inc., the Central New York Cooperative Association, Inc., and Schuyler Junction New York Milk Shed Cooperative, Inc., seeking a mandatory injunction requiring the defendants and their representatives to comply with the provisions of the Order. On November 26, 1938, a

[1] Act of June 3, 1937, 50 Stat. 246.

similar action was filed in the same court against the Jetter Dairy Company, Inc. On December 2 these causes were consolidated. The original proceedings had sought relief not only for violations of the Order of the Secretary of Agriculture but also, if the court should find that the defendants or any of them were not subject to that Order, for violation of Official Order No. 126 issued by the Commissioner of Agriculture and Markets of the State of New York. The two orders are *in pari materia*, one covering milk moving in or directly burdening, obstructing or affecting interstate commerce and the other[2] covering milk in intrastate commerce. Each defendant is a dealer handling milk moving in interstate commerce. On December 15, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, was permitted to intervene as a party plaintiff in the consolidated action. He sought an injunction commanding the defendants and their representatives to comply with Order No. 126 or, should it be determined that their milk was not subject to this Order, to comply with the Order of the Secretary of Agriculture.

In their answers, the defendants pleaded certain affirmative defenses, setting up the invalidity of Order No. 27 because of improper efforts to secure its adoption. Broadly speaking, these defenses were based upon erroneous representations alleged to have been made by officials and by certain private organizations to bring about the approval of the Order and upon an alleged conspiracy of the same private organizations to create a monopoly by means of the Order. The motion to strike these defenses having been overruled, the Dairymen's League Cooperative Association, hereinafter called the League, and the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., hereinafter called the Agency, were permitted to intervene to combat them.

The answers also challenged the two orders and the Act as contrary to the Fifth and Fourteenth Amendments to the Constitution and the Act as involving improper delegation of legislative power. The Central New York Cooperative Association denied the power of the Congress to enact the legislation under the Commerce Clause and set up as a further defense that it was not subject to either order.

After a hearing upon the merits, the District Court dismissed the complaints. The state order was eliminated from consideration on

[2] As authorized by N. Y. Laws 1937, c. 383. See Noyes *v.* Erie & Wyoming Farmers Co-op., 170 Misc. 42.

the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid. It was further held that Sections 8c(5)(B)(ii) and 8c(5)(F) of the Act violate the due process clause of the Fifth Amendment, that the Order is discriminatory and takes property without compensation, that approval of the producers was secured by unlawful misrepresentation and coercion and that important provisions of the Order, authorizing payments to cooperative and proprietary handlers, have no basis in the Act. *United States* v. *Rock Royal Co-operative*, 26 F. Supp. 534, 548, 550, 544, 545, 553. As the unconstitutionality of certain sections of an Act of Congress was one ground of the decision an appeal was allowed directly to this Court.[3]

The Statute.[4] The controversy revolves almost entirely around Order No. 27. Back of the Order is the statute under which it was

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[3] Sec. 2, Act of Aug. 24, 1937, 50 Stat. 752, 28 U. S. C. § 349a.

[4] Pertinent portions of the Act are as follows:

Act, Sec. 8c(1). "The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. . . ."

(2) "Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin)."

(3) "Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order."

(4) "After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity."

(5) "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the

issued, the Agricultural Marketing Agreement Act of 1937 which reenacted and amended certain provisions of the Agricultural Ad-

grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

"(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the 'Capper-Volstead Act', engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

"(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

[N. B. (6) relates to products other than milk.]

(7) "In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

justment Act.[5] As its name implies, it was aimed at assisting in the marketing of agricultural commodities.

By Section 1 it is declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers" thus destroying the value of agricultural assets to the detriment of the national public interest. This interference is declared to "burden and obstruct the normal channels of interstate commerce."

By Section 2 it is declared to be the policy of Congress, through the exercise of the powers conferred upon the Secretary of Agriculture, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. . . ."

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

(18) "The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices."

[5] Act of May 12, 1933, 48 Stat. 31, as amended Aug. 24, 1935, 49 Stat. 750.

Under Section 2 of the Act, the base period for agricultural commodities, except tobacco and potatoes, is fixed at the pre-war period of August, 1909, to July, 1914. Where the purchasing power during the base period cannot be satisfactorily determined from available statistics within the Department of Agriculture, the Secretary is authorized to take as the base period from August, 1919, to July, 1929, or a portion thereof. Section 8c. In prescribing minimum prices for milk the statute authorizes the Secretary to fix minimum prices without restriction to the purchasing power during the base period so as to reflect the prices of available supplies of feed and other economic conditions, if he finds after a hearing that minimum prices with a base period purchasing power are unreasonable. Section 8c(18).

Section 8a(6) gives jurisdiction to the district courts of the United States to enforce and to prevent and restrain any person from violating any of the orders, regulations or agreements under its provisions.

Section 8b authorizes the Secretary of Agriculture to enter into marketing agreements with the producers and others engaged in the handling of agricultural commodities in or affecting interstate commerce. These agreements may be for all agricultural commodities and their products, are entirely voluntary and may cover the handling of the commodity by any person engaged in the various operations of processing or distribution. Agreements are involved only incidentally in this proceeding.

Section 8c provides for a use of orders, instead of agreements, in certain situations. These orders apply only to specified commodities, including milk.[6] They are to be entered only when the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity or product thereof, and after notice and an opportunity for hearing. It is necessary also for the Secretary of Agriculture to set forth in such order a finding upon the evidence introduced at the hearing that the issuance of the Order and of the terms and conditions thereof will tend to effectuate the declared policy.[7] When, as here, the commodity is milk, the Act requires[8] that the Order contain one or more of terms specified in Section 8c(5) and no others, except certain terms common to all orders and set

[6] Sec. 8c(2).
[7] Sec. 8c(4).
[8] Sec. 8c(5).

out in Section 8c(7). These terms, as used in the Order under examination, will be referred to later. Orders may only be issued[9] after hearing upon a marketing agreement which regulates the handling of the commodity in the same manner as the order. Without special determination of the Secretary of Agriculture and approval of the President, orders are not to become effective unless approved by handlers as required by the Act.[10]

Notwithstanding the refusal or failure of handlers to sign a marketing agreement relating to such commodity, the Secretary of Agriculture, with the approval of the President, may issue an order without the adoption of an agreement if he determines that the refusal or failure of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy with respect to the commodity and that the issuance of the order is the only practical means of advancing the interest of the producers. In such a case the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during a representative period, in the production for market of the commodity within the production area or two-thirds of those engaged in the production of the commodity for sale in the marketing area specified in the marketing agreement or order. Section 8c(9). Section 8c(19) authorizes a referendum to determine whether the issuance of the order is approved by the producers. Section 8c(12) provides that the Secretary shall consider the approval or disapproval by any cooperative association as the approval or disapproval of the producers who are members, stockholders or patrons of the cooperative association.

Section 8c(15) provides for administrative review by the Secretary on petition of a handler objecting to any provision as not in accordance with law and seeking a modification or exemption therefrom. By (15)(B) the district courts have jurisdiction to review such ruling.

The Problem.—In accordance with the provisions of the Act the Secretary of Agriculture, before promulgating Order No. 27, conducted public hearings attended by handlers, producers and consumers of milk and their representatives throughout the milkshed. No defendant, however, was represented. These hearings followed the presentation by the Agency to the Secretary and to the Com-

[9] Sec. 8c(10).
[10] Sec. 8c(8).

missioner of a proposed marketing agreement and order regula
ing the handling of milk in the New York marketing area with
request for action under the Federal and New York statutes. T
hearings were jointly held by the Federal and state governmen
The cooperation of the two governments was the culmination of
course of investigation and legislation which had continued ov
many years. The problem from the standpoint of New York w
fully considered and the results set out in the Report of 1933 of th
Joint Legislative Committee to Investigate the Milk Industry. Thi
investigation was followed by the creation of the Milk Contro
Board with broad powers to regulate the dairy business of th
state. This board had power to fix prices to be paid to purchaser
and to be charged to consumers.[11] A later New York act, th
Rogers-Allen Act,[12] authorized the state commissioner to cooperat
with the Federal authorities acting under the present Marketing
Agreement Act, and to issue orders supplementary to those of the
Federal Government to be carried out under joint administration.

The problems concerned with the maintenance and distribution
of an adequate supply of milk in metropolitan centers are wel
understood by producers and handlers. In the milkshed and
marketing area of metropolitan New York these problems ar
peculiarly acute.[13] It is generally recognized that the chie
cause of fluctuating prices and supplies is the existence of
normal surplus which is necessary to furnish an adequat
amount for peak periods of consumption. This results in an exces
of production during the troughs of demand. As milk is highl
perishable, a fertile field for the growth of bacteria, and yet a
essential item of diet, it is most desirable to have an adequate pro
duction under close sanitary supervision to meet the constantl
varying needs. The sale of milk in metropolitan New York
ringed around with requirements of the health departments to a
sure the purity of the supply. Only farms with equipment a
proved by the health authorities of the marketing area and operate
in accordance with their requirements are permitted to mark
their milk. More than sixty thousand dairies located in the stat
of New York, Connecticut, Massachusetts, Maryland, New Jerse
Pennsylvania and Vermont hold certificates of inspection and a

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11 Certain of these powers were upheld in Nebbia *v.* New York, 291 U.
502.

12 N. Y. Laws 1937, c. 383.

13 Nebbia *v.* New York, 291 U. S. 502; Baldwin *v.* Seelig, 294 U. S. 51
Hegeman Farms Corp. *v.* Baldwin, 293 U. S. 163.

proval from the Department of Health of the City of New York. More than five hundred receiving plants similarly scattered have been approved for the receiving and shipping of grades A and B milk. Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. It is obvious that the marketing of fluid milk in New York has contacts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condition for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, cut-throat competition even among them would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act.

Order No. 27.[14] The Secretary of Agriculture found that two-thirds of the milk produced for the New York marketing area ac-

[14] Pertinent portions are as follows:

Order, Article VI, Section 1. "Net Pool Obligation of Handlers.—The net pool obligation of any handler for milk received from producers during each month shall be a sum of money computed for such month as follows:

"1. Determine the total quantity of milk in each class at each plant;

"2. Subtract from the quantity of milk in each class the quantity of such milk received from other plants or from other handlers;

"3. Subtract pro rata out of each class the quantity of milk received from the handler's own farm;

"4. Subtract from the remaining quantity of milk in each class, the quantity of each to which the prices in section 1 of Article IV do not apply, which result shall be known as the 'net pooled milk' in each class;

"5. Multiply the total quantity of net pooled milk in each class, at all plants of the handler combined, by the respective class prices set forth in

tually moves in interstate commerce and that the remaining one-third produced within the State of New York was "physically and inextricably intermingled" with the interstate milk; that all was handled either in the current of interstate commerce or so as to affect, burden and obstruct such interstate commerce in milk and its products. An exception was made as to milk regulated by the order of the Commissioner of Agriculture and Markets of the State of New York. The Secretary further found that prices calculated in

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section 1 of article IV and add together the resulting sums;

"8. Deduct 20 cents per hundredweight for all net pooled milk received from producers at plants in the counties or portions of counties listed below in this section. The result thus obtained shall be known as the 'handler's net pool obligation.'"

Counties — *New Jersey:* Hunterdon, Somerset, Essex, Union, Morris, Warren, Sussex, Passaic. *New York:* Columbia, Dutchess, Nassau, Orange, Putnam, Suffolk, Westchester. *Connecticut:* Litchfield. *Massachusetts:* Berkshire. *Towns in Ulster County, New York:* Marbletown, Hurley, Kingstown, Ulster, Rosendale, Esopus, New Paltz, Lloyd, Gardiner, Plattekill, Marlborough, Shawangunk.

"SEC. 2. Computation of the Uniform Price.—The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the final report submitted for the preceding month by each handler and, on the 14th day of such month, compute from all of such corrected reports the uniform price in the following manner:

"1. Combine into one total the net pool obligations of all handlers;

"2. Subtract the total of payments required to be made for such month by section 5 of article VII and the total of payments claimed pursuant to section 6 of article VII;

"3. Add the amount of cash in the producer settlement fund;

"4. Divide the result by the total quantity of milk represented in the sum obtained pursuant to paragraph 1 of this section; and

"5. Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 201-210 mile zone."

Article VII, SECTION 1. "Time of Payment.—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article."

Article VII, SEC. 2. "Transportation and Location Differentials.—The uniform price shall be plus or minus the differential shown in column B of the schedule contained in section 3 of article IV for the zone of the plant, as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties listed in paragraph 8 of section 1 of article VI."

Article VII, SEC. 5. "Payments to Cooperative Associations.—Any cooperative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members.

accordance with the Agricultural Marketing Agreement Act of 1937 to give this milk a purchasing power equivalent to the parities mentioned in Sections 2 and 8e of that Act were not reasonable in view of the supplies and prices of feeds and other economic conditions which affect the supply and demand for milk. He then fixed a minimum price for milk to be determined from time to time by formula.

By the Order the marketing area is defined as the City of New York and the counties of Nassau, Suffolk and Westchester. A producer is any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area. A handler is a person engaged in the handling of milk or cream received at an approved plant for similar sale. "Handler" includes cooperative associations. The administrative sections of the Order setting up a milk administrator

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such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members by such association and on which such handler has made the reports and payments required by this order.

2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association.

"SEC. 6. Market Service Payment.—The market administrator shall pay out of the producer settlement fund to any handler immediately after audit of claim for such payment made on forms supplied by the market administrator:

1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area which was, during any month except November or December, moved to a plant where it was utilized in Classes II-A, II-B, III-A, III-B, III-C, III-D, or, during the month of October, IV-A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles, and plus 1/10th of 1 cent per hundredweight per additional mile, of the shortest highway distance between the two plants; and

2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equipped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area."

and defining his duties are not attacked. Nor are those which classify milk.

Article IV is important since it establishes minimum prices for milk. There are various differentials based upon use, butter fat content, and distances between the points of production and consumption which it is unnecessary to analyze. For the purposes of this opinion it is sufficient to say, as an example, that the minimum price each handler should pay for milk is fixed by a formula which varies with the butter-price range for 92-score butter at wholesale in the New York market during the 60 days preceding the 25th day of the preceding month. The handlers are required to file reports as to their receipts and utilization of milk of the various classes. It should be understood, however, that this minimum price is not the amount which the producer receives but the price level or so-called "value" from which is calculated the actual amount in dollars and cents which he is to receive.

By Article VI a uniform price is computed and it is this uniform price which the producer is actually paid by the proprietary (non-cooperative) handlers. The uniform price is determined by a computation which in substance multiplies the amount of milk (classified according to its use) received by all handlers, less certain quantities of milk permitted to be deducted, by the minimum prices fixed by Article IV for the different classes of milk. From the result various payments and reservations are deducted and the remainder is divided by the total quantity of milk received. To equalize, handlers pay into the producer settlement fund. While much over-simplified the operation will be made clear by summarizing the provisions of Article VII to require that handlers shall pay to the producer settlement fund the amount by which their purchased milk multiplied by the minimum prices for the various classes is greater than their purchased milk multiplied by the uniform price. When the handlers' purchased milk multiplied by the minimum prices is less than when it is multiplied by the uniform price, the producer settlement fund pays them the difference for distribution to their producers. These provisions give uniform prices to all producers, with exceptions to be herein stated, in accordance with the general use of milk for the preceding period.

Other provisions of the Order upon which an attack is made will be pointed out in the discussion of the particular objections.

Suspension of Order. It developed at the argument of the causes in this Court that the Secretary of Agriculture on March 18, 1939,[15] had suspended Order No. 27 on account of the effect of the decree below on its administration and enforcement. Section 8c(16)(A). Since this suspension is authorized by the statute and the Order preserves accrued rights, we are of the opinion this step does not make these proceedings moot. Reports of their receipts and classified sales of milk, accounting of their pool obligations in the determination of the uniform price and settlement with their producers on the basis of the Order, as well as the payment of money, are sought from the defendants. The controversy over the validity of the Order and the power to enforce its provisions remains.

Adoption of the Order. Before considering the validity of the Marketing Act and the provisions of the Order under attack, we shall examine the contention of the defendants that the Order was adopted under circumstances which require a court of equity to refuse to enforce it. After dealers had refused or failed to sign the proposed marketing agreement, the Secretary conducted a referendum under Section 8c(19) to ascertain whether the issuance of Order No. 27 was approved by two-thirds of the producers, as required by Section 8c(9). Vigorous campaigns were waged by both proponents and opponents of the Order. Among the proponents were the League and the Agency. After the vote, the Secretary on August 24, 1938, with the approval of the President, determined that the issuance of the Order was favored by at least two-thirds of the producers, and declared it effective as of September 1, 1938.[16]

The defendants base their appeal to the conscience of the chancellor upon matters connected with the referendum which they claim amount to fraud in its adoption. The alleged fraud is said to consist of widespread public misrepresentations to the effect that all producers would receive the same price for their milk and a conspiracy between the League and others to convert the state and national acts into instruments for the creation of a monopoly in large handlers in the sale of fluid milk in the marketing area.

The findings supporting the charges of misrepresentation and conspiracy may be summarized as determining that the intervening plaintiffs, the League and the Agency, participated actively in proposing, adopting and inducing both producers and handlers to accept the Order. In greater detail, the findings show that the League

[15] 4 Fed. Reg. 1259.
[16] 3 Fed. Reg. 2100.

was instrumental in the organization of the Agency; that it has re
resentatives upon the Agency's Board of Directors; that the Agen
has acted as an organization for promoting action under both fe
eral and state acts; that both League and Agency published pape
which gave vigorous support to the campaign for approval of t
Order. At the time of the hearings the Agency issued an explan
tory booklet stating that an equal purchasing price would be paid b
all dealers for milk of the same use and that each producer woul
share equally the benefits of the fluid milk market. Both Agency an
League announced repeatedly that handlers would be required t
pay a uniform price and that no handler would receive a competi
tive advantage over the others. The Agency expended over $63,00
between December 1, 1937, and June 1, 1938, and over $45,00
between the latter date and September 1, 1938, the date the orde
went into effect, as it actively supported the Federal-state orde
program. Voting on the Order took place August 18, 19 and 20
Of 38,627 votes counted as valid in the referendum, 33,663 or 87.
percent were in favor of the issuance of the Order, and 4,964 or 12.
percent were opposed. Of the favorable votes, the League cas
22,287.

Supporting evidence beyond the coordinated activities of th
Agency, the League and other cooperatives for the charge of con
spiracy to monopolize by securing the adoption of the Order wa
found by the District Court in the provisions of the Order. Com
petitive advantages to cooperatives in the Order were thought by
it to indicate an improper influence by them in its drafting. These
will be discussed later from the point of view of their legality
under permissible classification. The court found that the con
spiracy to obtain a monopoly was carried out by coercive tactics on
the part of producers, under the leadership of the League and the
Agency. These tactics consisted of threats to handlers that if they
did not comply with the Order, the producers would withhold de
livery of milk. These schemes, the lower court determined, were
so successful in securing the drafting, adoption and acceptance of
the Order that a conspiracy to monopolize interstate commerce con
trary to the Sherman Act was established. It held that the occur
rence of the incidents just detailed compelled refusal of the injunc
tion. We do not agree.

While considering the manner of the adoption of the Order, the
validity of the Act and the provisions of the Order must be assumed.
The Order was submitted to the producers for approval after the

ngs specified in the statute. The full text of the Order with natory pamphlets was mailed each prospective voter. In the f this fact, erroneous statements cannot be permitted to render ubmission futile. There is no evidence that any producer mis- rstood. A casual sentence in one of the pamphlets of the De- nent of Agriculture and a number of other statements in publi- ns of the League and Agency were to the effect that dealers d pay all producers the uniform price for milk. Such assertions the qualifications given in the Order that they are not applic- to milk sold outside the marketing area or to milk handled by eratives. The variation from the facts is not immaterial in view e value or volume of milk involved. But the Order, Article VII, nly stated that cooperatives were not covered by the payment irements and it appeared, also, that milk sold outside the mar- ng area was not within its terms. A study of the official form the Order would have cleared up any misconception created by language. The Secretary of Agriculture declared that three- rths of the producers affected by the Order approved its terms. e litigants do not deny that three-fourths of the voters voted for institution of the Order. There is no authority in the courts go behind this conclusion of the Secretary to inquire into the fluences which caused the producers to favor the resolution.

The coercion by the League and the Agency, exercised upon the ndlers after the adoption of the Order to force or induce them to quiesce in its operation, is of the same indirect character as the leged misrepresentation. It is the partisan coercion of the pro- ucer seeking to compel dealer support of the plan by the threat f the use of his economic power over his own milk. The coercion as ineffective upon these defendants. Producers' organizations rged in their papers and meetings diversion of milk from handlers o influence them to agree to the Order. Such efforts could not ave had an effect on the prior vote of the producers. It is quite ue that the League which itself cast two-thirds of the favorable otes was in a position to cast more than one-third of the total ualified vote against the Order. This arises from the provision of the Act, authorizing cooperatives to express the approval or dis- approval for all of their members or patrons.[17] This is not an unreasonable provision, as the cooperative is the marketing agency of those for whom it votes. If the power is in the Congress to put

[17] Section 8c(12).

the order in effect, the manner of the demonstration of furth approval is likewise under its control. These associations of pr ducers of milk have a vital interest in the establishment of a efficient marketing system. This adequately explains their intere in securing the adoption of an order believed by them to be favo able for this purpose. If ulterior motives of corporate aggrandi ment stimulated their activities, their efforts were not thereb rendered unlawful.[18] If the Act and Order are otherwise valid, th fact that their effect would be to give cooperatives a monopoly o the market would not violate the Sherman Act or justify the re fusal of the injunction.

Correlation of Order and Act. There is another phase of th argument against the Order which is not affected by the validity of the Act or its application in the Order and therefore is ready for disposition before the constitutional questions need be reached. Defendants contend there is no statutory basis for the sections of the Order exempting cooperatives from the payment of the uniform price[19] and authorizing payments to them and certain handlers from the producer settlement fund.[20]

The Government makes the point that none of the defendants, all handlers, can object to these terms of the Order because only producers delivering milk to cooperatives are affected by the exemption of cooperative handlers from the requirement to pay at not less than the uniform price and only producers are affected by the use of the pooled money for Sections 5 and 6 payments to cooperative and other handlers. Although three of the defendants cannot complain of the benefits conferred upon cooperatives, for they are cooperatives, the defendant Jetter Dairy Company has standing to raise the issue of want of statutory authority to except cooperative handlers from the payment of the uniform price. It is a proprietary corporation, a handler of milk, required by the Order to pay uniform prices for the milk it purchases.[21] This requirement to pay uniform prices arises from the provisions of Article IV that it shall pay minimum prices. The two are the same except for the deduction of certain service payments. The cooperatives are excepted from the payment. The burden of payment is laid directly

[18] Cf. Isbrandtsen-Moller Co. *v.* United States, 300 U. S. 139, 145; Water Service Co. *v.* Redding, 304 U. S. 252, 254.

[19] Article VII, Section 1.

[20] Article VII, Sections 5 and 6.

[21] Article VII, Section 1.

upon Jetter while others are excepted. None of the defendants, on the other hand, is in a position to raise the issue of lack of statutory authority for the payments authorized by Article VII, Sections 5 and 6. Whether cooperative or not, the defendant corporations have no financial interest in the producer settlement fund. All defendants pay into, or draw out of, that fund in accordance with their utilization of the milk delivered to them by their patrons. The defendants' profit or loss depends upon the spread each receives between the class price and sale price. If the deductions from the fund are small or nothing, the patron receives a higher uniform price but the handler is not affected.[22]

We now consider whether the Act authorizes the exception of the cooperatives from the uniform payment provisions of Article VII, Section 1. This authority, if it exists, is in Section 8c(5)(F) of the Act. The earlier paragraphs provide for minimum prices to be paid by handlers to producers and associations of producers, subject to equal quality and location differentials not important here. These would require minimum prices to be paid by cooperatives when, as here, they were handlers under the definition of the Order,[23] were it not for the exception of these same cooperatives under subsection (F): "Nothing . . . shall . . . . prevent a cooperative . . . . from . . . making distribution thereof [net proceeds] . . . in accordance with the contract between the association and its producers." This language specifically permits, indeed requires, the Order to except cooperatives from the requirement of paying minimum prices to producers. As the minimum price is paid to the producer through the payment of the uniform price, after equalization in the pool, there is authority in the Act to except the cooperative from the payment of the uniform price.

I. Terms of the Order.

Certain provisions of the Order were found by the District Court to show unconstitutional discrimination against one or more of the defendants. The discriminations of which complaint is made arise from the application to the New York problem of Section 8c(5) of the Act relating to milk.

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[22] Currin *v.* Wallace, 306 U. S. 1, 18; Chicago Board of Trade *v.* Olsen, 262 U. S. 1, 42; Oliver Iron Mining Co. *v.* Lord, 262 U. S. 172, 181; Gorieb *v.* Fox, 274 U. S. 603, 606; cf. Carmichael *v.* Southern Coal Co., 301 U. S. 495, 513; Steward Machine Co. *v.* Davis, 301 U. S. 548, 598.

[23] Article I, Section 1, subsec. 6.

A. *Uniform Price.* The Jetter Dairy Company, a proprietary handler, urges that as milk cooperatives need not pay producers a uniform price, it is unreasonably discriminatory and violative of the due process clause of the Fifth Amendment to require it to pay this uniform price. In Section 8c(5)(F) there is a definition of the type of cooperative permitted to settle with its members in accordance with the membership contract. The general characteristics of cooperatives are well understood. The Capper-Volstead Act defines such cooperatives as associations of producers, corporate or otherwise, with or without capital stock, marketing their product for the mutual benefit of the members as producers with equal voting privileges, restricted dividends on capital employed and dealings limited to 50 percent non-member products.[24] Different treatment has been accorded marketing cooperatives by state and Federal legislation alike.[25] Indeed the Secretary is charged by this Act to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution."[26] These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment.[27]

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[24] 42 Stat. 388.

[25] United States—The Clayton Act, § 6, 38 Stat. 731; Robinson-Patman Act, § 4, 49 Stat. 1528; Capper-Volstead Act, 42 Stat. 388; War Finance Corporation Act, 40 Stat. 506, as amended 42 Stat. 181, 182; The Grain Futures Act, 42 Stat. 1000; The Agricultural Marketing Act, 46 Stat. 91.

States—See Hanna, The Law of Cooperative Marketing Associations (1931), c. 3.

[26] Agricultural Adjustment Act, Sec. 10(b), 48 Stat. 37, as amended by Sec. 16(b)(1) of the Act of August 24, 1935, 49 Stat. 767, as adopted by Sec. 1(h) of the Act of June 3, 1937, 50 Stat. 246.

[27] Flint v. Stone Tracy Co., 220 U. S. 107, 173; Brushaber v. Union Pacific Railroad Co., 240 U. S. 1, 21; Chicago Board of Trade v. Olsen, 262 U. S. 1, 40; Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Association, 276 U. S. 71, 89. The Government furnishes us with a collection of state cases approving the special advantages given co-operatives: Tobacco Growers Coop. Asso. v. Jones, 185 N. C. 265; Kansas Wheat Growers v. Schulte, 216 Pac. 311; Brown v. Staple Cotton Growers Co-op. Asso., 96 So. 849; Northern Wisconsin Co-op. T. P. v. Bekkedal, 197 N. W. 936; Dark Tobacco Gr. Co-op. Asso. v. Dunn, 266 S. W. 308; Minnesota Wheat Growers v. Huggins, 203 N. W. 420; List v. Burley Tobacco Growers Co-op. Asso., 114 Ohio St. 361; Dark Tobacco Growers Co-op. Asso. v. Robertson, 150 N. E. 106; Potter v. Dark Tobacco Growers Co-op., 201 Ky. 441; Harrell v. Cane Growers Co-op., 126 S. E. 531; Nebraska Wheat Growers v. Norquest,

Frost v. *Corporation Commission*[28] in fact recognized the validity of such classification. The Commission was enjoined from issuing a license for the operation of a cooperative cotton gin, under a proviso directing it to do so on petition of 100 citizens and taxpayers without the showing of public necessity required for other ginners. The applicant was organized for profit, though dividends were limited, and its membership was not confined to producers. The court thought the distinctions had no reasonable relation to the subject of the legislation, special opportunities for cooperatives. It was said the Court had "no reason to doubt" that the classification was valid as applied to true cooperatives.[29]

The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit.[30] For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons.

The commodity handled by a cooperative corresponds for some purposes to the capital of a business corporation. Either may cut sale prices below cost, one as long as its members will deliver, the other as long as its assets permit. When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price. The cooperative member measures his return by the market or uniform price the business handler pays. In commodities with the wide market of staple dairy products, quotations are readily available. If distributions do not equal open prices, the cooperators' reactions would parallel those of

204 N. W. 798; Warren *v.* Alabama Farm B. Cotton Association, 104 So. 264; Manchester Dairy System *v.* Hayward, 132 Atl. 12, 19; Clear Lake Co-operative Live Stock Association *v.* Weir, 206 N. W. 297; Hollingsworth *v.* Texas Hay Asso., 246 S. W. 1068; Washington Cranberry Asso. *v.* Moore, 201 Pac. 773; Poultry Producers *v.* Barlow, 208 Pac. 93; Oregon Growers Co-op. Asso, *v.* Lentz, 212 Pac. 811; South Carolina Cotton Growers *v.* English, 133 S. E. 542; Milk Producers *v.* Bell, 234 Ill. App. 222 and Barns *v.* Dairymen's Co-operative Association, Inc., 220 App. Div. (N. Y.) 624.

[28] 278 U. S. 515.

[29] *Id.*, 523.

[30] Cf. N. Y. Cooperative Corporations Law.

stockholders of losing businesses. Neither the Act nor the order protects anyone from lawful competition, nor is it essential that they should do so.[31] We do not find an unreasonable discrimination in excepting producers' cooperatives from the requirement to pay a uniform price.

B. *Unpriced Milk.* Another discrimination is said to reside in that part of the Order which limits minimum prices to milk "sold in the marketing area or which passes through a plant in the marketing area." Other milk, though from the same production area, is "unpriced milk" and does not figure in the computation of the uniform price. Where both priced and unpriced milk are dealt in by a handler, he must furnish a statement to the producer showing the percentage of his milk paid for at the uniform price.[32] The defendants handle only milk which is sold in the marketing area. They assert that an unreasonable discrimination results in favor of handlers, such as the League, which market milk both in and outside the marketing area.

The basis of the complaint is that large dealers and cooperative handlers with extensive gathering and distributing facilities are permitted to purchase milk throughout the milk shed at any price they please, if the milk does not pass through a plant in the marketing area, and sell it at any price they please, provided the sale is outside the limited New York marketing area. By reason of the fact that milk sells for more in New Jersey than in New York, a greater profit is made by the handler. If he so desires, the handler can use this profit to replace losses on New York area sales and still be in a position to pay the uniform price to producers on pool milk. This is said to create a discrimination against the defendants.

It is possible for the handlers with unpriced milk to use their profits from the profitable extra area trade in the way suggested. It was equally possible for them to do so before the Order. It is a competitive situation which the Order did not create and with which it does not deal. We are of the view that there is no discrimination by reason of this situation.

The District Court found that handlers of unpriced milk "are permitted to blend prices paid or purported to have been paid for such milk sold in other markets, with the uniform price announced

[31] Railroad Co. *v.* Ellerman, 105 U. S. 166; Alabama Power Co. *v.* Ickes, 302 U. S. 464, 480.

[32] Order, Article VII, Section 1.

by the Administrator for milk sold in the area, thereby reducing the actual price paid by such handlers, for milk sold in the Metropolitan Area, in competition with milk sold by the defendants." "If the price figured by the handler for unpriced milk, is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof." It is erroneous to suppose that by buying some milk at less than the minimum, the "actual price" paid for milk sold in the marketing area is reduced. The price paid for all milk sold by proprietary handlers in that area is the uniform price. Unpriced milk from the same producer may be bought for less. The average paid the producer may be below the minimum but for the part sold in the marketing area or passing through plants there located the minimum is paid. This is all that justifies the language of the finding that "the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price. . . ."

C. *Nearby Differentials.* Provision is made by the Order for special differentials of 20 cents on milk from certain counties located most favorably to the marketing area.[33] This is to enable handlers to pay the producers at these plants.[34] The five cent difference is absorbed by the handlers. The Act authorizes such an arrangement. 8c(5)(A). This was found discriminatory as between producers by the District Court but there was no finding or conclusion of law as to any discrimination against defendants. The District Court was of the opinion this was unfair to these defendants who have no patrons in these counties. Here the defendants urge further advantages from this arrangement to their competitors who have patrons in these counties because near locations, freight differentials considered, have lower transportation costs. The differential increases milk prices to the producers. This payment tends to stimulate production. Larger production means more benefit from the freight advantage to competitors. The discrimination seems fanciful and remote. It would not justify a court in overturning the Secretary's determination of the propriety of the differentials on evidence found by the lower court to be substantial. Such an administrative determination carries a presumption of the existence

[33] Order, Article VI, Section 1.
[34] Order, Article VII, Section 2.

of a state of facts justifying the action far too strong to be overturned by such suggestions as are made here.[35]

II. Constitutionality of the Act.

A. *Minimum Prices.* The Act authorizes and the Order undertakes the fixing of minimum prices for the purchase of milk "in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce" in milk.[36] There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce. Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the Federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines.[37]

The challenge is to the regulation "of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant." It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce.[38] We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the Federal power to regulate inspection of the whole.[39] Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them.[40] Power to estab-

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[35] Borden's Farm Products *v.* Baldwin, 293 U. S. 194, 209; Pacific States Co. *v.* White, 296 U. S. 176, 185.

[36] Section 8c(1).

[37] Stafford *v.* Wallace, 258 U. S. 495; Chicago Board of Trade *v.* Olsen, 262 U. S. 1; Houston & Texas Ry. *v.* United States, 234 U. S. 342, 351-2; Minnesota Rate Cases, 230 U. S. 352, 399; Labor Board Cases, 301 U. S. 1; Currin *v.* Wallace, 306 U. S. 1; Mulford *v.* Smith, No. 505 this term, decided April 17, 1939; National Labor Relations Board *v.* Fainblatt, No. 514 this term, decided April 17, 1939.

[38] Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282, 290, 291; Lemke *v.* Farmers' Grain Co., 258 U. S. 50, 54; cf. Foster-Fountain Packing Co *v.* Haydel, 278 U. S. 1, 10.

[39] Currin *v.* Wallace, 306 U. S. 1.

[40] Consolidated Edison Co. *v.* National Labor Relations Board, 305 U. S. 197, 220.

lish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production.[41] Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales.

This power over commerce when it exists is complete and perfect.[42] It has been exercised to fix a wage scale for a limited period,[43] railroad tariffs[44] and fees and charges for live-stock exchanges.[45]

The authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. Since *Munn* v. *Illinois*, this Court has had occasion repeatedly to give consideration to the action of states in regulating prices.[46] Recently, upon a reexamination of the grounds of state power over prices, that power was phrased by this Court to mean that "upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."[47]

The power of a state to fix the price of milk has been adjudicated by this Court.[48] The people of great cities depend largely upon an adequate supply of pure fresh milk. So essential is it for health that the consumer has been willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements, as enforced by

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[41] Stafford v. Wallace, *supra*, note 37.

[42] Gibbons v. Ogden, 9 Wheat. 1, 196; Minnesota Rate Cases, 230 U. S. 352, 398.

[43] Wilson v. New, 243 U. S. 332, 346.

[44] 34 Stat. 589, 49 U. S. C. § 15(1).

[45] Tagg Bros. v. Morehead, 280 U. S. 420; Stafford v. Wallace, 258 U. S. 495.

[46] Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517; Brass v. North Dakota, 153 U. S. 391; German Alliance Insurance Co. v. Lewis, 233 U. S. 389; O'Gorman & Young v. Hartford Insurance Co., 282 U. S. 251; Nebbia v. New York, 291 U. S. 502; West Coast Hotel Co. v. Parrish, 300 U. S. 379; Townsend v. Yeomans, 301 U. S. 441.

Wolff Packing Co. v. Industrial Court, 262 U. S. 522; Tyson & Bro. v. Banton, 273 U. S. 418; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1; Ribnik v. McBride, 277 U. S. 350; Williams v. Standard Oil Co., 278 U. S. 235.

[47] Nebbia v. New York, 291 U. S. 502, 537.

[48] *Id.*

the municipal health authorities. It belongs to that category of commodities that for many years has been subjected to the regulatory power of the state. A thorough exposition of the milk situation in the New York shed was made in the *Nebbia* case. There is nothing to add to what was there said, save to point out that since that decision, we have held that a state cannot prohibit the sale of imported milk where the extra-state purchase price was below the prescribed minimum[49] and that a Pennsylvania regulatory law, including minimum prices, applied in the absence of Federal legislation to milk purchased in Pennsylvania for shipment into the New York marketing area.[50] In *Hegeman Farms Corp.* v. *Baldwin*,[51] this Court sustained again the New York Milk Control Statute against the complaint that the price limits were arbitrary. A variation in prices to be charged the consumer between dealers who had and dealers who had not well advertised trade names was upheld.[52] The power enjoyed by the states to regulate the prices for handling and selling commodities within their internal commerce[53] rests with the Congress in the commerce between the states.

B. *Equalization Pool.* In order to equalize the prices received by producers, handlers are required to clear their purchases through the producer settlement fund. Payments into and withdrawals from this fund depend upon the "value" of the milk received which is fixed by the Order at different prices governed by the use made by the handler of the purchased milk and upon whether his obligations to producers are greater or less than the uniform price due the producers under the scheme. The result of the use of the device of an equalization pool is that each producer, dealing with a proprietary handler, gets a uniform or weighted average price for his milk, with differentials for quality, location or other usual market variations, irrespective of the manner of its use. The Act, Section 8c(5)(B)(ii) and (C) and the Order, Articles IV, VI and VII authorize such an adjustment.

The defendants' objection to the equalization pool, here considered, is not to the disbursements from the fund for expenses of

[49] Baldwin *v.* Seelig 294 U. S. 511.

[50] Milk Control Board *v.* Eisenberg Farm Products, No. 426 this term. February 27, 1939.

[51] 293 U. S. 163.

[52] Borden's Co. *v.* Ten Eyck, 297 U. S. 251.

[53] Nebbia *v.* New York, 291 U. S. 502; Townsend *v.* Yeomans, 301 U. S. 441.

tandby or marketing services authorized by Article VII, Sections
and 6, concerning which we hold the handler has no standing to
omplain. It is to the alleged deprivation of liberty and property
ccomplished by the pooling requirement in taking away from the
efendants their right to acquire milk from their patrons at the min-
mum class price, according to its use, and forcing the handlers to
ay their surplus, over the uniform price, to the equalization pool
nstead of to their patrons. This argument assumes the validity of
rice regulation, as such, but denies the constitutionality of the pool-
ng arrangement because handlers are not at liberty to pay the pro-
ucer in accordance with the use of the producer's milk but
ust distribute the surplus to others whose milk was resold less
dvantageously. It is urged that to carry this principle of contribu-
ion to its logical conclusion would mean that the wages of the em-
loyed should be shared with the unemployed; the highly paid, with
he underpaid and the receipts of the able, the fortunate and the
iligent, with the incompetent, the unlucky and the drone.

No such exaggerated equalization of wealth and opportunity is
roposed. The pool is only a device reasonably adapted to allow
egulation of the interstate market upon terms which minimize
he results of the restrictions. It is ancillary to the price regulation,
esigned, as is the price provision, to foster, protect and encourage
nterstate commerce by smoothing out the difficulties of the surplus
nd cut-throat competition which burdened this marketing. In
Mulford v. *Smith*,[54] we made it clear that volume of commodity
ovement might be controlled or discouraged. As the Congress
ould have, clearly, the right to permit only limited amounts of
ilk to move in interstate commerce, we are of the opinion it might
ermit the movement on terms of pool settlement here provided.

Common funds for equalizing risks are not unknown and have
ot been considered violative of due process. The pooling principle
as upheld in workmen's compensation,[55] bank deposit insurance,[56]
nd distribution of benefits in the Transportation Act.[57]

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[54] *Supra*, note 37.

[55] Mountain Timber Co. *v.* Washington, 243 U. S. 219; New York Central
ilroad Co. *v.* White, 243 U. S. 188.

[56] Noble State Bank *v.* Haskell, 219 U. S. 104; Abie State Bank *v.* Bryan,
2 U. S. 765.

[57] New England Divisions Case, 2(U. S. 184; Dayton Goose Creek Railway
United States, 263 U. S. 456.

The defendants rely particularly upon *Thompson* v. *Consolidated Gas Utilities Corp.*,[58] and *Railroad Retirement Board* v. *Alton*.[59] In the *Thompson* case, the Texas Railroad Commission ordered proration of gas production in the Panhandle. It was assumed that proration to prevent waste and protect correlative rights in a pool was valid but it was held that the proration order in issue was for none of these purposes. It was for the "sole purpose . . . to compel those [with market outlets] . . . to purchase gas from potential producers" who have no market. This was not deemed to be reasonably related to the conservation of gas or the protection of correlative rights. In the *Retirement Board* case, the pooling principle was involved but was found to be invalid because the burdens on the roads were not equalized with the benefits. Entry on service was made at different age levels for different roads. Employees seventy or older were required to retire. Some roads had none. Solvent and insolvent roads were liable alike. All carriers were treated as a single employer. It was these provisions, deemed unequal, which led to the conclusion that the manner of pooling of funds denied due process. In this case, the pooling has differentials to cover the variations of quality and location.

C.—*Delegation.* There are three issues of delegation presented: (1) the delegation of authority to the Secretary of Agriculture to establish marketing areas; (2) the delegation of authority to producers to approve a marketing order without an agreement of handlers; and (3) the delegation of authority to cooperatives to cast the votes of producer patrons.

From the earliest days the Congress has been compelled to leave to the administrative officers of the Government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied.[60] In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which

[58] 300 U. S. 55, 77, 78.

[59] 295 U. S. 330, 355 *et seq.*

[60] Panama Refining Co. *v.* Ryan, 293 U. S. 388, 421; Schechter Corp. v. United States, 295 U. S. 495, 529; Currin v. Wallace, 306 U. S. 1.

that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable.[61] The present Act, we believe, satisfies these tests.

1. *Delegation to the Secretary of Agriculture.* The purpose of the Act is "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." To accomplish this, the Secretary of Agriculture is directed to issue orders, whenever he has reason to believe the issuance of an order will tend to effectuate the declared policy of the act. Unlike the language of the National Industrial Recovery Act condemned in the *Schechter* case, page 536, the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms.[62] In this Act it is to restore parity prices, Section 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out in 8c(5) and (7). While considerable flexibility is provided by 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified.

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[61] Buttfield *v.* Stranahan, 192 U. S. 470, 496; United States *v.* Chemical Foundation, 272 U. S. 1, 12; Monongahela Bridge Co. *v.* United States, 216 U. S. 177, 193; United States *v.* Grimaud, 220 U. S. 506, 516; Avent *v.* United States, 266 U. S. 127, 130.

[62] "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." 48 Stat. 195.

The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8c(2), limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.

It is further to be observed that the Order could not be and was not issued until after the hearing and findings as required by Section 8c(4). Public hearings were held at Albany, Malone, Syracuse, Elmira, and New York from May 16 to June 7, 1938, with four days' recess. Nearly three thousand pages of testimony were introduced, eighty-eight documentary exhibits and some twenty briefs by interested parties were filed. On July 23, 1938, the Secretary, in the Federal Register, notified the public of his findings and the terms of the Order and again invited comment. Numerous parties again filed briefs. A right by statute is given handlers to object to the Secretary to any provision of an order as not "in accordance with law," with the privilege of appeal to the courts. Section 8c(15)(A) and (B). Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority.[63]

A further provision of the Act is to be noted as it was employed as a standard to determine the minimum price. This is Section 8c(18). Acting under this section, the Secretary fixed a fluctuating minimum price based upon wholesale butter prices in New York. While it is true that the determination of price under this section has a less definite standard than the parity tests of Sections 2 and 8e, we cannot say that it is beyond the power of the Congress to leave this determination to a designated administrator, with the standards named. The Secretary must have first determined the prices in accordance with Section 2 and Section 8e, that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, conside ing the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide ade-

[63] Cf. Schechter Corp. v. United States, 295 U. S. at 533.

quate quantities of wholesome milk and be in the public interest. This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary.

2. *Delegation to Producers.* Under Section 8c(9)(B) of the Act it is provided that any order shall become effective notwithstanding the failure of 50 percent of the handlers to approve a similar agreement, if the Secretary of Agriculture with the approval of the President determines, among other things, that the issuance of the order is approved by two-thirds of the producers interested or by interested producers of two-thirds of the volume produced for the market of the specified production area. By subsection 19 it is provided that for the purpose of ascertaining whether the issuance of such order is approved "the Secretary may conduct a referendum among producers." The objection is made that this is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.[64]

3. *Authorization of Cooperatives to Cast the Votes of Producer Patrons.* This objection, too, falls before the answering argument that inasmuch as Congress could place the Order in effect without any vote, it is permissible for it to provide for approval or disapproval in such way or manner as it may choose.

Cooperatives in the Equalization Fund. The defendant, Central New York Cooperative Association, denies liability under Articles VII and VIII of the Order on the ground that it is not liable to pay its net pool obligation into the administrative fund or to meet the expenses of administration. The asserted reason for its freedom from liability is that it is a cooperative composed of milk producers and distributes the milk of its members and others as agent.

The cooperative owns no farms. Its members are dairy farmers. By their contract they agree "to deliver . . . all . . . milk produced . . . which said milk is to be marketed and distributed by the [cooperative] . . . .". The latter "agrees to

[64] Currin v. Wallace, 306 U. S. 1, 15.

pay . . . for the milk . . . a price . . . based upon the amount received . . . less the expenses . . . ." Non-members' milk is marketed under the same contract. The cooperative leases receiving and distributing facilities from a business corporation. The milk is received by the cooperative at receiving plants and shipped to the city depot. It distributes through other business corporations which are wholly owned subsidiaries of the cooperative. These distributing subsidiaries use the leased physical facilities under verbal contracts with the cooperative. The cooperative receives the net amount from the sales and distributes to its patrons under license from the Director of the Division of Milk Control of New York permitting the marketing in the manner described.

Section 8c(5)(A) authorizes an order to classify milk and fix minimum prices which all handlers shall pay for milk purchased from producers. Section 8c(5)(C) authorizes the equalization pool and the handlers' payment to this settlement fund. It is urged that cooperatives which merely act as agents for their members are not included in handlers purchasing from producers. This is said to be definitely shown by the provisions of 8c(5)(F) providing that nothing contained in the subsection shall be construed to prevent a Capper-Volstead cooperative from making distribution to its "producers in accordance with the contract." The Order defines a handler as including a cooperative association "with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered" to other handlers. Under the provisions of the Order, Article VII, Sections 8 and 9, cooperative handlers as other handlers equalize their purchases by payment into the producer settlement fund, even though they are not required to pay the uniform price to their producers by reason of the exception of Article VII, Section 1, and the provisions of 8c(5)(F), as explained at page 17.

Cooperative contracts are of two general types, sale and agency.[65] The Central New York Cooperative operates under the agency type.

It is obvious that the use of the word "purchased" in the Act, Section 8c(5)(A) and (C), would not exclude the "sale" type of cooperative. When 8c(5)(F) was drawn, however, it was made to apply to both the "sale" and "agency" type without distinction. This would indicate there had been no intention to distinguish be-

[65] Hanna, Law of Cooperative Marketing Associations, pp. 210, 256.

tween the two types by (A) and (C). The section with authorizes all orders, Section 8c(1), makes no distinction. The orders are to be applicable to "processors, associations of producers, and others engaged in the handling" of commodities. The reports on the bill show no effort to differentiate.[66] Neither do the debates in Congress. The statutory provisions for equalization of the burdens of surplus would be rendered nugatory by the exception of "agency" cooperatives. The administrative construction has been to include such organizations as handlers.[67] With this we agree. As here used the word "purchased" means "acquired for marketing." Subsection (A) cannot be construed as freeing agents, cooperative or proprietary, from the requirement to account at the minimum prices for milk handled.

As a corollary the contention is made also by Central Cooperative that no cooperative may be required to pay its surplus receipts over uniform prices into the equalization fund. This, too, is based upon a construction of Section 8c(5)(F) as permitting a cooperative to make settlement with its members in accordance with the terms of its own contract with them. If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be most strongly marked. Such a construction is not required. Cooperatives are covered by Section 8c(1) and (5)(A) and (B), and by the provisions of the Order, except as to the payment of the uniform price. Any payments below the uniform price fall on their members. We are of the view that the administrative construction is correct and that the "net proceeds" of (F) refer to the result of the cooperative sales in the marketing area after complying with the equalization requirements.

The defendant, Central New York Cooperative Association, raises for itself a final point. In determining the net pool obligation of any handler for milk received from producers,[68] the handler is authorized to subtract pro rata out of each class from the milk involved in the pool "the quantity of milk received from the handler's own farm." We have determined that this cooperative, though marketing milk under an agency contract with its members,

[66] House Report No. 1241, 74th Cong., 1st Sess.; Senate Report No. 1011, 74th Cong., 1st Sess.

[67] Costanzo v. Tillinghast, 287 U. S. 341, 345; United States v. Chicago, North Shore R. Co., 288 U. S. 1, 13-14.

[68] Article VI, Section 1.

is a handler subject to the Act and Order. The cooperative argues that as its members, farmers, would not need to account to the pool for their personal sales to consumers, the cooperative, being utilized as an agent to market the farmers' milk, is under no obligation to contribute to equalization. As the cooperative does not have its own farm but is itself a handler under the Act, it must pay into the producer settlement fund.

Inasmuch as all the defendants in these appeals are handling milk in interstate commerce, the petition for the enforcement of Official Order No. 126, issued under c. 383 of the Laws of 1937 of the State of New York, concerning milk not covered by Order No. 27 of the Secretary of Agriculture, should be dismissed.

The order of the District Court in Nos. 771, 827 and 828 is reversed and the causes are remanded to that Court with instructions to enter an order specifically enforcing up to the time of suspension the provisions of Order No. 27, issued by the Secretary of Agriculture August 15, 1938, regulating the handling of milk in the New York marketing area, as to all the defendants and enjoining defendants, their officers, agents and servants, from further violation of the Order.

The order of the District Court in dismissing the petition of Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, is affirmed.

It is so ordered.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the judgment and opinion of the Court except insofar as the opinion appears to imply that power of Congress to enact the marketing law depends upon the use and nature of milk. They do not believe that we are called upon in this case to indicate, as they think we do, that there is such a constitutional limitation on the power of Congress to regulate interstate commerce.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 771, 826, 827 and 828.—October Term, 1938.

771 — The United States of America, Appellant, *vs.* Rock Royal Co-operative, Inc., et al.

826 — Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, Appellant, *vs.* Rock Royal Co-operative, Inc., et al.

827 — Dairymen's League Cooperative Association, Inc., Appellant, *vs.* Rock Royal Co-operative, Inc., et al.

828 — Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., Appellant, *vs.* Rock Royal Co-operative, Inc., et al.

Appeals from the District Court of the United States for the Northern District of New York.

[June 5, 1939.]

Mr. Justice McReynolds and Mr. Justice Butler, dissenting.

We are of opinion that the decree below should be affirmed. In our view the challenged order of the Secretary must succumb to two manifest objections. It is unnecessary for us to dissect the record in search of other impediments.

First. Congress possesses the powers delegated by the Constitution—no others. The opinion of this Court in *Schechter Poultry Corporation* v. *United States* (1935), 295 U. S. 495—noteworthy because of modernity and reaffirmation of ancient doctrine—sufficiently demonstrates the absence of Congressional authority to manage private business affairs under the transparent guise of regulating interstate commerce. True, production and distribution of milk are most important enterprises, not easy of wise execution;

but so is breeding the cows, authors of the commodity; also, sowi and reaping the fodder which inspires them.

Second. If perchance Congress possesses power to manage t milk business within the various states, authority so to do cann be committed to another. A cursory examination of the statu shows clearly enough the design to allow a secretary to prescri according to his own errant will and then to execute. This is n government by law but by caprice. Whimseys may displace d liberate action by chosen representatives and become rules of co duct. To us the outcome seems wholly incompatible with t system under which we are supposed to live.

Mr. Justice ROBERTS.

In Nos. 772, 809 and 865 I have expressed my views as to unconstitutionality of the provisions of the Agricultural Mark ing Agreement Act of 1937 here involved, in view of their attemp delegation of legislative powers. That matter is not pressed in present cases and I need not here advert to the subject. I am opinion, nevertheless, that Order No. 27 is not, in the respects be discussed, authorized by the Act, but if it is authorized, depr the appellees of their property without due process of law in vi tion of the Fifth Amendment.

This conclusion is based upon findings of fact of the Dist Court. While the findings in question are the subject of ass ments of error, the appellants failed, either in brief or in oral a ment, to point out that they lack substantial support in the dence. Examination of the record discloses that these findings based on uncontradicted testimony, authentic documentary dence, and a stipulation of the parties. They should, therefore accepted here. They may briefly be recapitulated.

Under the terms of the Act and the order, all of the appellees handlers and the Dairymen's League Cooperative Association, appellant in No. 827, is likewise a handler. By Art. VII, Se of the order, on or before the 25th day of each month, each han which is not a cooperative association of producers is required to to each producer the uniform price fixed by the order for all delivered by the producer during the preceding month which sold in the marketing area. The cooperative associations which handlers are not required to make payment for similar milk at

uniform price or at any stated price. Art. VII, Sec. 8, requires all handlers, on or before the 18th day of each month, to pay to the market administrator for the Producer Settlement Fund "the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pool milk of such handler, by the uniform price." Thus each handler is required to pay into the fund for all milk used in the marketing area the difference between $2.45 per cwt. and the uniform price for all Class I milk. Handlers selling milk received from producers in the production area, but marketed outside the marketing area, (denominated "unpriced milk") are not required to pay a uniform price for such milk or to pay into the fund the difference between the uniform price and the actual market value of such milk, or any fixed amount in respect thereof. They are permitted to blend prices paid or purported to have been paid for unpriced milk with the uniform price announced by the Administrator for milk sold in the marketing area, thereby reducing the actual price paid by them for milk sold in the marketing area in competition with other handlers who sell milk only in that area. In a pamphlet issued by the Secretary, the provisions of the order are so construed and the method of accounting is described as follows:

"Thus, the handler may multiply the total pounds of milk sold by it in the area by the uniform price; multiply the total pounds of milk sold in other markets and which is called 'unpriced milk' by 'such prices as it sees fit;' add the totals, and divide by the total pounds of milk, to obtain the average of 'blended' price paid producers for all milk. If the price figured by the handler for unpriced milk, is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof."

The appellees' receiving stations in the production area supply the marketing area defined by the order. The appellee, Jetter Dairy Company, sells milk in competition with dealers operating milk receiving stations in the production area in New York, who ship milk received at their stations to the marketing area. Other appellees buy milk which is sold to independent dealers in competition with milk received at the other stations in the producing area. Several of the appellees' largest competitors, including the Dairymen's League Cooperative, sell large proportions of their milk outside the marketing area in northern New Jersey. The Milk Control Board of New Jersey fixed a base price of $2.76 per cwt. to producers for 3.5 milk f. o. b. country milk plants, which price was

in effect during the period covered by the order. The same B fixed wholesale prices from dealers to stores at eleven cents quart, bottled in glass, in two rural districts, and twelve cent quart, in glass, in three heavily populated districts, and fixed a imum price to consumers out of stores in the two rural dis of twelve cents per quart and, in the more heavily populate tricts, of thirteen cents per quart. No resale prices are fixed i marketing area either from dealers to stores or from stores t sumers. The fair market value of "unpriced" Class I milk duced in the production area, and sold by handlers in New J during the period the order was in force, was $2.76 per cwt.

Whereas the uniform price for 3.5 milk fixed by the Ad trator was, for September, $1.87, October, $1.91, and Nove $2.10 per cwt., the Dairymen's League paid its producers a price for the same milk, in the same zone, for September, $1.7 October, $1.81, and, for November, $2.01 per cwt. Thus the ence between the value of Class I milk sold by the Dairy League in New Jersey, and the prices paid for the same t ducers per cwt. was, in September, $1.01; in October, $.95, a November, $.75. $1.01 per cwt. on 10,208,500 pounds of mi in New Jersey by the Dairymen's League amounts to $102,

Sheffield Farms Company, a competitor of the appellees, u in September, 1938, 40,083,075 pounds of Class I milk in Ne State and 6,426,443 pounds of milk in New Jersey, as well a in other markets. For out of market or unpriced milk the co negotiated with its producers to pay the uniform order pr such out of market milk. The base price paid was, therefore or eighty-nine cents per cwt. less than the price fixed by th Jersey Control Board. The difference amounted to $57.19 14.27 cents per cwt. on such milk and the price paid for milk was reduced by that amount. Similar spreads are sh the company's purchases for October, 1938.

Based upon these facts, the court further finds that pric to producers delivering to handlers, whether cooperative prietary, which sell fluid milk in the marketing area, and als State of New Jersey and other markets, are less than the value of the milk delivered, due to the process of blendin for milk sold outside of the marketing area, which bear no lation to the actual value thereof, with prices charged for m in the area.

It is evident from the terms of the order, and the Sec

construction of it, that handlers who use "unpriced" milk may fix any price they choose to fix for it. Thus, contrary to the requirement of Section 8c(5)(A), of the statute, all producers do not receive a uniform price for milk. This is a necessary effect of the provision permitting the blending of the price paid producers for milk sold in the marketing area and an arbitrary price fixed for "unpriced" milk. The effect upon a handler whose trade is solely in the marketing area is disastrous. The lower price paid by those who are permitted to blend makes it possible for them to resell the milk in the marketing area, in which no resale price is fixed, at a cut rate which is destructive of their competitors' business. And there is evidence that handlers, cooperative and proprietary, have taken advantage of the terms of the order to cut the price of milk to consumers in the marketing area to the disadvantage of their competitors.

The appellants make no answer to the appellees' attack on this feature of the order. The opinion of this court states that the detriment to the smaller handlers who sell milk for use only in the marketing area is the result of competitive conditions which the order does not affect. But it is evident that the order freezes the minimum price which is to be paid by many handlers and leaves the price of other handlers who compete with them open to reduction by the device of blending.

There is nothing in the Act which authorizes the discrimination worked by the order permitting handlers, whether proprietary or cooperative, to blend the prices of unpriced milk with that of milk, sold in the marketing area. Section 8c(5)(F), as I read it, prohibits such a practice by cooperatives. If the order had provided that milk sold in New Jersey should be accounted for to the pool at its actual value and had the milk so sold been accounted into the pool, competitors could not have obtained the advantage which so seriously injures the business of appellees. As the order is drawn and administered it inevitably tends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors. I think no such arrangement was contemplated by the Act, but that, if it was, it operates to deny the appellees due process of law.

I think that the decree should be affirmed.

The CHIEF JUSTICE joins in this opinion so far as it relates to the invalidity of the order on the ground stated; Mr. Justice MCREYNOLDS and Mr. Justice BUTLER also join in this opinion.